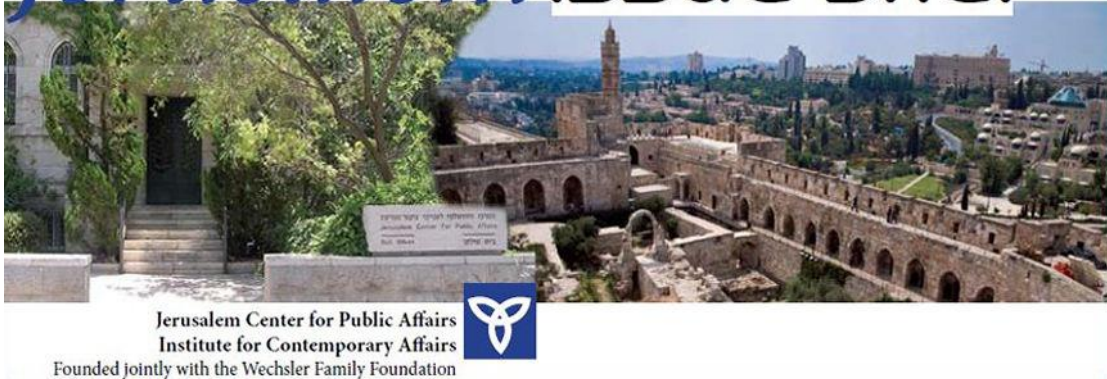


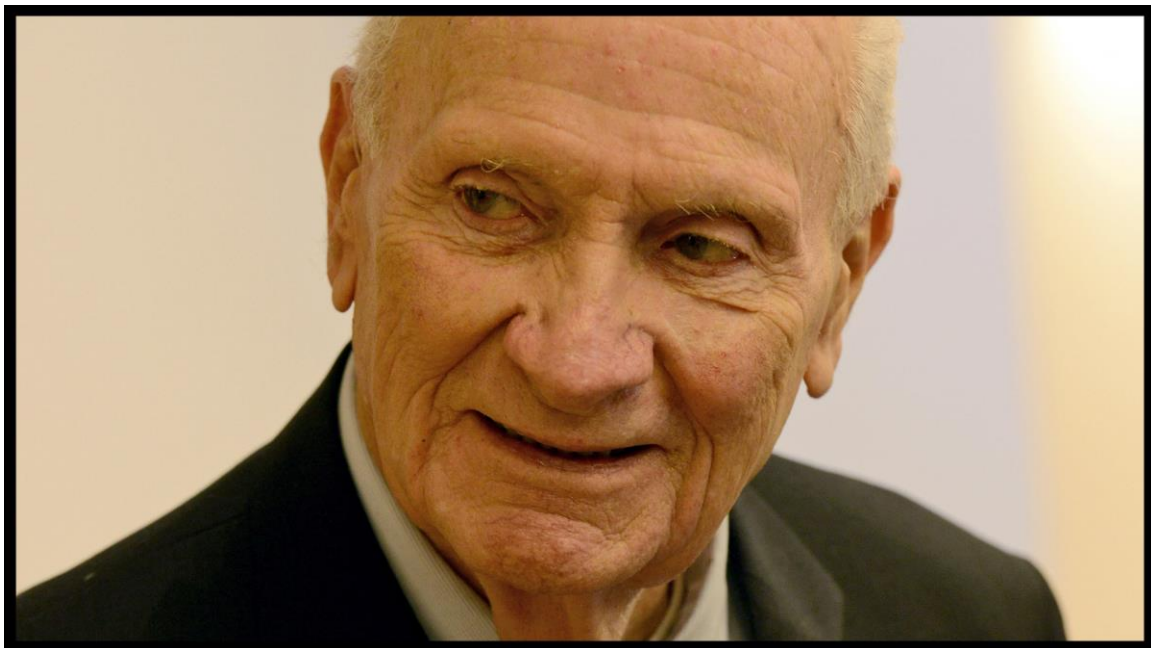
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Former Israeli Chief Justice Meir Shamgar: The Right Man in the Right Place at the Right Time

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(Kobi Gideon/GPO)

- Israel's former Chief Justice Meir Shamgar, who died on Oct. 18 at age 94, played a unique role in molding Israel's legal system as well as Israel's status in the administered areas. As the Military Advocate General in the 1960s, he designed and built the legal and the command structure that served as the basis for Israel's administration of the territories following the Six-Day War and up to the present.
- Following the Six-Day War and Israel's attaining control of Judea, Samaria, and Gaza, Shamgar was faced with a melange of unique legal and military realities, as well as an area steeped in historic Jewish heritage. Shamgar was well aware that

this was not a simple classic situation of belligerent occupation of the land of a sovereign state.

- Jordan was not considered as having sovereign rights over Judea and Samaria (the West Bank) following its unrecognized annexation of the area in 1950, and Egypt had never claimed sovereign rights over Gaza. Hence, such a special and irregular legal situation called for creative and original thinking in order to devise the appropriate legal framework and status of the territory.
- On top of these circumstances lay the unique legal and historic background of the area in which claims of indigenous, historic, and legal rights of the Jewish people – as recognized in the 1917 Balfour Declaration and subsequently incorporated into instruments of international law – were at the foundation of the status of the land.
- In a 1971 article dealing with the application of international law in the administered areas, Shamgar set out the reasoning for his determination that the territories are not simply “occupied territories” but better and more accurately defined as “administered areas.” Based on Shamgar's legal construction, Israel distinguished between the unique status of the territory and Israel's humanitarian obligations *vis-à-vis* the local population emanating from the applicable international humanitarian norms.
- At the behest of Shamgar, Israel provided the local population with full and unprecedented access to its Supreme Court, as a means of ensuring that the Israeli military and governmental authorities functioning in the territories duly observe the Fourth Geneva Convention's humanitarian provisions.

The passing of Israel's former Chief Justice Meir Shamgar, who died on Oct. 18, 2019, at age 94, in addition to being seen as a sad loss to Israel's legal world, appears to have released an outpouring of emotions from all directions of the Israeli political and legal spectrum. Such sentiments, including some biting criticism, relate to his unique role in, and contribution to, molding Israel's legal system as well as Israel's status in the administered areas.

Clearly, someone who served as the legal adviser to Israel's Ministry of Defense, and then as Israel's Military Advocate General, and then as its Attorney General, followed by his appointment as a Supreme Court justice, and ultimately as Chief Justice – made a considerable mark on Israel's legal system in each of those spheres.

But even on this occasion of his passing, various politically-driven elements could not miss the opportunity to utilize the occasion to blame Shamgar for all Israel's troubles, as the Military Advocate General who, in the 1960s designed and built the legal and the command structure that served as the basis for Israel's administration of the territories following the Six-Day War and up to the present.

These same elements, incessantly plying their unidirectional political agendas, have not missed the opportunity to advance their fixation against Israel's continued presence in, and administration of, the territories.

It is indeed sad that even in their eulogies for such a great jurist, they could not resist injecting skepticism and even negativity, demonstrating an element of partisan-political short-sightedness and limited vision.

Examples of such short-sightedness include the following op-ed pieces in various newspapers:

...one also cannot avoid noting Shamgar's contribution to the normalization of the Israeli occupation. In his various roles, he gave the stamp of approval to actions that enabled the state and the defense establishment to continue controlling the occupied Palestinian population and its land while depriving them of their basic rights, as individuals and as a people.¹

He prepared the legal and command system for the possibility of military control over occupied territories. Only exceptional individuals have his ability to foresee and to prepare the governmental system under his command of future possibilities, even if it seemed then to be almost fictional.²

...If it weren't for his contribution, perhaps the occupation would not have extended for so long. If it weren't for the justification that he gave it, perhaps the crime would have been eradicated a long time ago. In Ariel and Itamar, they should call streets after him. From Jenin to Rafah they should remember him with disgrace. Shamgar was the silver platter upon which the occupation was delivered to Israel and the world.³

...In practice, the definition ["administered areas"] has created legal and planning chaos from which the settlement movement has not recovered.⁴

The *Jerusalem Post* also remarked that "Shamgar's ideas, embodied by a series of IDF military orders issued soon after the IDF took over the West Bank, have dominated the Israeli debate for the 50 years since then, certainly up until the Settlements Regulation Law passed in February [2017]."⁵

Indeed, Shamgar, as the Military Advocate-General during the 1960s, found himself at a unique and historic juncture, following the Six-Day War and Israel's attaining control of the areas of Judea, Samaria, and the Gaza Strip. He was both faced with a mélange of *sui generis* legal and military realities, as well as an area steeped in historic Jewish heritage.

As regards the legal status of the territory, Shamgar the jurist was well aware of the fact that this was not a simple classic situation of belligerent occupation of the land of a

sovereign state. In such situations international law, as set out in the 1907 Hague Rules of Land Warfare⁶ and the 1949 Fourth Geneva Convention on the Protection of Civilian Persons in Time of War,⁷ prescribes clear norms of behavior between an occupier and the local population, on issues of property, law and basic rights, while protecting the territorial rights of the sovereign.

Shamgar was aware of the irregular situation, in which Jordan was not considered as having sovereign rights over the areas of Judea and Samaria following its unrecognized annexation of the areas in 1950, and in which Egypt had never claimed sovereign rights over the Gaza Strip area, where it had maintained a military administration.

Hence, such a special and irregular legal situation called for creative and original thinking in order to devise the appropriate legal framework and status of the territory.

On top of these circumstances lay the unique legal and historic background of the area in which claims of indigenous, historic, and legal rights of the Jewish people - as recognized in the 1917 Balfour Declaration and subsequently incorporated into instruments of international law - were at the foundation of the status of the land.

In a 1971 article dealing with the application of international law in the administered areas, Shamgar set out the reasoning for his determination that the territories are not simply "occupied territories" but better and more accurately defined as "administered areas under belligerent occupation."

*The territorial position is ... sui generis, and the Israeli government tried therefore to distinguish between theoretical juridical and political problems on the one hand, and the observance of the humanitarian provisions of the Fourth Geneva Convention on the other hand. Accordingly the government distinguished between the legal problems of the applicability of the Fourth Convention to the territories under consideration which, as stated, does not in my opinion apply to these territories, and decided to act de facto, in accordance with the humanitarian provisions of the convention.*⁸

As such, based on Shamgar's legal construction, Israel distinguished between the unique *sui-generis* status of the territory emanating from its special historic and legal circumstances, on the one hand, and Israel's humanitarian obligations *vis-à-vis* the local population emanating from the applicable international humanitarian norms, on the other.

Israel's military proclamations and orders, issued upon entering the territories in June 1967, stressed the premise that Israel was acting in accordance with accepted norms of international law as set out in the 1949 Geneva Conventions, regarding property, respect for local law and other general matters.⁹

At the same time, and without accepting the formal application of the Fourth Geneva Convention to the territories, implying recognition of Jordanian sovereignty, Israel nevertheless undertook to apply the humanitarian provisions of that convention to the local population. In this context, Israel cooperated with the ICRC in enabling it to assist the local population, pursuant to the Fourth Geneva Convention.

Similarly, at the behest of Shamgar, Israel provided the local population with full and unprecedented access to its Supreme Court, as a means of ensuring that the Israeli military and governmental authorities functioning in the territories duly observe the convention's humanitarian provisions.¹⁰

Shamgar's special ability enabled him to collate, at a most critical juncture in the area's history, all the various legal, military considerations, and to construct a framework that, on the one hand, made no irreversible legal or political determinations regarding the permanent status of the territory. Yet, at the same time, left all these issues open for a subsequent peace-negotiation process. This enabled all parties to accept UN Security Council Resolution 242 (1967)¹¹ as the basis for a peace negotiation process that continues up to the present day.

Shamgar was, indeed, the right man in the right place, at the right time.

* * *

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Notes

¹ Editorial, "Justice Meir Shamgar's Legacy," *Ha'aretz*, Oct. 20, 2019, <https://www.haaretz.com/opinion/editorial/justice-meir-shamgar-s-legacy-1.8009633>

² Mordechai Kremnitzer, *Ha'aretz*, Oct. 18, 2019 (Hebrew), <https://www.haaretz.co.il/news/law/premium-1.8006816>

³ Gideon Levy, "Forefather of the 'Administered Territories'," *Ha'aretz*, Oct. 20, 2019, <https://www.haaretz.com/opinion/premium-forefather-of-the-administered-territories-1.8009353>

⁴ Yehuda Yifrach, *Makor Rishon*, Oct. 24, 2019 (Hebrew), <https://www.makorishon.co.il/news/yoman/179217/>

⁵ Yonah Jeremy Bob, "50 Years since 1967: What Is the West Bank's Real Legal Status?" Jerusalem Post, <https://www.jpost.com/Magazine/50-years-of-law-versus-reality-493859>

⁶ <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000001-0631.pdf>

⁷ <https://ihl-databases.icrc.org/ihl/385ec082b509e76c41256739003e636d/6756482d86146898c125641e004aa3c5>

⁸ Meir Shamgar, "The Observance of International Law in the Administered Territories," 1 *Israel Yearbook on Human Rights* (1971), p. 266.

⁹ IDF West Bank Force Commander's Proclamations Nos. 2 and 3 dated June 7, 1967 and the Order Concerning Security Regulations, <http://nolegalfrontiers.org/military-orders/mil039ed2.html?lang=en>

¹⁰ See High Court of Justice (HCJ), *Beit Sourik Village Council v. Government of Israel*, HCJ 2056/04, Judgement, available at: http://elyon1.court.gov.il/Files_ENG/04/560/020/A28/04020560.A28.pdf; *Mariabe v Prime Minister of Israel*, HCJ 7957/04, Judgement, available at: http://elyon1.court.gov.il/Files_ENG/04/570/079/A14/04079570.A14.pdf.
<http://www.hamoked.org.il/Document.aspx?dID=Documents1548>

¹¹ <https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/un%20security%20council%20resolution%20242.aspx>

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