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The Suit Against Sharon in Belgium: A Case Analysis

Interview with Irit Kohn

"In 1982 during the Lebanon War, Lebanese Christian militias murdered hundreds of Palestinians in refugee camps in Sabra and Shatilah. In June 2001, several survivors and family members of the victims submitted a complaint in a Belgian court that was not directed against the murderers, many of whom were known. The claim instead named as defendants Israeli prime minister Ariel Sharon, the Israeli chief of staff in 1982 Rafael Eitan, and the then head of Northern Command, General Amos Yaron."

Irit Kohn at the time was head of the International Department of the Israeli Ministry of Justice. This department is responsible for, among other things, extradition issues and legal assistance. She headed the Israeli defense team.

"At the time of the submission Belgian law had universal jurisdiction as far as crimes against humanity, war crimes, and genocide were concerned. It did not require any connection to the country involved. Any private citizen, in Belgium or elsewhere in the world, could submit a complaint against anybody to the Belgian court system that could serve as a claim for criminal prosecution there."

A Political Act

"After the complaint, a committee of Israeli experts was formed. It included Danny Shek, who was director of the Western Europe section at the Foreign Ministry, Daniel Saada, a lawyer and Israeli diplomat in Belgium, Allon Geilert, a lawyer from the Prime Minister's Office, and myself. We worked together very well, and nothing was leaked of our deliberations. After some time Efraim Halevy also joined us. He had been Israeli ambassador to the EU in Brussels and had many contacts there.

"Nineteen years had passed since the mass murders by the Lebanese Christian militias. The complaint seemed a politically motivated act. The complainants waited until Sharon became prime minister of Israel. They wanted him to be subject to a criminal prosecution for alleged war crimes. They saw him as responsible for the murders by Israel's Christian allies in the two refugee camps. They claimed that as Sharon was Israeli defense minister in 1982 and collaborated with these militias, he should have known that if they came to these camps there would be a massacre."

Kohn says there was a major discussion among Israeli government lawyers as to whether Israel should relate to the complaint or not. "Some experts from the attorney general's office initially recommended that Israel should not react. Also some executives from the Prime Minister's Office said we should not relate to those who brought the complaint against us."

European Extradition Laws

"I strongly supported the position that we should defend our prime minister. The extradition laws in Europe meant that if Sharon would want to go to a European country, Belgium might take out an arrest warrant. As other European countries have extradition treaties with Belgium, this would mean in practice that Sharon could not visit Europe. If the matter went to trial in Belgium, and we did not contest it, the judge might decide to base himself on the facts as presented by the other side. Finally we reached agreement that we should defend the prime minister.

"We had originally assumed that, as in most democratic states, in criminal cases the Belgian state prosecutor has discretion as to whether or not to prosecute. This assumption was based on the traditional sanctity of independent prosecutorial discretion, which relates to the principle of separation of powers that is inherent to democracy. As the case evolved it became clear that in this instance this principle of Belgian law was not upheld.

"In Belgium's judiciary, being part of the continental system, there is an investigating judge. At this stage, upon the recommendation of the experts' committee Israel hired a local lawyer, Michèle Hirsch, who had experience in prosecution under these laws. She had been involved in the prosecution of murderers on behalf of victims of the Rwanda massacres.

"Our claim was that the complaint was politically motivated. The Sabra and Shatilah massacres had been investigated by a committee headed by the president of the Israeli Supreme Court, Judge Yitzhak Kahan. This committee had been established following a large demonstration in Israel by four hundred thousand people demanding that the truth about the massacres be revealed. Whenever I later lectured about the issue, I always mentioned that I was one of the demonstrators. I felt at the time that we had heard a variety of rumors and the matter had to be clarified.

"We now know that there was not one Israeli soldier in Sabra or Shatilah during the time of the murders. While we were later in Belgium preparing Sharon's defense, a Palestinian woman appeared on television. She claimed Israeli soldiers had been in the refugee camps as she had seen a soldier wearing a helmet with a Star of David. Israeli troops, however, do not have such helmets."

The Kahan Committee

"According to the Law of Investigating Committees, the Kahan committee had very broad investigatory powers. Its three members were highly respected individuals. Besides its president it consisted of Supreme Court justice Aharon Barak and General Yona Efrat. Many witnesses appeared before it. The committee recommended that Sharon should be removed from his post as defense minister, and this was done. I do not know of any other state that would take such steps at a time of war.

"Israel had handled the issue in a highly professional manner. There was thus no reason for somebody else to apply universal jurisdiction. The basic idea of universal jurisdiction is to address those cases of war crimes where the country involved either did not want or was unable to prosecute. Another country can then assume the role of the court.

"The Belgian investigating judge accepted our position at the time and decided that there was no reason to prosecute. He concluded that the murderers were the Christian Lebanese militiamen who were not being brought before the court. On that level, we won. The complainants appealed to a Belgian court. To defend ourselves, we took another lawyer who was a university professor and an expert in these matters, Prof. Andrien Masset. Based on the same reasoning, we also won there."

The Court of Appeals

"The complainants then turned to the Belgian Court of Appeals. We hired yet another lawyer who was a specific expert on courts of appeal. The Belgian procurer general, who appears before the Court of Appeals, spoke in favor of us. He argued among other things that it would not be possible to collect admissible and verifiable evidence. This important legal argument was summarily dismissed. The procurer general also posited that the investigation of the complaint would not begin as long as the subject of this investigation was not present in Belgium. Also this position was dismissed.

"In 99 percent of the cases, the procurer general's opinion is adopted by the Belgian Appeals Court. On 12 February 2003, however, the court decided against us. To our lawyer and us this seemed a politically motivated decision.

"Independently of our case the question of immunity came up. There had been a decision by the International Court of Justice in The Hague in a case that involved Belgium and the Congo. The Hague court decided that a country's prime minister and foreign minister, while they are in office, are immune from prosecution. This also applied to Sharon as long as he was prime minister. Thereafter, however, he could be prosecuted. Meanwhile, the case against the two other accused Israelis could go ahead.

"During the court procedures, we were frequently in contact with the Belgian Ministry of Justice. We explained to them

that their law was a fiction and their legal system could not achieve anything. If they were indeed to indict Sharon in Belgium, they could not get any evidence. They could only get information from the other side as Israel would not cooperate with them.

"In preparing the case I had reviewed the universal jurisdiction law in many countries, including European ones. All, except Belgium, required the presence of the subject in the country where the case would be judged before the investigation began.

"Another perspective comes from the practice of extradition treaties. These stipulate that the final decision to extradite somebody is made by a country's justice minister, who is a political appointee in the executive branch of the government. The rationale for granting him this authority is that such a decision involves the weighing of political factors of foreign policy. These are not within the competence of the prosecutorial authority."

Legal Considerations

Kohn explains her views on the matter of universal jurisdiction. "Law expresses the political approaches and will of a society. International law reflects those of international society. It should not become an instrument to impose the political aims and desires of one group of nations on others, especially not if both groups represent democracies.

"Furthermore, applying unlimited universal jurisdiction by individual states can generate tension and crises between states and can cause conditions that destabilize regimes in specific countries. Friction indeed built up between Belgium and Israel and later even more so between Belgium and the United States. These were paradigms of problems that could have considerably worsened if the Belgians had not backtracked. International law is designed to create accepted rules of conduct between nations. If the result of international law is to heighten tensions and foster crises it defeats one of its basic justifications.

"In the Sharon and Bush, Sr. (concerning the first Gulf War), cases, it was obvious that if a state such as Belgium would assume the jurisdiction to try the leader and citizens of another state for acts that were committed outside the prosecuting country's borders, this was a sure recipe for raising tensions. If it had ever come to trial it would have impacted Belgium's relations with the United States and Israel in a major way.

"Thus the Belgian prosecution and judicial authorities could have caused major damage to their country on matters that were entirely outside their area of competence. Belgium would have made a dangerous mistake if it had left the discretion on whether to proceed in the hands of the judicial authorities. They realized that, albeit late. Then the legislative branch of government intervened.

"There were other important legal aspects. Judges in nation-states reflect their cultures. If national judges sit in judgment on events that have taken place far away in a cultural environment they know little about, there is a high probability that they will reach faulty results."

Belgian Justice: A Poor International Image

"The Belgian ministry officials were well aware that their universal law was becoming a target for complainants from everywhere. This was happening at a time when Belgian justice had an increasingly poor image internationally. One case that was mishandled concerned the pedophile Dutroux. The court case took place only eight years after the events he was accused of.

"The prosecution of Sharon did not go ahead because of a development that had nothing to do with him or Israel. Under the universal law, as mentioned, a complaint was also brought against President George Bush, Sr., Secretary of State Colin Powell, and retired general Norman Schwarzkopf concerning the first Gulf War in Iraq. The United States was more powerful than Israel. They told the Belgian government that if their legal authorities were to go ahead with the process, NATO's headquarters would be moved away from Brussels."

Belgium Bows to American Threats

"This threw the Belgians off balance. They now finally started to understand that they had created problems for themselves. The parliament rushed to change the law, and amendments to it were passed that would create obstacles for future plaintiffs. These included provisions that a future plaintiff or victim would have to have lived three years in Belgium. There would also have to be real linkage between the alleged crime and Belgian interests and several other such clauses.

"Initially they wanted to exclude the United States from the universal law but not the three Israelis. Till the last moment there was a major Belgian parliamentary effort to retain the original complaint as to them having committed a war

crime. That, however, would have proved that the entire motivation of the process against Sharon was political. It would also have shown that the Belgian parliament could legislate against a particular country, which would have publicly revealed their one-sidedness toward Israel. In the end they also understood that such a move would not hold up judicially.

"The Belgians bowed to the American threat and changed their law. The principle of the revised law was different. In Belgium from now on, only cases can be brought that have a linkage to the country. In the case of Sharon, neither the complainants nor the accused had such linkage. In addition, as I indicated before, Sharon had immunity as long as he was prime minister. Those two factors ended the matter."

Legal Arguments

Kohn says that subsequently she has often lectured about the case. "We felt we had strong legal arguments and should put them forward. We did not want to digress from these arguments."

When asked why the Israeli side did not stress Belgium's poor human rights record and weak legal system, Kohn answers: "We made a major effort not to attack the Belgian legal system. We received many letters about the terrible crimes committed by the Belgians in the Congo over a long period. Nor did we ever bring up their failure in dealing with their major pedophile case. We felt we should use such arguments only as a last resort."

"We focused on the fact that the Belgian universal law was a fiction. If they applied it, they would be swamped with complaints from all over the world. The procurer general also understood this when he recommended to the court not to prosecute."

When asked why the Belgian judicial system took what were, with great probability, political decisions, Kohn replies: "Concerning the politicians, there are many Muslims in certain parts of Belgium, and those who want to get elected there seek their votes."

"As far as the Appeals Court judges are concerned I do not have an answer. I discussed the matter in Belgium, and said to people that I did not believe that in a West European democratic country such as Belgium, judges could be influenced. When I said that, several people acquainted with the Belgian system started to laugh."

The Media's Hostility

Kohn observes that the Belgian media played an anti-Israeli role. "Every time, shortly before any court proceeding or meeting took place, the television showed movies on Sabra and Shatilah. These were difficult to watch because what happened there was indeed terrible."

"We wondered whether the films were not influencing the judges. When we wanted to raise this issue with the local newspapers, they did not give us an opportunity to explain our position. We were clearly operating in a hostile environment. We felt that the press was against us and did not give us a chance to say our piece."

"Later also in Sweden a complaint was brought against Sharon. A Swedish prosecutor, Thomas Lindstrand, decided on 23 October 2002 not to proceed with it. He argued that it would not be possible for the Swedes to gather evidence on crimes allegedly committed in the West Bank and Gaza. He understood that these constraints could influence a possible trial's outcome."

Kohn concludes: "After a relatively short period of inactivity, laws for universal jurisdiction have developed in many countries. Recently there was an attempt to bring a criminal complaint against an IDF general and the defense minister, both in the UK. After the second Lebanese confrontation, various sources report the readiness of NGOs to file complaints against IDF officers for war crimes."

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IRIT KOHN joined the Israeli Ministry of Justice in 1989 and from 1995 to 2005 was director of its International Affairs Department. She has been a member of various governmental committees and has published on several legal subjects. In 2004, she was elected to the Vice-Presidency of the International Association of Jewish Lawyers and Jurists. She holds an LLB degree from the Hebrew University of Jerusalem.

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