

The Future of Head of State Immunity: The Case against Ariel Sharon

Heidi Altman, April 2002

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I. Introduction

In September 1982 a massacre was committed in the refugee camps of Sabra and Shatila in the city of Beirut in the course of a foreign occupation. In June 2001 twenty-three Lebanese and Palestinian survivors of that massacre filed a complaint with a Belgian court against Ariel Sharon, sitting Prime Minister of Israel, for his involvement in the atrocities.¹ In February 2002 the International Court of Justice announced its decision on the Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), finding the circulation by Belgium of an arrest warrant for the sitting Foreign Minister of the Congo for war crimes and crimes against humanity illegal and a violation of the immunity of the incumbent Minister.²

Many international legal scholars and human rights activists expressed surprise and disappointment at the ICJ's finding, which is a weighty comment on the long-evolving struggle between the protection of immunities and the promotion of individual accountability. In the days following the *Congo* decision, many were quick to dismiss the pending case against Sharon in Belgium; a spokesman for the Belgian foreign ministry quickly announced that "The Sharon case, in my opinion, is closed."³ Yet the lawyers for the plaintiffs insisted that there was "much to be challenged," and on 6 March 2002 the Court of Appeals of Brussels agreed to the lawyers' request to schedule a hearing in order to assess the relevance of the ICJ decision to the Sharon case.⁴

The Belgian case against Sharon is part of an evolving pattern in the international community whereby Westphalian notions of sovereignty have been increasingly displaced by the value placed upon the rights and responsibilities of the individual. The legal actions taken in Belgium are a part of a rising call for individual accountability that threatens traditional concepts of relations between states. This movement has led to a process of progression evolution of the law, whereby legal scholars and practitioners have debated the inviolability of immunities for former and sitting state officials. Before the ICJ ruling on *Congo v Belgium*, the international community had largely rejected immunity for former Heads of State accused of international crimes,⁵ and the question of immunity for sitting Heads of State or high-ranking Ministers had not yet been fairly tested as a matter of international law. This article argues that, in deciding as it did in *Congo v Belgium*, the International Court of Justice prematurely aborted the process of progressive evolution of the law that was underway by producing a ruling based largely on political considerations and only nominally on considerations of the state of the law.

The logic of the *Congo* decision is based upon the claim that absolute procedural immunity does not equal impunity. This article refutes that claim; a world without impunity cannot be realized until the international community has accepted restrictions on immunity for sitting Heads of State in cases of genocide, crimes against humanity, and war crimes. The case in Belgium against Sharon is the first major opportunity presented to the international community to respond to the ICJ decision in *Congo*. In this sense, the Belgian court is faced with a unique chance to recognize the limitations inherent in the ICJ decision and to push forward the progression of international law away from immunities that facilitate impunity for international crimes. A denial of immunity for Ariel Sharon by the Belgian court would be a brave achievement in the struggle to place human values on a level equal to or above that of state sovereignty; such a finding would recognize progressive trends in international law and reject a culture of impunity in the international arena.

This article will explore the relevant issues presented by the case against Ariel Sharon in light of evolving international norms. After discussing the state of the law regarding immunity for former and incumbent Heads of State with consideration of the ICJ decision in *Congo v Belgium*, the possibility of preserving functional relations between states in the face of dissolving immunities will be explored. An analysis of the Sharon case will follow, addressing the prospects for the case independently and in the aftermath of *Congo v Belgium*. The charges facing Sharon will be analyzed in addition to the legal questions in the path of indictment such as *nullum crimen sine lege* (retroactivity) and command responsibility. Evidence and analysis presented establish that the case can and should proceed, that Sharon is indeed indictable, and that the case against him presents a unique and important opportunity for progressive development of the law governing procedural immunity for sitting Heads of State.

International law has evolved to a point where impunity for grave breaches of custom such as those committed by Ariel Sharon is no longer acceptable. Particularly after the ICJ's disappointing ruling in *Congo v Belgium*, the moment is ripe for the Belgian court system to take the lead in responding affirmatively to the rising international call for individual accountability.

A. Changing Perceptions of Sovereignty

International law, based upon the value of the individual but evolving in a world still governed by concepts of sovereignty and the nation state, has traditionally assigned responsibility for international wrongdoing to the state. The mechanisms established under international law for recourse, such as the International Court of Justice and the UN Human Rights Committee, address grievances and assign responsibility on a state level. Holding individuals accountable for involvement in international wrongdoing is a modern idea which has legitimately taken root within recent decades. A traditional venue for seeking justice for the victims of Sabra and Shatila would be a case brought by Lebanon against Israel in the International Court of Justice. That individual Palestinian and Lebanese plaintiffs have brought a case against sitting Prime Minister Ariel Sharon in a European court illustrates substantive shifts in international customary law regarding questions of jurisdiction and immunity. The issues of universal jurisdiction and restrictions on substantive immunity for former Heads of State are areas of the law wherein such shifts have already reached the level of *lex lata*.

1. Universal Jurisdiction

Although the question of universal jurisdiction was initially raised in the Congo's Application to the ICJ instituting proceedings in *Congo v Belgium*, the line of argument was not elaborated on during oral proceedings and was not included in the Congo's final submissions to the Court. For this reason, the Court did not rule on the issue in its final decision.⁶ This article, as well, will not address the issue at length but briefly address background and the customary status of the norm.

The concept of universal jurisdiction has evolved alongside the international human rights movement as part of a growing refusal to accept impunity for authors of gross violations of human rights.⁷ The principles which traditionally ascribe jurisdiction to a state are based upon an affiliation of the alleged perpetrator or the victim with the territory, the nationality, or the security of the state. The principle of universality, however, provides that there are certain crimes of such a horrifying nature that they pose an affront to all states, and as such all states have an interest in bringing their perpetrators to justice.⁸ Methods of implementing the universality principle have come under great scrutiny in recent years, alongside the impending establishment of the International Criminal Court and the highly publicized proceedings of the ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR), as well as the trials of such notorious figures as Pinochet

Ugarte and Slobodan Milosevic. In 2001 the Princeton Project on Universal Jurisdiction, composed of leading international scholars and jurists, produced the Princeton Principles, designed to “clarify and bring order to an increasingly important area of international criminal law: prosecutions for serious crimes under international law in national courts based on universal jurisdiction.”⁹ Alongside several similar guides which have been produced in recent years,¹⁰ the Principles clarify the basic precepts of universal jurisdiction but leave many questions unanswered (most notably the future of procedural immunity for sitting Heads of State).

Today, universal jurisdiction extends to the commission of war crimes, crimes against humanity, and the crime of genocide.¹¹ Ideally, universal jurisdiction allows for national courts to be used as a venue to bring perpetrators of heinous international crimes to justice, in addition to ad hoc tribunals such as the ICTY and the ICTR and/or an international tribunal such as the ICC envisioned in the Rome Statute. The system envisioned by the Rome Statute is one of complementarity, wherein the ICC is complementary to domestic criminal jurisdiction, and only possesses jurisdiction when a State is “unwilling or unable genuinely to carry out the investigation or prosecution.”¹²

2. Immunity for Former Heads of State

The concept of immunity for diplomatic agents of a state is articulated in the 1961 Vienna Convention on Diplomatic Relations, which provides that a diplomatic agent shall enjoy immunity from criminal, civil, and administrative jurisdiction in a receiving State. The Convention distinguishes between procedural immunity, which is available to a diplomat for the duration of his time in office, and substantive immunity, which remains after the diplomat has left office. Unlike procedural immunity (immunity *rationae personae*) which is of a personal nature and includes all criminal and civil acts, substantive immunity (immunity *rationae materiae*) is applicable only with regard to acts of state (acts performed by the diplomat “in the exercise of his functions”).¹³ Head of State immunity, not explicitly delineated in the Vienna Convention,¹⁴ rests heavily on the customary concept of sovereign immunity, which originated at a time in European history when the sovereign and its ruler (usually a monarch) were deemed indivisible and the immunity granted to the Head of State was seen as an extension of the immunity granted to the state itself. As the value placed on individual accountability increases and the value placed on the sovereign decreases, Head of State immunity as a legal concept is at a strange crossroads.¹⁵

Substantive immunity for former Heads of State in the case of grave breaches of international law has effectively been reversed by evolving custom.¹⁶ This was acknowledged by the ICJ in its decision on *Congo v Belgium*, which noted that an individual ceases to be wholly protected by immunities after he has left office.¹⁷ Treaty law removing such immunity dates back to the Versailles Treaty¹⁸ and includes the Nuremberg Principles¹⁹ and the Genocide Convention.²⁰ Both state practice and *opinio juris* indicate that the rejection of the norm in cases of international crimes has reached the level of custom. The clearest evidence of this is the removal of substantive immunity for former Heads of State in cases of grave breaches in the Statutes of the ICTY and the ICTR as well as the Rome Statute for the ICC. All three documents are considered to be codifications of customary international law.²¹ Case law also points to state practice.²² The case which has attracted the most publicity on this issue is that of former Head of State of Chile (Senator for Life) Pinochet Ugarte.²³ While this case is notable as the first case denying substantive immunity for a former Head of State charged with crimes against humanity, the actual decision by the Lords of Appeal allowing for the extradition of Pinochet is limited. The scope of the decision is restricted by the requirement of double criminality and the definition of extraditable acts under UK domestic law, and relies heavily upon obligations incumbent upon the UK exclusive to the Convention Against Torture. The *Pinochet* case, however, is noteworthy as a measure of evolving international norms.²⁴

II. Immunity for Sitting Heads of State

A. *Congo v Belgium: the 14 February ICJ Ruling*

In its 14 February 2002 decision regarding the Case Concerning the Arrest Warrant of 11 April 2000, the ICJ presented its vision of the state of international law regarding the immunity from criminal process for incumbent Ministers for Foreign Affairs. Due to the scarcity of specific references to Ministers for Foreign Affairs in treaty law, the Court based its decision entirely on customary international law. On this basis, the Court found that “the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability.”²⁵

This decision is particularly relevant to the question addressed here of Heads of State. In determining the personality of the Minister of Foreign Affairs, the Court found that his functions resembled that of a Head of State in that his responsibility for the conduct of his State’s relations with other States grants him recognition under international law as a representative of the State solely by virtue of his office.²⁶ In respect to said functions, the Court found no distinction between official and private acts committed while in office, nor between acts committed before or during time spent in office.²⁷ Contrary to the direction of international law suggested by the *Pinochet* precedent, the Court found no indication in *opinio juris* or state practice that immunities are lifted in cases of war crimes or crimes against humanity.²⁸

The Court emphasized, however, that its finding was not a suggestion of impunity, in that “immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts.” In this regard, the Court delineated four situations in which immunities would not bar criminal prosecution for a Minister of Foreign Affairs:²⁹

1. The individual bears no criminal immunity under international law as implemented in his own country and is tried in his own country’s domestic court system.
2. The State which the Minister represents waives his immunity.
3. The individual ceases to hold the office of Minister of Foreign Affairs, in which case he may be tried by the court of another State in respect to acts committed before or after his time in office, or acts committed in a private capacity during his time in office.
4. The individual is tried before “certain international criminal courts” which possess jurisdiction.

Having presented these four exceptions to the rule, the Court claimed that its ruling did not grant impunity for sitting Ministers of Foreign Affairs. Following the logic of the Court, this system of thought would apply as well to immunities for sitting Heads of State.

B. *A Pivotal Moment in the State of the Law, Interrupted*

The importance of custom is that it allows for a process of evolution of international law, independent of treaty law, in accordance with changing times and circumstances. The state of the law regarding immunity *rationae personae* for sitting Heads of State who have authored international crimes appeared, before *Congo v Belgium*, in a liminal phase of custom evolution. Although the practice of states consistently protected such immunity, *opinio juris* demonstrated a consistent rejection of it. This strong showing of *opinio juris* but weak evidence of state practice placed the question of immunity for sitting Heads of State at the level of *lex ferenda*. A flexible approach to custom creation might have found the showing of *opinio juris* to be so strong that the burden of proof for state practice was lowered.³⁰ The 2001 Princeton Principles reflected this state of flux regarding the legal status of procedural immunity: while stating clearly in the *Commentary* following the Principles (drafted by a small group and appended to the Principles) that “heads of state enjoy unqualified ‘act of state’ immunity during their term of office,” it is also stated that the Principles do not “affirm procedural immunities as a matter of principle. In the future, procedural

immunities for sitting heads of state, diplomats, and other officials may be called increasingly into question.”³¹

Very few scholars and practitioners had come forward with definitive views on the state of international law on this question. In 1994 Arthur Watts expressed the widely cited opinion that: “It can no longer be doubted that as a matter of general customary international law a Head of State will personally be liable to be called to account if there is sufficient evidence that he authorized or perpetrated such serious international crimes.”³² In 1999, Amnesty International echoed Watts’ opinion in a brief setting forth its positions on the legal issues involved in the *Pinochet* case.³³

Other than these few exceptions, however, the question remained unanswered: where precisely did international law stand on the question of immunity for sitting Heads of State? The ICJ decision in *Congo v Belgium* provided an answer to this question, but an answer which cut short the developmental process underway in international legal norms. The exact state of the law, only briefly addressed in the Court’s decision, will be more fully explored here.

State practice shows a consistent, if hesitant, recognition of procedural immunity for sitting Heads of State. Shortly before the Belgian court heard its first proceedings regarding the case against Sharon, a much less publicized decision was announced in the United States which spoke directly to the issue of Head of State immunity. On October 30, 2001 United States District Judge Victor Marrero accepted the US State Department’s suggestion of immunity for sitting President Robert Gabriel Mugabe of Zimbabwe against prosecution for crimes against humanity including extra-judicial killing and torture.³⁴ The Court’s reliance upon the Executive Branch to determine the status of a defendant’s immunity is an element of this case that is particular to US law, and is illustrative of the overriding role played by politics in legal determinations of immunities, not only in the US but throughout the international community.³⁵ This methodology was strongly contested by the Plaintiffs, who argued that the Court had the power under the Foreign Sovereign Immunities Act to determine the question under rule of law rather than submit absolutely to the State Department.³⁶

The *Mugabe* decision did, nonetheless, acknowledge a process of custom evolution currently underway but not yet completed regarding immunity *rationae personae* for sitting Heads of State: “The progression of the legal precepts and theories Plaintiffs here invoke, despite critical strides marked in recent years, still trails behind human aspirations and has some time and way to go to close the gap.”³⁷ The Court based its ultimate submission to grant Mugabe immunity largely on an 1812 US Supreme Court decision, *Schooner Exchange v. McFaddon*, in which a French ship in US territorial waters was ruled exempt from US jurisdiction under cloak of sovereign immunity.³⁸ By basing the legality of the decision so strongly on *Schooner*, the *Mugabe* decision implies that Head of State immunity remains indistinguishable from sovereign immunity. This traditionalist view is tempered by Judge Marrero’s statement that “since 1967, however, some conceptual fissures have separated the ancient notion that equated the head-of-state to the state itself. There is now growing recognition that the sovereign is solely the state and that the nation’s ruler is a distinct entity.” Due to the “lack of consensus” on the issue, however, the court relied on traditional custom and ruled conservatively.³⁹

The “conceptual fissures” referred to in *Mugabe* include notably two US cases: *Clinton v Jones* (1997) and *United States v Noriega* (1990). Although both cases point to an evolution away from Head of State immunity, both entail unique circumstances that limit the scope of the decision. In *Clinton* the court denied immunity *rationae personae* exclusively in cases of civil suits for money damages.⁴⁰ In *Noriega* immunity was withheld due not to the nature of the acts committed but rather to the US perception of the illegitimacy of the defendant’s claim to power. In another example of politics superceding legal considerations, the Court denied Noriega immunity because the United States government had never recognized him as Panama’s “legitimate, constitutional ruler.”⁴¹ Had the US Executive recognized his legitimacy, it is implied, immunity would have been granted. Identical logic is stated explicitly in *Doe v. Karadzic* and *Kadic v. Karadzic*, two US cases brought

in parallel against Radovan Karadzic, self-proclaimed president of an unrecognized *Republika Srpska*, for genocide and various crimes against humanity committed in the course of the conflict in Bosnia-Herzegovina. Immunity was denied to Karadzic, again, because the Executive Branch had not recognized a Bosnian-Serb nation and Karadzic was therefore not a recognized Head of State. The decision reads: “Were the Executive Branch to declare defendant a head-of-state, this Court would be stripped of jurisdiction.”⁴²

The Court, in *Karadzic*, based its authority on *Lafontant v. Aristide* in which a US Court ruled in 1994 that immunity for a sitting Head of State remained customary under international and US domestic law. Lafontant, a resident of New York, sought monetary compensation from sitting President Jean-Bertrand Aristide of Haiti for her husband’s death at the hands of Haitian soldiers under direct order from Aristide. The Court stated that “a head-of-state recognized by the United States government is absolutely immune from personal jurisdiction in United States courts unless that immunity has been waived by statute or by the foreign government recognized by the United States. A visiting head-of-state is generally immune from the jurisdiction of a foreign state’s courts.”⁴³

On 13 March 2001 the French *Cour de Cassation* (Supreme Court) upheld Head of State immunity by declining jurisdiction on the case brought against Mouammar Ghaddafi, leader of the Socialist People’s Libyan Arab Republic, for his role in the 1989 bombing of a French airliner. The decision was based upon a plea of immunity; the court found that as a matter of international custom criminal jurisdiction does not extend to sitting foreign Heads of State.⁴⁴

The opinion of the Lords ruling in the *Pinochet* decision in the UK, although directly related to the question of immunity for former Heads of State, also sheds light on state practice regarding immunity for sitting Heads of State. While denying Pinochet substantive immunity regarding a small percentage of the crimes alleged (*see supra* note 24 and accompanying text), the opinion of the House of Lords provides explicit support for Head of State immunity *rationae personae*. Lord Browne-Wilkinson states that “[personal] immunity enjoyed by a Head of State in power and an ambassador in post is a complete immunity.” There was dissent to this statement, notably by Lord Phillips of Worth Matravers who implies through his arguments that in the case of an international crime, universal jurisdiction supersedes and removes any immunities: “Once extra-territorial jurisdiction is established, it makes no sense to exclude from it acts done in an official capacity.”⁴⁵

A curious exception to the pattern of state practice upholding immunity *rationae personae*, particularly in light of the current proceedings against Ariel Sharon, is the decision of the Supreme Court of Israel in *Attorney General of Israel v Eichmann* in 1962.⁴⁶ Following the end of World War II, Adolf Eichmann was abducted from his exile in Argentina by Israeli “volunteers” and brought to the newly-established state of Israel to face trial for crimes he had committed as an officer of the Third Reich at a time when the State of Israel had not yet been established. The Court based its jurisdiction upon The Nazis and Nazi Collaborators (Punishment) Law 5710-1950 which provides that any person having committed an act constituting a crime against the Jewish people, a crime against humanity, or a war crime can be tried under Israeli jurisdiction and is liable to the death penalty. Explicitly claiming retroactivity and extra-territoriality, this Law is largely comparable in its progressive implementation of universal jurisdiction to the most comprehensive domestic legislation passed to implement the Rome Statute.⁴⁷ Eichmann’s official capacity as a middle ranking official of the Third Reich placed him at the head of the Department charged with the implementation of the “Final Solution.” In its final judgment finding Eichmann guilty as charged, the Israeli Court broadly rejected any type of immunity in cases of international crimes:

The principle of international law which, under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.⁴⁸

The findings of the *Eichmann* case were so broad that, in his opinion in the *Pinochet* case, Lord Millett referenced the case as authority for the following assertion: “the fact that the accused committed the crimes in question in the course of his official duties as a responsible officer of the state and in the exercise of his authority as an organ of the state is no bar to the exercise of the jurisdiction of a national court,” rejecting immunity *rationae materiae* and *rationae personae*.⁴⁹

While the practice of states continues to recognize Head of State immunity *rationae personae*, however, *opinio juris* (legal obligation felt by states at the international level) shows a strong rejection of the same principle. Recognition of this change began with the establishment of the ad hoc tribunals for former Yugoslavia and Rwanda. In May 1993 the Secretary General of the UN issued a report regarding the establishment of the International Criminal Tribunal for Yugoslavia (ICTY), including the following remark:

Virtually all of the written comments received by the Secretary-General have suggested that the statute of the International Tribunal should contain provisions with regard to the individual criminal responsibility of heads of State, government officials and persons acting in an official capacity. These suggestions draw upon the precedents following the Second World War. The Statute should, therefore, contain provisions which specify that a plea of Head of State immunity or that an act was committed in the official capacity of the accused will not constitute a defense, nor will it mitigate punishment.⁵⁰

As the Secretary General noted, states’ sense of legal obligation to reject Head of State immunity is grounded largely in the history of twentieth century atrocities. Following both world wars, the international community sought justice for those who had committed heinous crimes regardless of their official positions. While the Treaty of Versailles called to “publicly arraign William II of Hohenzollern [former emperor of Germany],”⁵¹ both Tribunals created at the conclusion of the Second World War (the Nuremberg Tribunal⁵² and the International Military Tribunal for the Far East⁵³) found the official position of an accused irrelevant to responsibility and punishment.

This sense of legal obligation regarding Head of State immunity has since been codified in the Statutes of the ICTY, the ICTR, and the Rome Statute.⁵⁴ These three documents, particularly the Rome Statute, have been accepted by the community of states as written expressions of international custom (*see supra* notes 11 and 21). That these three Statutes are viewed as codifications of international law indicates that the international community of states did not consider their contents to be representative of new principles of international law. The sense of legal obligation to disregard Head of State immunity *rationae personae*, therefore, pre-dates the Statutes of the ICTY, ICTR, and the ICC.⁵⁵

The ICTY indictment of Slobodan Milosevic on 22 May 1999 marked the first time an international body stripped a sitting Head of State of immunity. Milosevic had been elected President of the FRY [Federal Republic of Yugoslavia] on 15 July 1997 and remained President at the date of the ICTY indictment.⁵⁶ ICTY Prosecutor Louise Arbour charged Milosevic with crimes against humanity and violations of the laws or customs of war. The Court addressed the question of immunity in its decision on preliminary motions in November 2001. In rejecting the assertion of immunity raised in the *amici curiae*, the Court proclaimed Article 7, paragraph 2⁵⁷ of the ICTY Statute to be customary international law.⁵⁸

On the eve of the ICJ decision in *Belgium v Congo*, then, the state of international custom on the question of immunity for sitting Heads of State was at a pivotal moment. Bifurcated between a very strong showing of *opinio juris* and little evidence of state practice, the debate was very much open. The ICJ’s finding that procedural immunity remains, without exception, a facet of customary

international law was based upon a cursory examination of the patterns presented above, with reference to a few cases in national courts (*Qaddafi* and *Pinochet*) and only an implicit and brief consideration of *opinio juris*.⁵⁹ The finding appears to be based to a much larger extent upon political considerations, or considerations of comity, as evident in the first paragraph of the decision addressing methods of determining custom regarding immunities:

In customary law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States. In order to determine the extent of these immunities, the Court must therefore first consider the nature of the functions exercised by a Minister of Foreign Affairs.⁶⁰

This statement is followed by a lengthy examination of the functions of the Minister for Foreign Affairs as well as the political courtesies necessary to allow for the exercise of these functions.

That the ICJ decision placed greater weight upon political considerations than legal considerations in its findings on international customary law is perhaps its most disappointing element. As pointed out by Judge Van den Wyngaert in her dissenting opinion, while “international comity and political wisdom may command restraint” in the criminal prosecution of sitting Foreign Ministers, this does not amount to international custom.⁶¹ That the ICJ did view such political concerns as central to the process of custom creation, however, is not entirely surprising considering the nature of the debate regarding immunities. Just as historical reasons for establishing immunities centered around ideas of chivalry and comity, so do today’s arguments in support of absolute immunity for sitting Heads of State fall accordingly in the realm of traditional norms of state-to-state diplomacy.

B. Realpolitik: The Argument for Immunity Rationae Personae

Support for absolute procedural immunity for sitting Heads of State is rooted in traditional notions of diplomatic relations between states. This is illustrated in legal writing and scholarship, as well as in the logic employed by the ICJ in the *Congo* decision and by domestic courts in many of the previously discussed cases (*see supra* note 35 and accompanying text). State actors fear that derogation from the norm of immunity for sitting Heads of State will lead to an atmosphere of disarray in international relations and diplomacy. Although the direction of international law points toward recognition of the rights of victims of human rights abuses and accountability for their perpetrators even if this recognition threatens the norm of sovereignty, state actors fear the consequences of following this path.

The chivalrous notion of comity, a courtesy extended from one state to another in order to protect functioning relations, assumes the preservation of diplomatic immunities. Comity was defined in plain speech by a US Court in the *Lafontant* decision as the “concept of doing to others as you would have them do to you.”⁶² In *Pinochet*, Lord Browne-Wilkinson emphasized the application of comity between Heads of State “in recognition of the dignity of the state which he represents.”⁶³ Many fear that the abrogation of comity between states would lead to a world of chaotic inter-state relations in which domestic courts would be burdened with cases brought against Heads of State by former victims, human rights organizations, or anyone with a “cause”. The result, they claim, would be a sort of “travel game” whereby Heads of State would have to research any country to which they plan to travel in order to ensure that they would not be served with an arrest warrant upon arrival. It is argued that the result of such games would be much more severe than mere inconvenience. A hypothetical case: the leader of a nation involved in a conflict is invited to use the good offices of a foreign state to conduct peace negotiations. What if this leader could not attend the peace negotiations because a warrant for his arrest had been circulated in the same nation that has offered its services? This hypothetical situation can be extended to cases of international

summits or meetings between Heads of State. The importance of freedom of travel for representatives of the State was emphasized by the ICJ in the *Congo* decision.⁶⁴

Another fear is that of judicial reprisals to settle political vendettas. This fear has been expressed by Lord Browne-Wilkinson, who in his dissent from the Princeton Principles went so far as to speculate that the rejection of immunity might induce violence or armed warfare between states:⁶⁵

... the Principles do not recognize any form of sovereign immunity.... If the law were to be so established, states antipathetic to Western powers would be likely to seize both active and retired officials and military personnel of such Western powers and stage a show trial for alleged international crimes. Conversely, zealots in Western States might launch prosecutions against, for example, Islamic extremists for their terrorist activities. It is naïve to think that, in such cases, the national state of the accused would stand by and watch the trial proceed: resort to force would be more probable. In any event the fear of such legal actions would inhibit the use of peacekeeping forces when it is otherwise desirable and also the free interchange of diplomatic personnel. I believe that the adoption of such universal jurisdiction without preserving the existing concepts of immunity would be more likely to damage than to advance chances of international peace.⁶⁶

The fears and risks discussed here regarding the disruption of international relations are real ones. The moral and legal weight behind individual accountability for international crimes regardless of official capacity, however, is of such substance that it mandates an evaluation of the trade-offs involved in accepting the risks of impunity in order to preserve comity.

C. The Moral Argument against Head of State Immunity

The question of immunity for sitting Heads of State who have committed grave international crimes is one area where, as Judge Marrero stated in *Mugabe*, “legal precepts and theories ... still [trail] behind human aspirations.”⁶⁷ This is nowhere better demonstrated than in the disappointment of the human rights community at the *Congo* decision. It is time to close this gap and recognize that there are indeed ways to reconcile conflicts within the system of international relations in order to allow for the acceptance of a legal precept which is of great moral bearing.

The moral argument against immunities is the very same argument which runs through the international human rights movement as a whole: a respect for the rights of the individual and a recognition of his/her subsequent responsibilities. With the establishment of ad hoc tribunals and a growing body of international human rights law, the international community has strongly asserted individual responsibility for violations of human rights. The status of sitting Heads of State appears to be the last battleground on this issue;⁶⁸ prime ministers, presidents, and kings are the remaining individuals who are granted immunity for the gravest crimes by a system of international law which refutes impunity for all other individuals. This logic appears backward – of all individuals living in the world of states, why is a cloak of immunity granted to those who have the most power to do harm or good, the highest number of lives at their disposal? Unlike average citizens, the leaders of most countries have *de facto* and *de jure* control over most of their nation’s functions, and have therefore the utmost opportunity and ability to inflict loss of life and dignity were they to commit international crimes.⁶⁹ Those given the opportunity to represent and rule a nation of people should be held to the very highest standards of international law, not the lowest.

Granting immunity to sitting Heads of State sends the message that they will be granted leave by the international community to commit war crimes, crimes against humanity, and even genocide throughout their time in office. What atrocities might be avoided, what crimes prevented, if sitting

Heads of State knew that they would be held accountable by the international community for their own actions?

D. Reconciling Law and Politics

1. Why Immunity Does Equal Impunity

The ICJ decision presents a four-pronged system of exceptions to absolute immunity, and states that this system sufficiently ensures that immunity does not equal impunity. As Judges Higgins, Kooijmans and Buergenthal argue in their Joint Separate Opinion, however, there is reason to feel “less than sanguine” about the realities of this system.⁷⁰ Each of the four examples has severe limitations.

Firstly, it is highly unlikely that a sitting Head of State or high-ranking State representative would ever be brought to criminal judgment before the courts of his own country. Secondly, it is just as unlikely that said country would waive immunity for its own representative traveling abroad. Thirdly, substantive immunity for former Heads of State and government officials does not allow for prosecution of “acts of state,” a term that remains vaguely defined even after the *Pinochet* and *Congo* decisions. In addition, this provision allows impunity for international criminals while remaining in office and, as Higgins, Kooijmans and Buergenthal point out, does not address the problem presented by belligerent governments that might keep an official in office exclusively to avoid prosecution.⁷¹

The fourth example is the most intriguing and presents more nuanced problems. That “an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction”⁷² assumes a system of international criminal justice that is far more advanced than we see today or foresee in the near future. Resources and political stamina limit the number of ad hoc tribunals such as the ICTY and the ICTR that can be established, and the establishment of the ICC may not become a reality for some time.⁷³ Even when it does, its ability to prosecute sitting Heads of State and government officials may be severely limited. Although Article 7 of the Rome Statute ensures that Heads of State who stand before the Court will not be granted immunity, loopholes in the Statute leave concern regarding the ability of the Court to secure the presence of an incumbent Head of State through surrender. Article 88 of the Statute requires that “State Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation” specified in the Statute. Yet Article 98 provides that a State must not be required to act “inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State.” Under this regime, State parties would find it possible to remain in cooperation with the Rome Statute while conferring immunity on sitting or former Heads of foreign States in surrender cases simply by deferring to other multilateral treaties or customary law which provide immunity.⁷⁴

Under scrutiny, the system of immunities proposed by the ICJ is a system which does provide impunity for international crimes. At least until the international community sees the realization of an International Criminal Court which has eliminated the type of loophole described above, granting procedural immunity to sitting State representatives will produce a culture of impunity.

2. Rejecting Immunity while Preserving Functioning Relations

In light of the inadequacy of the immunities system presented in the ICJ decision, the challenge facing international legal and human rights advocates as well as policy makers is to establish a mechanism whereby sitting Heads of State face responsibility for their actions without

irreversibly disrupting functional relations between states. Such a mechanism must entail severe limitations on the concept of immunity *rationae personae* and therefore will be a somewhat radical departure from traditional norms of inter-state relations.

Those who argue for the preservation of immunity *rationae personae* paint a picture of a world without immunity where there is unending litigation and the map is a board game with warrants for arrest flying freely. What these arguments ignore are the structural limitations inherent in universal jurisdiction: crimes which prescribe universal jurisdiction are limited to the most grievous violations of the law of nations. The Rome Statute and domestic implementing legislation currently in existence remove immunity only in the cases of such severe violations (*see supra* note 47). The world envisioned by the Rome Statute is not one in which Heads of State are wanted globally for shop lifting – it is a world in which Heads of State cannot commit grave violations of individuals’ human rights with impunity.

Although the fear that judicial proceedings will be used as political weapons throughout the world is a legitimate fear, the moment has arrived whereby it must be balanced against the need for individual accountability. In *Congo*, the ICJ found its answer to this need in international criminal courts: the Court presumed that functional relations between states could be preserved without sacrificing justice if incumbent Heads of State (whose nations had not waived their immunity) would be protected by immunities in the domestic arena but not before international criminal courts. While this solution is the most elegant in theory, it is lacking in practice for the reasons presented above. A critical assessment of the international criminal system as it exists today indicates that the only way to protect against impunity for international criminals, whether Heads of State or every day civilians, is to restrict immunities (procedural and substantive) in cases of genocide, crimes against humanity, and war crimes. This restriction is narrow enough to uphold justice without irrevocably damaging the nation-state system.⁷⁵

The International Court of Justice denied this reality and in so doing rejected the opportunity to recognize an evolution of international customary law that reflects the standards of our time. So where do we find ourselves in the meantime? Several brave lawyers in Belgium have taken it upon their shoulders to use their nation’s courts to respect the international legal obligation to deny immunity to sitting Heads of State charged with international crimes. They do so at the risk of bringing some measure of disarray to the world of diplomacy. In weighing the value of the human rights of victims and the accountability of perpetrators versus the sovereignty of the state, they chose the value of the individual. I applaud that choice, and believe that in the long run the losses incurred by this show of respect for the process of progressive evolution in international law will be much less than the gains.

III. The Case against Ariel Sharon

On 6 February 2001 Ariel Sharon was elected Prime Minister of Israel on the heels of his provocative visit to the Temple Mount (*al-Harem al-Sharif*), widely charged with sparking the 2nd Palestinian Intifada. On 18 June 2001, four months following the elections, twenty-three Lebanese and Palestinian civilians filed a complaint against Ariel Sharon with a Belgian court. All twenty-three were witnesses and survivors of a massacre which had taken place in the Sabra and Shatila Palestinian refugee camps in Israeli-occupied Beirut nineteen years prior when Sharon was the sitting Israeli Minister of Defense. The complaint was filed under the Belgian Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, as modified on 10 February 1999 so as to conform with the requirements of the Rome Statute, and charged Sharon, as well as “other Israelis and Lebanese responsible,” with “grave violations of international humanitarian law” including acts of genocide, crimes against humanity, and crimes against persons and goods protected by the Geneva Conventions signed in Geneva on 12 August 1949 (war crimes).⁷⁶

After four pre-trial hearings, the Belgian court was in deliberation regarding jurisdiction when the ICJ announced its 14 February decision in *Congo v Belgium*. Despite predictions to the contrary, the lawyers for the plaintiffs in the Sharon case pushed forward and on 6 March the Court of Appeals of Brussels agreed to the lawyers' request to schedule an additional hearing in order to assess the impact of the ICJ decision on the case. The hearing is to be held in Brussels on 15 May 2002.⁷⁷

Under international law as well as Belgian law, Ariel Sharon is indictable for war crimes. A rejection of immunity for Sharon would mark the first time a domestic court revoked immunity for a sitting Head of State in a criminal case of this magnitude. The Act under which the case has been filed clearly rejects Head of State immunity: Article 5 §3 of the Act states that "the immunity attributed to the official capacity of a person, does not prevent the application of the present act."⁷⁸ The Belgian court possesses legitimate jurisdiction over this case, and potential obstacles to indictment are insurmountable. The decision of the International Court of Justice does not change this set of circumstances, nor should it influence the judges' decision in the case brought against Ariel Sharon. Decisions by the ICJ do not constitute international customary law, nor do they prohibit the evolution of state practice.

This case, the first dealing with immunities to be placed before a court since the *Congo* decision, is an opportunity for the progressive evolution of international law to continue despite obstacles in its path. The international community and the Belgian judges must ask themselves if there is any justice in allowing Sharon to maintain his power over so many lives and futures if he is indeed guilty of the crimes alleged and indictable under international law, as the evidence and analysis below indicate that he is. Sharon's record on human rights throughout his career has been dismal – evidence points to the commission of international crimes in many cases beyond Sabra and Shatila. Several of these instances date back to the 1950's when Sharon was the commander of IDF Unit 101, a small commando unit charged with "carrying out special tasks" that resulted in at least one massacre and several raids on refugee camps.⁷⁹ Sharon's management of his current position as Prime Minister has shown equally little respect for human rights and international law. Actions taken by Israeli forces against the Palestinian population during the current *Intifada* have included strategic policies of assassination, closures resulting in a lack of access to medical care and education, as well as various methods of collective punishment.⁸⁰ Since Sharon's election, 34 new Israeli settlement sites have been built in the West Bank in contravention of international humanitarian law.⁸¹

Robert Fisk, a journalist and himself a witness to the massacre in Lebanon in 1982, has spoken out regarding the similarities between Ariel Sharon's rhetoric and actions today as Prime Minister and his rhetoric and actions in Lebanon, nineteen years ago, when he served as Minister of Defense during the occupation of Beirut.

In Gaza, I cannot fail to remember Beirut in 1982, when Sharon's invading army had surrounded the PLO [Palestinian Liberation Organization]. Gaza is now a miniature Beirut. Under Israeli siege, struck by F-16s and tank fire and gunboats, starved and often powerless – there are now six-hour electricity cuts a day – it's as if Arafat and Sharon are replaying their bloody days in Lebanon. And Sharon used to call Arafat a mass murderer back then. It's important not to become obsessed during wars. But Sharon's words were like a ghost to me. Every morning in these past few weeks, I would pick up the *Jerusalem Post*. And there on the front page, as usual, would be another Sharon diatribe. PLO murderers, Palestinian Authority terror. Murderous terrorists.⁸²

History indicates that Ariel Sharon is a man prone to place little value on human life, and that he has acted without regard for human rights or international law throughout his career. Today, as Head of State, he has power over actions and events which affect the lives of thousands – this is not

the time for him to be granted immunity for past actions without considering the possibility that he might commit similar offences in the future. Ariel Sharon is a case in point in the moral argument against Head of State immunity.

The case against Sharon before the Belgian court focuses exclusively on the crimes alleged to have been committed by Sharon in 1982 at Sabra and Shatila refugee camps in West Beirut, Lebanon. Chibli Mallat, a Lebanese solicitor who is one of the 3 lawyers presenting the case, ascribes this exclusive focus to the large amount of evidence available and the applicability of Belgian law.⁸³ Below the impact of the *Congo* decision is addressed, followed by a background of the massacre as well as an analysis of legal issues presented by the case.

A. In Light of *Congo v Belgium*: Can the Case Proceed?

Decisions by the International Court of Justice, though indicative of trends in international law, are not representative of custom. They are binding only upon the parties to the case being heard, and only in regard to that particular case.⁸⁴ Therefore, due to the limited legal weight of the *Congo* decision, the case against Sharon pending in Belgium should proceed and be weighed upon its own merits.

The specifics of the situation considered in *Congo* differ significantly from the circumstances surrounding the case against Sharon. In statements released since 14 February, the lawyers for the plaintiffs in the Sharon case have put forward three major arguments as to why the ICJ ruling has no bearing upon the case they have lodged. The first is that, as stated above, the ruling is not binding upon Israel or Belgium in regard to the Sharon case.⁸⁵ The second argument relates to the narrow scope of the decision: the ICJ ruled that it was the circulation of a warrant of arrest for the Congolese Minister for Foreign Affairs that constituted a violation of his immunities.⁸⁶ The Court did not rule on the legality of the criminal investigation itself. Thirdly, the circumstances of the cases differ, as the arrest warrant issued against the Congolese Minister did not include a count of genocide, while the charges brought against Sharon include acts of genocide. Lawyers for the plaintiffs argue that this is an important distinction, in that the Genocide Convention explicitly states that “persons committing genocide ... shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”⁸⁷

Although the latter two arguments are sound, they have the potential to become problematic in the future if the case does proceed. The argument for indictment on genocide is not as strong as the argument for indictment on war crimes (see §IIIB1d below); in addition, if an indictment is pronounced against Sharon, does the Prosecution truly intend to withhold a warrant of arrest until Sharon leaves office?

The case against Sharon can and should proceed in spite of the ICJ ruling in the *Congo v Belgium* case. The simplest argument behind this statement is also the strongest: regardless of the specificities of the *Congo* case, it is simply not binding on the Belgian court as it considers the present case against Sharon. The Belgian judges hearing this case must not fall into the very same trap that the ICJ did by aborting a process of legal evolution before it reaches fruition.

B. Massacre at Sabra and Shatila Refugee Camps, September 1982

As the occupying force in Beirut, the Israeli Defense Force under the command of Ariel Sharon was responsible for the safety of the population. The IDF opened the refugee camps to a militia with a history of hatred and indiscriminate violence against Palestinians. It sealed off the refugee camps. It refused to allow terrified, pleading camp residents to escape through the exits of the camps. The IDF supplied the flares that lit the way for the murderers; it provided a bulldozer to help bury bodies in a mass grave and hide it with earth. And no official intervened when it became clear that innocent lives were being taken.... Yet, Ariel Sharon has never served time in

prison for his actions; on the contrary, he is now head of the Jewish State. He is officially welcomed in most countries, including the United States, where he has met with the President at the White House.⁸⁸

1. Background and History of the Massacre

The massacre at Sabra and Shatila refugee camps occurred within the context of the confused and violent political history of the Palestinian population in Lebanon. The first Palestinian refugees who fled to Lebanon numbered approximately 110,000 and arrived before and during the War of 1948. A new refugee flow was produced by the 1967 War and in 1970 when King Hussein of Jordan expelled the Palestinian Liberation Organization (PLO) from his country following a civil war. The massive influx damaged Lebanon's precarious demographic balance, which had been preserved in a consociational government established by the National Pact of 1943 and based on a 1932 census. A vicious civil war in 1975 pitted the Lebanese Maronite Christian right, dominated by the Phalangist Party, against the Palestinians. The war raged until the Syrian Army entered Lebanon on behalf of the Maronite Christians and initiated one in a series of foreign occupations in Lebanon. During this period, Israel provided the Christian Maronite community with considerable support and launched sporadic attacks against the PLO, whose forces were ensconced within Lebanon.⁸⁹

A full-scale Israeli War in Lebanon was widely acknowledged to be a long-time goal of Defense Minister Ariel Sharon. With the stated aim of removing Palestinian terrorists from Lebanon, the War began as retaliation against the PLO for an attack on Israeli Ambassador Shlomo Argov in London on 3 June 1982. (It was quickly revealed that the attack had not been carried out by the PLO, but by a rival organization). Although the invasion was launched after a multi-nationally monitored withdrawal of PLO forces from Lebanon, Sharon and other Israeli military officials insisted that PLO forces still remained in Beirut. In the Israeli newspaper *Ma'ariv*, Israeli Defense Force (IDF) Chief of Staff General Raphael Eitan described the purpose of the Beirut operation: "We are going to mop-up West Beirut.... We will find all the terrorists and their leaders. We will destroy whatever requires destruction."⁹⁰ By June 5 Israeli mobilization along the Lebanese border was complete.⁹¹ Although the Lebanese capitol of Beirut was subject to artillery and air attacks throughout the operation, Sharon did not order the actual invasion of West Beirut until Bashir Gemayel, leader of the Christian Phalange, was assassinated; speculation by the Phalange as well as Israeli leaders assigned responsibility to the PLO. Full occupation of Beirut was complete on Thursday, September 16. A military communiqué on that day stated: "Tzahal [IDF] is in control of all key points in Beirut. Refugee camps harboring terrorist concentrations, remain encircled and closed."

It was acknowledged that the most sensitive part of this "mop-up" would be entry into the refugee camps. Early on the morning of the 16th meetings were held between IDF officials and Phalangist officials: Sharon and his forces had decided to leave the entry into the camps to the Phalangists. The time of Phalangist entry into the camps was 5:15 PM on Thursday, September 16, and the massacre of Sabra and Shatila began immediately. The massacre stretched from that evening until 8 am on the morning of Saturday, September 18, and the horrors witnessed were as gruesome as any 20th century atrocity. Within the first few hours of the Phalangist presence in the Sabra and Shatila refugee camps, hundreds were murdered. Young girls were raped, children forced to watch their families murdered, victims mutilated and tortured beyond recognition before their death, infants and young children killed alongside women and men of all ages.⁹²

It is unclear to this day how many were killed in the massacre. Israeli intelligence estimated between 700 and 800 deaths; the Palestinian Red Crescent placed the number at greater than 2,000.⁹³ Many people taken away by the Phalange in trucks were left missing; others were buried under rubble and never found. On 19 September the United Nations Security Council issued Resolution 521 condemning the massacre of Palestinian civilians, and international outrage led to speculation regarding responsibility for the incident. Expressions of fury within Israeli society prompted the

Israeli Cabinet to establish a commission of inquiry charged with determining “all the facts and factors connected with the atrocity carried out by a unit of Lebanese Forces against the civilian population in the Shatilla and Sabra camps.” The subsequent Commission, referred to as the Kahan Commission (then President of the Israeli Supreme Court Yitzhak Kahan was the Chair), published a report assigning direct responsibility for the massacre exclusively to the Phalange. Indirect responsibility was assigned to eight Israeli officials, civilian and military, including sitting Prime Minister Menachem Begin.

Regarding Minister of Defense Ariel Sharon, the Commission assigned “indirect responsibility” and “personal responsibility” and recommended that Prime Minister Begin consider removing him from office.⁹⁴ Subsequent to the findings of the Commission, Sharon was removed from the office of the Defense Ministry but remained in the Cabinet as a Minister Without Portfolio. The Commission has been criticized for assigning responsibility without acknowledging or recommending significant consequences for that responsibility. No judicial action was taken against any of the parties involved in the Massacre.

2. Sharon’s Responsibility under International Law and the Case in Belgium

The case against Sharon in Belgium was brought under the Belgian Act Concerning the Punishment of Grave Breaches of International Humanitarian Law as modified by the Act of 10 February 1999. One of the most progressive laws of its kind in the world, the Act provides for jurisdiction over any individual, regardless of the victim or the perpetrator’s nationality or the location of the alleged act. Acts which constitute a crime under the Act include genocide, crimes against humanity, and grave breaches of the Geneva Conventions (war crimes). The text of the Act seeks consistency with international law by using definitions taken from international conventions: the definition for genocide from the Genocide Convention, the definition for crimes against humanity from the Rome Statute, and the definition of grave breaches directly from the Geneva Conventions. As stated above, the Act explicitly states the irrelevancy of “official capacity” in determining responsibility for crimes.⁹⁵

Several legal issues have already been addressed, to varying degrees, in front of the court during the pre-trial hearings conducted from October 2001 to January 2002. These have included the larger questions of the validity of the universal jurisdiction principle and the question of diplomatic immunity, as well as the issues of double jeopardy, amnesty, and retroactivity.⁹⁶ While the arguments presented by Sharon’s lawyer regarding double jeopardy and amnesty are clumsy,⁹⁷ the question of retroactivity is a legitimate challenge that must be addressed by the plaintiff’s legal team. Once retroactivity has been addressed, the nature of the alleged acts as international crimes must be addressed, as well as the nature of Sharon’s responsibility for the alleged acts.

a. *Nullum Crimen Sine Lege*

In order to determine the applicability of the Belgian Act to Sharon, the question of retroactivity must be addressed before considering the merits of the case. Does the Belgian Act, enacted in 1993 and amended in 1999, provide jurisdiction for crimes which are alleged to have been committed in 1982? The answer is yes; the Act does appear to provide retroactivity for violations of customary international law. Article 8 of the Act states that the Belgian penal code relative to statutory limitations of prosecutions and penalties is not relevant to the breaches included in the Act.⁹⁸

The Belgian court system has previously found this Act to have retroactive jurisdiction. In 1999 the court, ruling on the Belgian component of the legal actions brought against Pinochet, established the jurisdiction of the court over crimes which had been

committed prior to 1993 (the first drafting of the law) to the extent that as violations of international customary law they were illegal under Belgian law at the time. The court found the prohibition on crimes against humanity to be “part of customary international law and of international *jus cogens*, and this norm imposes itself imperatively and *erga omnes* on our domestic legal order.” Under this ruling, the Act provides for retroactivity in that it merely codifies Belgian jurisdiction over international custom which existed previous to the drafting of the law. This assertion is enforced by the Act’s reference to the Geneva Conventions and the Rome Statute, both of which are codifications of international customary law.⁹⁹ A similar conclusion was reached in 2001 with the indictment of four Rwandans tried in Belgium for international crimes including genocide and crimes against humanity committed during the Rwandan genocide of 1994. Because genocide and crimes against humanity were not included in the jurisdiction provided by the Act until its amendment in 1999, the decision was predicated upon retroactive jurisdiction.¹⁰⁰

As expressed by the judge in the *Pinochet* case, the reliance upon international custom to fulfill the requirement of retroactivity indicates that the requirement of double criminality is also fulfilled. *Jus cogens* norms held to be imposed *ergo omnes* upon the domestic legal order of every state would be just as applicable in Chile as they would in Belgium; they would by extension be similarly applicable in Israel.¹⁰¹

The charges brought against Sharon in the Belgian case are genocide, crimes against humanity, and war crimes. As these are all crimes firmly established in international customary law, the retroactive applicability of the Act over this case is clear.¹⁰²

b. War Crimes

The available evidence regarding Ariel Sharon’s involvement in the massacre in Sabra and Shatila points most strongly toward an indictable allegation of war crimes. War crimes are defined in the Belgian Act as well as Article 8 of the Rome Statute¹⁰³ as “grave breaches” of the Geneva Conventions of 12 August 1949. Israel is signatory to the Fourth Geneva Convention, having ratified the Geneva Conventions in 1951 (in addition, their status as custom renders the Geneva Conventions applicable to all nations regardless of ratification).¹⁰⁴ The Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War provides for the protection of persons who “in case of a conflict or occupation,” are “in the hands of a Party to the conflict or Occupying Power of which they are not nationals.” The residents of Sabra and Shatila refugee camp were persons protected by the Fourth Geneva Convention as Palestinian and Lebanese civilians living in Beirut under Israeli occupation. As mentioned earlier, an IDF military communiqué from mid-day Thursday, September 16 declared that the IDF was in control of all key points in Beirut. According to Article 29 of the Fourth Geneva Convention, the protection of the residents of Sabra and Shatila refugee camp fell directly to the IDF: “The Party to the conflict in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred.” As “the Minister in charge of the Army on behalf of the Government,”¹⁰⁵ individual responsibility for the protection of these civilians fell to Defense Minister Ariel Sharon.

c. Command Responsibility

Ariel Sharon is not alleged to have been a direct perpetrator of the massacre at Sabra and Shatila. His alleged responsibility under international law is predicated upon the concept of command responsibility, a theory well ensconced in international custom which imputes responsibility not only to those who commit crimes with their own hands, but to their superiors who possessed the power to prevent or abort the criminal activity. The Belgian Act accounts for command responsibility in Article 4 which defines punishable acts. Included in this list is the

“failure to act to the extent available to them by persons who had knowledge of the orders given to commit such a breach or of acts initiating the commission thereof and who were able to prevent or put an end to such a breach.”¹⁰⁶ Article 4 of the Belgian Act is a restatement of the idea of command responsibility as already established in customary international law, dating back to the Nuremberg Principles which judged “complicity in the commission of a crime against peace, a war crime, or a crime against humanity” to be a crime under international law.¹⁰⁷ Command responsibility is articulated in the Statutes of the ICTY and the ICTR,¹⁰⁸ and in Article 28 of the Rome Statute.

Several prominent cases have brought individuals to justice for international crimes under command responsibility. In a case brought by the ICTR against Jean Kambanda, former Prime Minister of Rwanda, the court assigned responsibility to Kambanda based upon his acknowledgment that as head of the government he exercised *de jure* and *de facto* control over national policy and the armed forces. The Court noted that Kambanda had direct knowledge of the proceedings of the massacres but “no action was taken to stop them.”¹⁰⁹ Similarly, command responsibility was imputed to Slobodan Milosevic by the ICTY in the *Milosevic* indictment by asserting his responsibility “for the actions of his subordinates within the VJ [Armed Forces of the Federal Republic of Yugoslavia] and any police forces, both federal and republican, who have committed the crimes alleged in this indictment...”¹¹⁰

The war crimes alleged to have been committed at Sabra and Shatila were directly perpetrated by the Phalange, and included: willful killing, torture or inhuman treatment, willfully causing great suffering, or serious injury to body, extensive destruction of property, intentionally directing attacks against individual civilians not taking direct part in hostilities, and rape. These crimes were committed by the Phalangist militia in the refugee camps of Sabra and Shatila, but were provided direct and indirect support by Ariel Sharon and the IDF.

The case against Sharon depends upon the ability of the prosecution to effectively place command responsibility upon Sharon for the massacre at Sabra and Shatila. There are three tests under international customary law which must be met in order to satisfy the requirements for command responsibility: ¹) possession of effective authority and control over the perpetrators, ²) knowledge of or ability to anticipate the commission of war crimes, and ³) failure to act within reasonable measures to prevent or halt their commission.¹¹¹

Regarding the first test, evidence points strongly to Sharon’s control over the Phalange. In his capacity as head of the IDF, his knowledge of the nature and activities of the militia indicates that he possessed the capability to have pre-empted or halted the actions in the refugee camps. On 9 AM the morning of Wednesday, September 15, Sharon arrived at the Israeli forward command post in Beirut (located on the roof of a building at the Kuwaiti Embassy crossroads, overlooking Sabra and Shatila) and reiterated an order he had already given: that the Phalange be sent into the camps “under the IDF’s supervision.” Sharon himself recalled this order in an address to the *Knesset* on September 22, and added that the Phalangists had entered Sabra and Shatila in coordination with Israel.¹¹² Further evidence of the IDF’s control over the Phalangists is the activity of Brigadier General Amos Yaron, Commander of Israeli Forces in Beirut, who on 3 PM of Thursday, September 16th, met with key Phalange leaders to coordinate the entry into Sabra and Shatila. Yaron assured them that any assistance necessary to “mop up the terrorists in the camps” would be provided by Israeli troops. Immediately following this meeting, Yaron called Sharon and informed him that “Our friends are marching on the camps. We have coordinated their entry.” Sharon’s reply was, “Congratulations! The operation of our friends is approved.” Throughout the massacre Israeli soldiers were stationed at check points around the camps, controlling exits and entrances.¹¹³

Regarding the second test, Sharon’s alleged knowledge of the incipient commission of the crimes, it is clear not only that Sharon was aware of the order for the Phalangists to enter the camp (he himself reiterated the order the day before the massacre), but that he had ample reason to anticipate that a massacre would take place upon the order’s fulfillment. An abundance of evidence

existed regarding the vengeful nature of the Phalange militia and their desire to slaughter the Palestinian population in Lebanon; with this desire heightened by revenge-seeking for the assassination of Bashir, Sharon would have known that a massacre would follow the Phalangist entry into the camps. It was the opinion of the Kahan Commission that “everyone who had anything to do with events in Lebanon should have felt apprehension about a massacre in the camps, if armed Phalangist forces were to be moved into them without the IDF exercising concrete and effective supervision and scrutiny of them.”

The relationship between Israel and the Phalange Party had begun in 1976 and grew to be an intimate alliance. The leaders of the Phalange never attempted to hide from the Israelis nor from Sharon their tendency toward excessive violence. Sharon, who was essentially the care-taker of the relationship between Israel and the Phalange, knew every detail of Phalange behavior; in mid-August 1982, Sharon was presented with a detailed list of atrocities perpetrated by the Phalangists. According to Israeli daily *Ha'aretz* military correspondent Ze'ev Schiff, “the document was sobering.”¹¹⁴

Numerous Israeli officials and politicians expressed their concerns, often directly to Sharon, regarding the nature of the force poised to enter the camps. The long list of quotes and statements on this issue indicates that Sharon, who had one of the closest relationships of any Israeli with the Phalangists, must have harbored similar suspicions. One Israeli officer, upon hearing of Sharon's decision to authorize the Phalange entry into the camps, quipped: “He who allows a fox into a hen-house should not be astonished if the chickens are devoured.”¹¹⁵ The evening before the entry, at a meeting in Sharon's office in Tel Aviv, IDF Chief of Staff Eitan warned: “Let me explain to you. Lebanon is at a point of exploding into a frenzy of revenge. No one can stop them. Yesterday we spoke with the Phalange about their plans. They don't have a strong command.... They're obsessed with the idea of revenge.... I'm telling you that some of their commanders visited me, and I could see in their eyes that it's going to be a relentless slaughter.”¹¹⁶ In the BBC documentary “The Accused,” Morris Draper, the US Special Envoy to the Middle East in 1982 was asked if “Ariel Sharon [could] have been in any doubt about what would have happened if you sent the Phalangists into a Palestinian refugee camp, an undefended camp.” Draper's response: “Well you'd have to be appallingly ignorant. I mean I suppose if you came down from the moon that day you might not predict it.”¹¹⁷

Lastly, then, did Sharon “take all necessary and reasonable measures within his power to prevent or repress” the crimes committed at Sabra and Shatila, or did he fail “to act to the extent possible” to prevent or halt the commission of crimes? The evidence leaves no doubt that Israeli forces and Sharon, in turn, knew that war crimes were being committed within the walls of the refugee camps and that any actions taken to end the massacre were hesitant and belated. The Israeli central command, as already noted, was located on the roof of a building at the Kuwaiti embassy crossroads, overlooking the camps. The Kahan Commission reported that the events in the camps were not visible from this rooftop. Yet Ellen Siegel, a nurse in the Gaza Hospital inside the Sabra camp during the massacres, stated in an interview with the author that the camps were visible from the ground level of the building, indicating that a view directly into the camps certainly would have been available from the roof.¹¹⁸ Many reports on the massacre share Ms. Siegel's view of the inaccuracy of the Commission's finding on this point. Regardless of the view from the command post, however, it is undisputed that Israeli soldiers knew of the existence of a massacre shortly after its inception. Between Thursday evening and Friday morning, reports of atrocities in the camps and an abundance of civilian deaths were delivered to four different IDF headquarters.¹¹⁹

The exact time that Ariel Sharon became aware of the massacre is contested. Sharon claimed before the *Knesset* that the first time he learned of the atrocities was on Friday evening, when Eitan returned to Israel and contacted Sharon, informing him of the reports of civilian deaths but claiming that “the Phalangists exaggerate.” At 11:30 that same evening, Ron Ben-Yishai, a military

correspondent of Israeli TV who had overheard Israeli officers speaking of summary executions in Shatila, contacted Sharon to urge him to take action to stop the murders. Ben-Yishai later reported that “Sharon hardly spoke. We greeted each other on the Jewish New Year and hung up. My impression is that he was rather aware of the developments in the camps.” While Sharon slept, the massacre not only continued throughout Friday night and Saturday morning, but new Phalangist troops were permitted to enter the camps.¹²⁰ At a meeting at 4 PM on Friday, Yaron had given the Phalangists until 5 AM Saturday morning to “continue action mopping up the empty camps.” Even with this already-lenient order on the table, the Phalangists were not forced out of the camp by Israeli orders until 8 AM.¹²¹

In addition to exercising minimal pressure to end the massacre once aware of its occurrence, the IDF under Sharon’s command provided implicit assistance to the Phalange. Israeli flares fired from all directions kept the camps constantly lit throughout the two long nights of the massacre, Israeli soldiers at camp exits prevented individuals from fleeing the camps, and Israeli forces provided the Phalange with a bulldozer which was used to destroy homes and bury victims in mass graves.¹²² The loan of the bulldozer was decided upon at a meeting on Friday afternoon between Israeli Chief of Staff Eitan and the Phalangist staff, who requested a tractor in order to “demolish illegal structures.” Brigadier General Yaron, also present at the meeting, testified to the Kahan Commission that although he had already ordered the Phalange to leave the camps by 5 AM the next morning, it was clear that “the Phalangists could still enter the camps, bring in tractors, and do what they wanted.”¹²³

The legal team representing the plaintiffs in Belgium has indicated that it possesses new evidence which may point even more directly toward Sharon’s command responsibility at Sabra and Shatila.¹²⁴ With or without this new evidence, however, the merits of the case strongly implicate Sharon under command responsibility for war crimes.

d. Crimes against Humanity and Genocide

The case against Sharon in Belgium additionally charges Sharon with crimes against humanity and genocide. Whether or not these allegations are true, their presentation in a court of law would be much more challenging than that of war crimes.

Many acts defined as crimes against humanity were committed at Sabra and Shatila: murder, torture, rape, enforced disappearance of persons, and inhumane acts. Yet the customary definition of crimes against humanity, as articulated in Article 7 of the Rome Statute, further requires that said acts be “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” An “attack against any civilian population” is further defined in Article 7.2 as “a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.” The population of the camps was indisputably of a civilian character (including women and children), there was a multiple commission of illegal acts, and the many meetings between Phalange and Israeli military officers do indicate an organizational policy.¹²⁵ Yet the element of the definition requiring that the acts be “part of a widespread or systematic attack” presents an obstacle to the prosecution of Sharon for crimes against humanity. In their complaint before the Belgian court, Solicitors Walley, Verhaeghe, and Mallat argue that “on this point of jurisdiction customary law has equally evolved since the Nuremberg and Tokyo trials: currently it is no longer required for the attack against a civilian population to be generalized and systematic.” No evidence is presented to explain the evolution of this changing norm, however. The Prosecution goes on to claim that, regardless, the events in Sabra and Shatila were “in a way” part of a systematic attempt to rid Lebanon of all Palestinians.¹²⁶ While this intention might have been the true desire of the Phalange it would be very difficult to prove that this was the personal intent of Ariel Sharon whose rhetoric of destruction was limited to “Palestinian terrorists.” Although

Sharon's personal intent can be speculated upon endlessly, he did in his public statements insist that he believed there were terrorists remaining in Beirut, and that they were his only targets.

Similar obstacles would hinder the prosecution of Sharon for the crime of genocide, defined by custom as the commission of certain crimes (including murder and causing bodily harm) "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group."¹²⁷ On 16 December 1982, the United National General Assembly stated in Resolution 37/123 D that the massacre at Sabra and Shatila was an act of genocide. Yet specific responsibility for the genocide was not assigned, and General Assembly resolutions do not impart international custom. Although there was clear hatred on the part of both the Phalange and the Israelis against Palestinians, proving intent to commit genocide is complex. Certain evidence regarding the behavior of Israeli troops during the invasion of West Beirut points to intent: homes and businesses were destroyed, and the entire research library of the PLO Research Center in Beirut looted (consisting of 25,000 volumes of books in Arabic, English, and Hebrew).¹²⁸ The Complaint Against Ariel Sharon points to efforts by Israeli officials to dehumanize the Palestinians by referring to them as "two-legged animals" or "drugged cockroaches." In addition, the Complaint refers to the *Akayesu* case heard before the International Criminal Tribunal for Rwanda (ICTR) in which the court stated that intent to commit genocide need not be explicitly stated but can be "inferred from a certain number of elements, such as the general doctrine of the political project (...) or the repetition of discriminatory destructive acts (or) the perpetration of acts undermining the foundation of the group." In the *Akayesu* case, however, the prosecution presented evidence of a "meticulously organized" genocide in which there were many "centrally organized and supervised massacres."¹²⁹ The elements with which an inference might be drawn in the Sharon case are not nearly as strong as those in the *Akayesu* case, particularly since the Sabra and Shatila massacre was not committed directly by Israeli forces, but by their associates.¹³⁰

The arguments presented here are not intended to claim that the crimes allegedly committed by Sharon at Sabra and Shatila do not constitute crimes against humanity and the crime of genocide, but that their prosecution as such would not necessarily result in an indictment. Prosecution for the commission of war crimes, however, has viability under current standards of international customary law as well as its Belgian implementing legislation.

IV. Conclusion

Since the establishment of the Nuremberg Tribunal following the atrocities of World War II and the Holocaust, the international community has witnessed remarkable strides in the development of human rights norms and the rejection of impunity for grave breaches of international law. The norm of immunity *rationae personae* for sitting Heads of State charged with international crimes remains an anachronistic vestige of a Westphalian world. This moment in time is a critical juncture in the evolution of this norm: while a disappointing decision by the International Court of Justice held procedural immunity as custom, patterns of state practice and *opinio juris* indicate that the *Congo* decision prematurely disturbed a process of evolution that had not yet reached maturity. Like most arguments presented in the international arena in favor of absolute procedural immunity, the *Congo* decision was based largely upon political, rather than legal and moral, considerations.

This article concludes that in order to create a world without impunity for international crimes, the international community must accept restrictions in immunity for incumbent Heads of State in cases of genocide, crimes against humanity, and war crimes. By restricting immunity in this manner, it will be possible to create a world without impunity for international crimes while keeping intact functional relations between states. Bringing individuals to justice, regardless of their official capacity, demonstrates an ultimate respect for international law that will do greater good for the international community of states than the temporary damage done to diplomatic relations.

For what if Sharon was to be indicted and found guilty of international crimes in Belgium? What if a warrant for his arrest was circulated in Brussels – would the damage done to the community of states be irreparable? On the contrary – Ariel Sharon, simply, would not travel to Belgium. If this disrupted his official duties, he and his administration would be forced to find creative alternatives. And the Israeli Cabinet, presumably, would decide if it was necessary to take action within Israel such as establishing another Commission of Inquiry or conducting early elections for Prime Minister. And finally, the survivors of Sabra and Shatila might feel some measure of relief, and Ariel Sharon might hesitate before committing, directly or indirectly, violations of human rights and dignity.

The Belgian judges weighing the case against Sharon are presented with a unique opportunity. Due to Belgium's progressive domestic implementing legislation, the prosecution of Ariel Sharon has the potential to overcome the legal obstacles in its path and set an important precedent in the rejection of immunity for sitting Heads of State in international law. Such a precedent would bring into question the reasoning behind the ICJ's ruling in *Congo v Belgium*, and bring the international community one step closer to a world governed by principles of law, where human dignity is valued at least as much as politics or the border of a sovereign state. As long as procedural immunity is preserved in the face of grave international crimes, Sharon and others like him will be presented the ultimate power over the lives of their citizens, just as they are presented a blanket reprieve for acts they may have committed against the very core of humanity.

It is true that the case pending in Belgium may stretch on for many years; there is no way of knowing if Ariel Sharon will still be in power by the time it is concluded. Sadly, however, the likelihood is low that Ariel Sharon will be the last individual seated at the head of a state who is alleged to have committed acts in violation of the law of nations. Justice must be sought, if not for Ariel Sharon, then for those who follow him. The community of states, which proclaims the Universal Declaration of Human Rights as a codification of its custom, must no longer grant its silence to international criminals who have been granted the leadership of nations.

¹¹ See The Complaint Against Ariel Sharon for his involvement in the massacres at Sabra and Shatila, available at <http://www.lawsociety.org/Sharon/complaint.htm> [hereinafter The Complaint Against Ariel Sharon].

² See Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 14 February 2002 General List No. 121 (International Court of Justice), available at <http://icj-cij.org>.

³ See *Belgian war crimes law rejected*, BBC NEWS, February 14, 2002, available at <http://news.bbc.co.uk>.

⁴ See Press Release, Court Diary, Belgian Appeals Court agrees to New Hearing, Re-Opening of Arguments, in War Crimes Case against Ariel Sharon and other Israelis and Lebanese (6 March 2002), available at <http://indictsharon.net>.

⁵ See Andrea Bianchi, *Immunity versus Human Rights: The Pinochet Case*, 10.2 EUROPEAN JOURNAL OF INTERNATIONAL LAW 237, 262-266 (1999). Also see Salvatore Zappala, *Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation*, 12.3 EUROPEAN JOURNAL OF INTERNATIONAL LAW 595, §4B (2001).

⁶ In a separate opinion, President Guillaume elaborated on the question of universal jurisdiction in light of the Court's inability to do so in the operative part of its Judgment. President Guillaume found, in a striking departure from prevailing opinions articulated by scholars and jurists such as the drafters of the Princeton Principles, that: "If the Court had addressed these questions, it seems to me that it ought therefore to have found that the Belgian judge was wrong in holding himself competent to prosecute Mr. Yerodia Ndombasi by relying on a universal jurisdiction incompatible with international law."

See Separate Opinion of President Guillaume, Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 14 February 2002 General List No. 121 (International Court of Justice), available at <http://icj-cij.org>.

⁷ For an overview of the state of universal jurisdiction in international law and practice today, see Bruce Broomhall, *Towards the Development of an effective System of Universal Jurisdiction for crimes under international law*, in *Universal Jurisdiction: Myths, Realities and Prospects*, 35 NEW ENGLAND LAW REVIEW 399 (Michael Scharf ed., 2001). Many civil society organizations have compiled guides to universal jurisdiction which outline the basic precepts involved. See INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, *HARD CASES: BRINGING HUMAN RIGHTS VIOLATORS TO JUSTICE ABROAD, A GUIDE TO UNIVERSAL JURISDICTION* (1999) and THE PRINCETON PROJECT ON

UNIVERSAL JURISDICTION, THE PRINCETON PRINCIPLES (2001) and FIONA MCKAY, REDRESS, UNIVERSAL JURISDICTION IN EUROPE (1999).

⁸ See LOUIS HENKIN, RICHARD CRAWFORD PUGH, OSCAR SCHACHTER & HANS SMIT, INTERNATIONAL LAW CASES AND MATERIALS 1049 (3rd ed 1993).

True universal jurisdiction is based largely on custom. The regime of universal jurisdiction found in many treaties (including the Geneva Conventions and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) is based upon the obligation of *aut dedere, aut judicare* (“either extradite or prosecute”), which is a state to state, rather than truly universal, system of rights and obligations. See Broomhall, *supra* note 7.

⁹ THE PRINCETON PRINCIPLES, *supra* note 7, at 11.

¹⁰ See *supra* note 7 and accompanying text.

¹¹ As articulated in the Rome Statute of the International Criminal Court, July 17 1998 [hereinafter Rome Statute], held to be a codification of international customary law. See REPORT OF THE PREPARATORY COMMITTEE ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT (March – April 1996), indicating the intent of the Committee to produce a codification of custom.

¹² See Helen Duffy and Jonathan Huston, Implementation of the ICC Statute: International Obligations and Constitutional Considerations, in THE ROME STATUTE AND DOMESTIC LEGAL ORDERS 29-49 (Claus Kress and Flavia Lattanzi eds., 2000). Articles 12 – 17 of the Rome Statute detail the process whereby a case may be brought before the Court by the Prosecutor or the UN Security Council in the case that the State which has jurisdiction over it is unwilling or unable to try. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, INTERNATIONAL COURT CRIMINAL BRIEFING SERIES VOLUME I, NUMBER 8, EXERCISE OF JURISDICTION: THE CASE FOR UNIVERSAL JURISDICTION 2 (May 1998).

¹³ Vienna Convention on Diplomatic Relations, April 18 1961, art. 31 & 39, 500 U.N.T.S. 95.

¹⁴ Immunity for Heads of Government, Ministers of Foreign Affairs, and other “persons of high rank” is explicitly provided for by Article 21, paragraph 2 of the New York Convention on Special Missions of 8 December 1969.

¹⁵ For a discussion of the origins of Head of State immunity in light of today’s legal norms, see *Tachiona v Mugabe*, 2001 US Dist. LEXIS 18712 (US S.D. NY 2001), in which the judge concludes that the “progression of the legal precepts” regarding immunities lags behind political trends.

¹⁶ See Bianchi, *supra* note 5, at §4 and Zappala, *supra* note 5 at §4B.

¹⁷ Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 14 February 2002 General List No. 121, para. 61 (International Court of Justice), available at <http://icj-cij.org>.

¹⁸ The Treaty of Versailles, June 28 1919, Article 227: “The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.” The impact of this precedent, however, is limited by the fact that Germany waived its sovereign immunity.

¹⁹ Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 1950, [hereinafter Nuremberg Principles] Principle III: “The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.”

²⁰ Convention on the Prevention and Punishment of the Crime of Genocide, 12 January 1951, 78 UNTS 277 [hereinafter The Genocide Convention], at Article 4: “Persons committing genocide or any other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”

²¹ Regarding the status of the ICTY and ICTR Statutes as custom, see Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UNSG S/25704, para. 34 (3 May 1993) where the Secretary General states that the ICTY “should apply rules of international humanitarian law which are beyond any doubt part of customary law.” Regarding the status of the Rome Statute as custom, see *Tadic Case*, IT-94-1-A, para. 223 (ICTY 15 July 1994) in which the ICTY ruled the Rome Statute as an expression of the “legal position i.e. *opinio juris* of [the States attending the Rome Diplomatic Conference].”

Statute of the International Criminal Tribunal for Yugoslavia, 25 May 1993, [hereinafter Statute of the ICTY] article 7 and Statute of the International Criminal Tribunal for Rwanda, 1 July 1994 [hereinafter Statute of the ICTR] article 6: “The official position of any accused person, whether as Head of State of Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.”

Rome Statute, *supra* note 11, article 27: “This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government ... shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.”

²² See, e.g., *Filartiga v Pena-Irala*, 630 F 2d 876 (2nd Cir, 1980) which disregards the importance of official function.

²³ *Ex parte Pinochet* (No. 3) (24 March 1999).

²⁴ There is an abundance of literature available regarding the effect of the *Pinochet* case upon the question of substantive immunity for former heads of state. See Christine M. Chinkin, *Immunity of former Head of State from prosecution by foreign state for acts committed while in office*, 93 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 703 (1999), and J. Craig Barker, *The Future of Former Head of State Immunity After Ex Parte Pinochet*, 48 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 937 (1999) and Bianchi, *supra* note 5, at §4.

²⁵ See Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 14 February 2002 General List No. 121, para. 54 (International Court of Justice), *available at* <http://icj-cij.org>.

²⁶ See *Congo v Belgium* at para. 53.

²⁷ *Id.* at para. 47.

²⁸ *Id.* at para. 58.

²⁹ *Id.* at para. 61.

³⁰ See Frederic L. Kirgis, *Custom on a Sliding Scale*, 81 AM. J. INT'L L. 146. Kirgis presents a "sliding scale" theory of custom creation whereby a strong enough showing of *opinio juris* makes state practice largely unnecessary and vice versa. The sliding scale theory is based on the decision of the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua* in which the ICJ found customary duties on the nonuse of force based entirely on *opinio juris* without any reference to state practice.

³¹ *Id.* at 49-51.

³² Arthur K. Watts, *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers*, III RECUEIL DES COURS 35, 84.

³³ See AMNESTY INTERNATIONAL, UNITED KINGDOM: THE PINOCHET CASE – UNIVERSAL JURISDICTION AND THE ABSENCE OF IMMUNITY FOR CRIMES AGAINST HUMANITY (January 1999). Amnesty International was granted leave by the UK House of Lords to intervene in the appeal regarding Senator Pinochet's entitlement to immunity. This paper was submitted by AI at the start of the main hearing. See *In re Pinochet* (No. 2) (15 January 1999).

³⁴ See *Tachiona v Mugabe*, 2001 US Dist. LEXIS 18712 (US S.D. NY 2001).

³⁵ This direct link in the US between political considerations and immunities is ironic in light of the US' opposition to the creation of the International Criminal Court, based largely upon fear of a politicization of the judicial process, and the prosecution of top civilian and military leaders based upon political reasons. [See John R. Bolton, *The Risks and Weaknesses of the International Criminal Court from America's Perspective*, 41 VIRGINIA JOURNAL OF INTERNATIONAL LAW 186, 194-195 (2000)]. The pre-existing connection between politics and immunities in US practice can also be seen in the 1996 Antiterrorism and Effective Death Penalty Act, which amended the 1976 US Foreign Sovereign Immunities Act (FSIA) to revoke sovereign immunities in cases "in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office...." This clause subsumes the system of immunities under the political war against terror.

³⁶ See Plaintiffs' Surreply Brief to the Government's Memorandum of Law in Reply to Plaintiff's Answering Brief, *Tachiona v Mugabe*, 2001 US Dist. LEXIS 18712 (US S.D. NY 2001).

³⁷ See *Tachiona v Mugabe*, 00 Civ. 6666 (US District Court So. District of NY 2001).

³⁸ *The Schooner Exchange v McFaddon*, 11 U.S. (7 Cranch) 116 (Supreme Court of the United States, 1812).

³⁹ See *Tachiona v Mugabe*, 2001 US Dist. LEXIS 18712, 33-34 (US S.D. NY 2001).

⁴⁰ See *Clinton v Jones*, 520 US 681 (Supreme Court of the United States, 1997).

⁴¹ See *United States v Noriega*, 746 F Supp. 1506 (S.D.Fla.1990).

⁴² *Doe v Karadzic and Kadic v Karadzic*, 866 F. Supp. 734 (US S.D. NY 1994).

⁴³ *Lafontant v Aristide*, 844 F. Supp. 12 (US E.D. NY 1994).

⁴⁴ See Zappala, *supra* note 5.

⁴⁵ *Ex parte Pinochet* (No. 3) (24 March 1999).

⁴⁶ *Attorney-General of Israel v. Eichmann* 36 ILR 5 (Supreme Court of Israel 1962).

⁴⁷ For a review of domestic legislation implementing universal jurisdiction, see AMNESTY INTERNATIONAL, *supra* note 33, at 13 for a list of 24 acts of national legislation authorizing the exercise of universal jurisdiction over crimes against humanity (including the Israeli Nazi and Nazi Collaborators Law). Also see Broomhall, *supra* note 7 and Kress and Latanzi, *supra* note 12. One example of particularly progressive implementing legislation is New Zealand's International Crimes and International Criminal Court Act 2000, §8-11 which grants New Zealand's courts jurisdiction over genocide, crimes against humanity, and war crimes. Jurisdiction is retro-active until 1979 in the case of genocide, 1991 in the case of crimes against humanity, and 2000 in the case of war crimes, assuming that the crimes were an offence under the law of New Zealand at the time (satisfying double criminality). Jurisdiction is granted regardless of the nationality of the victim or the person accused, regardless of where the act occurred, and regardless of the person's presence in or outside of New Zealand at the time of the commission of the act or the decision of the case. The legislative act used in the case against Sharon pending in Belgium is similarly progressive: see Belgium: Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, 38 ILM 918 (1999) [hereinafter Act Concerning the Punishment of Grave Breaches].

⁴⁸ *Attorney-General of Israel v Eichmann*, 36 I.L.R. 5 (Supreme Court of Israel 1962).

⁴⁹ *Ex parte Pinochet* (No. 3) (24 March 1999).

⁵⁰ Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UNSG S/25704 (3 May 1993), at Para. 55. See AMNESTY INTERNATIONAL, *supra* note 33, at 32-33 for individual states' comments to the Secretary General urging a rejection of Head of State immunity.

⁵¹ Treaty of Versailles, *supra* note 18, at Article 227.

⁵² Nuremberg Principles, *supra* note 19, at Principle III.

⁵³ Charter of the International Military Tribunal for the Far East, 1946, Article 6.

⁵⁴ The principle has been included in other instruments of international law including: the Convention for the Prevention and Punishment of the Crime of Genocide, the Draft Code of Crimes Against the Peace and Security of Mankind, and the Statute of the Special Court for Sierra Leone.

⁵⁵ See Zappala, *supra* note 5, at §4.

⁵⁶ The Prosecutor of the Tribunal v Slobodan Milosevic, et. al., IT-99-37 (ICTY 1999).

⁵⁷ Article 7, paragraph 2 reads: “The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.” Statute of the ICTY, *supra* note 21.

⁵⁸ See Prosecutor v Slobodan Milosevic Decision on Preliminary Motions, IT-99-37-PT (ICTY, 2001).

⁵⁹ See Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 14 February 2002 General List No. 121, para. 56-58 (International Court of Justice), *available at* <http://icj-cij.org>.

⁶⁰ *Id.*, at para. 53.

⁶¹ See Dissenting Opinion of Judge Van den Wyngaert, Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 14 February 2002 General List No. 121, para. 10 (International Court of Justice), *available at* <http://icj-cij.org>.

⁶² Lafontant v Aristide, 844 F. Supp. 12 (US E.D. NY 1994).

⁶³ *Ex parte Pinochet* (No. 3) (24 March 1999).

⁶⁴ See Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 14 February 2002 General List No. 121, para. 53 (International Court of Justice), *available at* <http://icj-cij.org>.

⁶⁵ Recent international events have prompted speculation that this very possibility is playing itself out surrounding the case against Sharon in Belgium. On 24 January 2002 a car bomb exploded in Beirut, killing Elie Hobeika, the former Director of Intelligence of the Lebanese Forces who is alleged to have directly led the Phalangist militia in committing the massacre in Sabra and Shatila. Accusations immediately appeared throughout the international media reiterating the Lebanese Government’s speculation that the death was an assassination in order to pre-empt Hobeika from damaging Sharon’s defense if the case goes to trial in Belgium; Hobeika had indicated that he had additional evidence regarding Sabra and Shatila and was prepared to travel to Belgium to testify as such. Representatives of the Israeli government immediately denied any involvement and an anti-Syria Lebanese group known as “Lebanese for a Free and Independent Lebanon” claimed responsibility for the death, yet neither the legitimacy of the organization nor its claim have been verified. The three lawyers representing the plaintiffs in Belgium released a press statement stating that: “The elimination of a key protagonist, who had offered to assist with the enquiry, appears as an evident attempt to undermine the case, and reinforces the international campaign which seeks to prevent any examination before a neutral forum of a crime against humanity which has remained unpunished.” See *Lebanese ex-militia leader buried*, BBC NEWS, January 26, 2002. Also see Press Statement concerning the death of Elie Hobeika (January 24, 2002) (on file at <http://indictsharon.net/case-diary2.shtml>).

⁶⁶ THE PRINCETON PRINCIPLES, *supra* note 7.

⁶⁷ Tachiona v Mugabe, 2001 US Dist. LEXIS 18712, (US S.D. NY 2001).

⁶⁸ Another exception to the assertion of responsibility for international crimes is the growing popularity of Truth and Reconciliation Committees such as that established in South Africa which often provide amnesty to individuals who come forward and confess to their crimes. See Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE LAW JOURNAL 2537 (1991). According to international law, however, amnesties may not be granted in respect of international crimes. A recent application of this principle occurred in Sierra Leone; while an amnesty provision was included in the Lome Peace Agreement, the Statute of the Special Court for Sierra Leone asserts that such amnesty would not apply to those accused of crimes against humanity, war crimes, and “other serious violations of international humanitarian law.” The Secretary General stated: “While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.” See REPORT OF THE SECRETARY-GENERAL ON THE ESTABLISHMENT OF A SPECIAL COURT FOR SIERRA LEONE, S/2000/915 (2000).

⁶⁹ See, e.g., the detailed description of Slobodan Milosevic’s *de jure* and *de facto* control over nearly all functions of the state during his time as president of the Federal Republic of Yugoslavia in The Prosecutor of the Tribunal v Slobodan Milosevic, et. al., IT-99-37, para. 55-62 (ICTY 1999).

⁷⁰ See Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 14 February 2002 General List No. 121, para. 78 (International Court of Justice), *available at* <http://icj-cij.org>.

⁷¹ *Id.*

⁷² See Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 14 February 2002 General List No. 121, para. 61 (International Court of Justice), available at <http://icj-cij.org>.

⁷³ Fifty-six states have ratified the Rome Statute of the International Criminal Court; the establishment of the Court requires sixty. Even if establishment is achieved, however, it is unclear how effective such an institution can be while a major power such as the United States persistently objects to its jurisdiction. For a presentation of United States objections to the creation of the Court, see Bolton, *supra* note 35.

⁷⁴ For a more detailed discussion of this possibility, see Duffy and Huston, *supra* note 12, at 35-39 and Bruce Broomhall, *The Future of Immunities in International Criminal Law*, in POST-CONFLICT JUSTICE (M. Cherif Bassiouni, ed., forthcoming 2002).

⁷⁵ See Darryl Robinson, *The Impact of the Human Rights Accountability Movement on the International Law of Immunities* (2002) (unpublished, on file with author), in which Robinson proposes a protocol or agreement “whereby states waive in advance immunities *rationae personae* relating to serious international crimes, such as genocide, crimes against humanity, war crimes and torture.”

⁷⁶ See The Complaint Against Ariel Sharon, *supra* note 1.

⁷⁷ See Press Release, *supra* note 4.

⁷⁸ Act Concerning the Punishment of Grave Breaches, *supra* note 47.

⁷⁹ Regarding the Qibya massacre conducted by Unit 101, see AVI SHLAIM, *THE IRON WALL* 91-93 (The Penguin Press 2000) and E.H. HUTCHISON, *VIOLENT TRUCE: A MILITARY OBSERVER LOOKS AT THE ARAB-ISRAELI CONFLICT 1951-1955*, 44 (The Devin-Adair Company 1956).

Regarding the Gaza raids, see Alexander Cockburn, *Wild Justice: The Crimes of Ariel Sharon*. 14.5 NEW YORK PRESS (2001).

⁸⁰ See Press Release, International Committee of the Red Cross, Statement by the International Committee of the Red Cross (5 December 2001), available at <http://www.icrc.org>, calling for restraint and the proportionate use of force by both sides in the present conflict. See also PALESTINE RED CRESCENT SOCIETY, *FACT SHEET, VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW BY ISRAELI AUTHORITIES* (2001).

⁸¹ See Joel Greenberg, *34 New West Bank Settlements Spotted*, THE NEW YORK TIMES ON THE WEB, March 19, 2002, available at <http://www.nytimes.com>.

⁸² Robert Fisk, *Travels in a land without hope*, THE INDEPENDENT, Aug. 29, 2001.

⁸³ Email Correspondence with Chibli Mallat, Solicitor, Beirut (Nov. 13, 2001).

⁸⁴ Article 59 of the Statute of the International Court of Justice states that “The decision of the Court has no binding force except between the parties and in respect of that particular case.”

⁸⁵ See Press Release, Court Diary, Lawyers for Sabra and Shatila Plaintiffs Ask to Re-Open Debate before Belgian Court following ICJ Ruling of 14 February (1 March 2002), available at <http://indictsharon.net>.

⁸⁶ See Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 14 February 2002 General List No. 121, para. 71 (International Court of Justice), available at <http://icj-cij.org>.

⁸⁷ See Press Release, *supra* note 4.

⁸⁸ Ellen Siegel, *After Nineteen Years*, VIII.4 MIDDLE EAST POLICY (December, 2001). Ellen Siegel was an eyewitness to the massacre while serving as a nurse in the Gaza hospital inside Sabra Refugee Camp.

⁸⁹ M. THOMAS DAVIS, *40 KM INTO LEBANON: ISRAEL'S 1982 INVASION* 55-61 (NATIONAL DEFENSE UNIVERSITY PRESS 1987).

⁹⁰ AMNON KAPELIOUK, *SABRA AND SHATILA: INQUIRY INTO A MASSACRE* 14 (ASSOCIATION OF ARAB-AMERICAN UNIVERSITY GRADUATES, INC. 1984).

⁹¹ ZE'EV SCHIFF AND EHUD YA'ARI, *ISRAEL'S LEBANON WAR* 102-103 (SIMON AND SCHUSTER 1984).

⁹² KAPELIOUK, *supra* note 90, at 30-32.

⁹³ SCHIFF AND YA'ARI, *supra* note 91, at 282.

⁹⁴ See REPORT OF THE COMMISSION OF INQUIRY INTO THE EVENTS AT THE REFUGEE CAMPS IN BEIRUT, (7 February 1983), available at <http://www.mfa.gov.il> [hereinafter THE KAHAN COMMISSION].

⁹⁵ Act Concerning the Punishment of Grave Breaches, *supra* note 47.

⁹⁶ Michael Verhaeghe and Laurie King-Irani, *Outline and Explanation of Court Hearings during the Pre-trial Procedure*, June 2001 – January 2002 (January 2002), available at <http://indictsharon.net>.

⁹⁷ The argument presented regarding double jeopardy is based upon the submission that Sharon has already been subjected to the Kahan Commission (see *THE KAHAN COMMISSION*, *supra* note 94 and accompanying text). The Kahan Commission, however, did not entail judicial proceedings of any manner.

The argument regarding amnesty is based upon a 1991 Amnesty Law passed in Lebanon granting immunity for certain crimes committed before 38 March 1991. Sharon's lawyers argue that this law covers any acts committed at Sabra and Shatila in 1982. It is a clear principle of international law, however, that amnesties may not be granted for international crimes including crimes against humanity, war crimes, and genocide. See REPORT OF THE SECRETARY-GENERAL ON THE ESTABLISHMENT OF A SPECIAL COURT FOR SIERRA LEONE, *supra* note 68, at para. 22. The Lebanese law, therefore, is in contravention of international law and is not applicable in Belgian courts. See WORLD ORGANIZATION AGAINST TORTURE USA, *SUBMISSION TO THE COURT OF APPEALS OF BRUSSELS ON THE AUTHORITY AND JURISDICTION OF*

BELGIUM TO CRIMINALLY PROSECUTE ARIEL SHARON, PRIME MINISTER OF ISRAEL, FOR ALLEGED ACTS OF GENOCIDE, CRIMES AGAINST HUMANITY, AND VIOLATIONS OF THE GENEVA CONVENTIONS, §B (November 15, 2001), *available at* <http://indictsharon.net>.

⁹⁸ Act Concerning the Punishment of Grave Breaches, *supra* note 47, at article 8.

⁹⁹ See Luc Reydam, INTERNATIONAL DECISION: Belgian Tribunal First Instance of Brussels 98 AJIL 700 (1999).

¹⁰⁰ See Linda Keller, *Belgian Jury to Decide Case Concerning Rwandan Genocide*, ASIL INSIGHTS (May 2001), *available at* <http://www.asil.org/insights/insigh72.htm>.

¹⁰¹ See Reydam, *supra* note 99.

¹⁰² See Attorney-General of Israel v. Eichmann 36 ILR 5 (Supreme Court of Israel 1962) for a comment on the issue of retroactivity by the newly established Israeli High Court which indicates that the Israeli judicial system recognized as early as 1950 that genocide, war crimes, and crimes against humanity warranted retroactive jurisdiction. The Court ruled in *Eichmann* that the Nazis and Nazi Collaborators (Punishment) Law of 1950 used as the basis for the case (which provided jurisdiction over crimes against the Jewish people, crimes against humanity, and war crimes) was retroactive in that the alleged crimes were firmly established in “the laws of all civilized nations” prior to their being committed.

¹⁰³ For the purposes of this article, the Rome Statute of the ICC will be referred to as an accepted statement of international customary law, which as articulated above may be applied under Belgian law retroactively to alleged crimes committed during the Massacre in 1982. For evidence of the Rome Statute as codification of international customary law, see *supra* note 11.

¹⁰⁴ Linda Malone, *The Kahan Report, Ariel Sharon, and the Sabra-Shatila Massacres in Lebanon: Responsibility Under International Law for Massacres of Civilian Populations*. 1985 UTAH LAW REVIEW 373, 403.

¹⁰⁵ Israeli Basic Law: The Army, 1976, L.S.I.

¹⁰⁶ Act Concerning the Punishment of Grave Breaches, *supra* note 47, at article 4.

¹⁰⁷ Nuremberg Principles, *supra* note 19, at Principle VII.

¹⁰⁸ Articles 7.2 of the ICTY Statute and 6.2 of the ICTR Statute read the same: “The fact that any of the acts referred to in ... the present Statute was committed by a subordinate does not relieve his [or her] superior of criminal responsibility if he [or she] knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.” Statutes of the ICTY and the ICTR, *supra* note 21, at Article 7.3 and 6.2 respectively.

¹⁰⁹ The Prosecutor v Jean Kambanda, 97-23-S, para. 39 (ICTR, 1998).

¹¹⁰ The Prosecutor of the Tribunal v Slobodan Milosevic, et. al., IT-99-37, para. 62 (ICTY 1999).

¹¹¹ The Rome Statute, *supra* note 11, at Article 28 and The Belgian Act Concerning the Punishment of Grave Breaches, *supra* note 47, at Article 4 both include these same 3 criteria, but with slightly different wording:

The Rome Statute’s first criteria for command responsibility, “effective authority and control,” is articulated in the Belgian Act as the ability “to prevent or put an end to such a breach.” The second criteria in the Rome Statute requires that the individual “knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes.” Similarly, the Belgian Act attributes responsibility to “persons who had knowledge of the orders given to commit such a breach or of acts initiating the commission thereof.” The third and last test is found in the Rome Statute as the failure to take “all necessary and reasonable measures within his power to prevent or repress” the crimes, and in the Belgian Act as the “failure to act to the extent available.”

¹¹² SCHIFF AND YA’ARI, *supra* note 91, at 254 and 281.

¹¹³ KAPELIOUK, *supra* note 90, at 25.

¹¹⁴ SCHIEFF AND YA’ARI, *supra* note 91, at 238.

¹¹⁵ KAPELIOUK, *supra* note 90, at 27.

¹¹⁶ SCHIFF AND YA’ARI, *supra* note 91, at 259-260.

¹¹⁷ *The Accused* (BBC Television Broadcast, June 17, 2001).

¹¹⁸ Telephone Interview with Ellen Siegel, (Nov. 11, 2001).

¹¹⁹ SCHIFF AND YA’ARI, *supra* note 91, at 265.

¹²⁰ KAPELIOUK, *supra* note 90, at 48.

¹²¹ THE KAHAN COMMISSION, *supra* note 94.

¹²² KAPELIOUK, *supra* note 90, at 45.

¹²³ See THE KAHAN COMMISSION, *supra* note 94.

¹²⁴ Journalists Robert Fisk and Julie Flint have uncovered evidence which suggests that more than 1,000 residents of Sabra and Shatila who survived the massacre died within the following 24 hours in areas under direct Israeli military control. See Robert Fisk, *New evidence indicates Palestinians died hours after surviving camp massacres*, INDEPENDENT NEWS, Nov. 28 2001. See also Verhaeghe and Irani, *supra* note 96.

¹²⁵ THE KAHAN COMMISSION, *supra* note 94.

¹²⁶ Complaint Against Ariel Sharon, *supra* note 1.

¹²⁷ The Rome Statute, *supra* note 11, at Article 6. The Genocide Convention, *supra* note 20, at Article 2.

¹²⁸ Donald Neff, *Israeli Leaders Found Indirectly Responsible for Massacres in Lebanon*, WASHINGTON REPORT ON MIDDLE EAST AFFAIRS, 91, 93 (January/February 1998).

¹²⁹ The Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T (1996).

¹³⁰ See Alexander K.A. Greenawalt, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*, 99 COLUMBIA LAW REVIEW 2259 (1999) for a critique of the specific intent interpretation of genocide. Greenawalt argues that “in defined situations, principal culpability for genocide should extend to those who may personally lack a specific genocidal purpose, but who commit genocidal acts while understanding the destructive consequences of their actions.” Were this type of approach accepted as custom, the case for Sharon’s commission of the crime of genocide would be much stronger.