

A Critical Study of the Shamgar Commission on the actions of Baruch Goldstein at the Cave of the Patriarchs in Hebron in February 1994

Introduction

On Purim 5754 (February 1994). Baruch Goldstein killed 29 Arabs in the Cave of the Patriarchs in Hebron.¹ These facts are not disputed by anybody, and this includes his family. But what were his motives for the action? Was it a massacre of Arabs, or was it a pre-emptive strike to prevent a massacre of Jews in the Cave of the Patriarchs that very morning? A Commission under the Chairmanship of the President of the Israel Supreme Court, Judge Meir Shamgar, (which became known as the Shamgar Commission) was immediately established to investigate and report on the matter. In this paper, we will study critically the actions of the Shamgar Commission.

Establishment of this Commission

On 27 February 1994, the then Prime Minister of Israel, Yitzchak Rabin, wrote to the President of the Supreme Court, Judge Meir Shamgar, informing him that on that same day the Government had decided that “the massacre which occurred in the Cave of the Patriarchs...” was of such great public importance as to warrant the establishment of a Commission of Inquiry to investigate it.² Accordingly, Judge Shamgar wrote a document appointing the other members of this Commission of Inquiry. In this document he included the phrase: “appointment of a Committee of Inquiry in connection with the massacre which occurred in the Cave of the Patriarchs...”³ Furthermore, the Commission was entitled “Commission of Inquiry on the Massacre in the Cave of the Patriarchs in Hebron 5754 [1994]”⁴ As one can see, in the decision of the Government, in the document of Judge Shamgar, and in the title of the Commission of Inquiry, the events which occurred in the Cave of the Patriarchs are described as a “massacre”, thus prejudicing the case”. There were indeed other possible explanations of what had occurred. For example, perhaps a group of Arabs had attacked Baruch Goldstein and his actions were in self-defence, or it might have been a pre-emptive stroke to prevent a massacre of Jews that morning in the Cave of the Patriarchs.

¹ A more detailed account of almost all the points appearing in this paper may be found in my book “Did or did not Baruch Goldstein *massacre* 29 Arabs?” (Kiryat Arba, 2003)

² Rabin to Judge Shamgar, 27 February 1994, (Report of Shamgar Commission [henceforth: Report] p.9)

³ Document by Judge Shamgar, 28 February 1994, (Report p.11)

⁴ Cover of Report

Since no investigation had yet taken place, it would have been far more proper to have used a neutral term such as “event” rather than “massacre”, in setting up the Commission.

Composition of the Commission

Judge Shamgar appointed four other members to this Commission:⁵

Judge Eliezer Goldberg, Judge in the Israel Supreme Court

Judge Abed el-Rahman Zouabi, Judge on the District Court of Nazareth.

Lieutenant General (res) Moshe Levi, a previous Chief of Staff of the Israel Armed Forces.

Professor Menachem Ya’ari. His appointment was questioned by Knesset member Michael Eitan who demanded his disqualification, since “Ya’ari in the past attended demonstrations of the left-wing “Peace Now” movement and had also attended its meetings.⁶ It is very possible that when Judge Shamgar invited Ya’ari to sit on this Commission, he did not know of his involvement with this movement; at all events Ya’ari remained a member.

There was a similar case in England which came before the Judicial Committee of the House of Lords but there the judge was replaced. The case involved the Chilean dictator Pinochet. After the Law Lords had decided by a 3 to 2 majority that he could be extradited, it was pointed out that one of the judges who had voted with the majority had ties with Amnesty International, even though he was in **no way involved** with Amnesty’s campaign for Pinochet’s extradition. The House of Lords immediately set aside their decision and a new trial was held with different judges.⁷

Examination of the Witnesses

It is a cardinal principle of law that a person is innocent until proven guilty. Another fundamental principle of justice is that a person judging a court case, (and the Israel Supreme Court has ruled that a similar thing can be said regarding a member of a Commission of Inquiry,⁸) must not decide on the guilt of the accused until he has heard all the evidence. Any deviation from this principle could lead to a retrial under a different judge.

⁵ Report, p.3

⁶ “Member of the Commission Ya’ari”, Kol Ha’ir, 4 March 1994, p.50

⁷ Keesing’s Record of World Events, pp.42611-12, 42723

⁸ Gilbert v. President of Supreme Court... and Judge Zouabi, Petition to Israel Supreme Court [henceforth: Bagatz], 2148/94, (1994) 48(iii) Piskei Din – decisions of the Israel Supreme Court [henceforth: P.D.] pp.576, 583

However, these principles were not followed during the hearings of the Shamgar Commission, since three members, namely a majority of the members of this Commission, Judge Zouabi, Moshe Levy,⁹ and Menachem Ya'ari¹⁰ - were describing Baruch Goldstein as a "murderer" even **before** they had heard all the evidence. This was especially so in the case of Judge Zouabi.¹¹ who used this term for Baruch Goldstein from the very **first day** of the hearings, and during the course of the hearings used it at least **seventeen** times in just the open sessions. If a majority of the Commission had already decided that Baruch Goldstein was a murderer before hearing all of the evidence, then the objectivity of the section of the Shamgar Report dealing with Baruch Goldstein is surely put in doubt.

On a number of occasions when the above principles were not observed, the Israel Supreme Court accepted an appeal by an accused to have a fresh trial under a different judge. A case for disqualification, when the judge had come to an opinion before hearing all the evidence, was in the trial of Fuad Masallem. In this trial the judge had given her decision before the defence had presented his **summation** speech.¹² In another case, that of Eliyahu Ronen, the reason for disqualification was that the judge had expressed a negative opinion of the defendant. in an **entirely different case**.¹³

Likewise, an attempt was made by Yoel Lerner to have the Commission disqualified since the members repeatedly described Baruch Goldstein as a murderer before all the evidence had been heard. Lerner applied to the Supreme Court but they dismissed the petition adding that he could make representations to the Shamgar Commission.¹⁴

Lerner accordingly wrote a letter to Judge Shamgar in which he proposed that the ideal way to correct the pre-judging by members of the Commission would be to disqualify the Commission and appoint a new one with different people who would act with neutrality. Failing that, the members of the present Commission should make a solemn declaration that despite the outward appearance of having pre-conceived opinions about Baruch Goldstein, they did not in fact have such ideas.¹⁵ Judge Shamgar summarily dismissed these proposals.¹⁶

⁹ Minutes of Shamgar Commission, Israel State Archives, 7648/gimmel [henceforth: Minutes] pp.370, 482, 719, 1679, 1715, 1782

¹⁰ Minutes pp.1295, 1296

¹¹ Minutes pp.100, 124, 188, 335, 436, 465, 574, 607, 789, 869, 1151, 1164, 1173, 1202, 1367, 1425, 1675

¹² Masallem v. State of Israel, Irur Plili – Criminal Appeal [henceforth: I.P.] 362/89, (1989) 43(iii) P.D. pp.281-83

¹³ Ronen v. State of Israel, I.P. 504/82, (1982) Taksir Piskei Din vol.20 pp. 234-5

¹⁴ Verdict, Lerner v. Shamgar Commission, 5 May 1994, Bagatz 1788/94, (File of Lawyer Gidi Frishtik (after having obtained permission from party to the file) [henceforth: Frishtik file])

¹⁵ Lerner to Judge Shamgar, 8 May 1994, (Frishtik file)

¹⁶ Judge Shamgar to Lerner, 24 May 1994, (Frishtik file)

Commission refusing to hear witnesses

In a criminal case, the defendant can put forward a plausible alternative explanation of the events, which is then considered by the judges when they write up their verdict.¹⁷ In this case, the alternative explanation is that Baruch Goldstein performed a pre-emptive strike to prevent a massacre of Jews that morning in the Cave of the Patriarchs. This explanation is plausible since it is supported by many other facts of that period. These include: numerous warnings that the Arabs were planning such an attack¹⁸; warnings that Arabs were attempting to smuggle in weapons to the Cave of the Patriarchs,¹⁹ which included damaging the metal detector at the entrance, thus giving them the opportunity to smuggle in the weapons²⁰; hundreds of Arabs shouting “Slaughter the Jew” during the days and hours preceding the morning of Purim.²¹

Three Americans, Carl Bishop, Reuben Margules and Joseph Gottlieb who were at the Cave of the Patriarchs on the Saturday night preceding Purim witnessed a large group (between 50 and 100) of Arabs shouting “Slaughter the Jews”. Furthermore, Carl Bishop went there on a further three occasions between that Saturday night and Purim and again saw the Arabs shouting the same slogan, and in addition, they cursed him, spat on him and even struck him.²² (This same cry “Slaughter the Jews” was also heard in Hebron in 1929 prior to the massacre of 67 Jews in that city.²³) Each of the three Americans offered to give evidence to the Commission²⁴ but the Commission did not call on even one of them. Another person who asked to give evidence which supported the premise that Goldstein’s action was a pre-emptive strike,

¹⁷ e.g. Amalia Amaya “Inference to the Best Legal Explanation”, *Legal Evidence and Proof: Statistics, Stories, Logic*, Hendrik Kapstein (ed.), (Ashgate: Aldershot, Hants, England, 2008), chap. 6

¹⁸ Minutes pp.69-70, 83-84, 125, 136, 198-99, 242, 453, 926-27, 2010-11, 2052; Evidence of Zvi Katzover, Israel Supreme Court, 21 April 1994, Exhibit 678, (Israel State Archives [henceforth: ISA] 7646/2-14/gimmel)

¹⁹ Minutes pp.518-19; Report p.28

²⁰ Reports from Logs..., (ISA 7647/3-32/gimmel)

²¹ Minutes pp.1653, 1712-13

²² Submission by Carl Bishop, no.23, Exhibit 1137, (ISA 7647/3-26/gimmel); Submission by Reuben Margules (via Menachem Gurman), no.68, Exhibit 1137, (ISA 7647/3-28/gimmel); Submission by Joseph Gottlieb (via Naomi Hochstein), no.108, Exhibit 1137, (ISA 7647/3-28/gimmel)

²³ Memorandum to the High Commissioner of Palestine from the Jewish Community of Hebron, reprinted in *Davar*, 8 September 1929, p.2

²⁴ Submission by Carl Bishop, op. cit.; submission by Alfred Hassner, no.132, Exhibit 1137, (ISA 7647/3-30/gimmel).; submission by Reuben Margules (via Menachem Gurman), op. cit.; submission by Joseph Gottlieb (via Naomi Hochstein), op. cit.

was Mordechai Saied,²⁵ but he was informed by the Commission that there was no need for his testimony.²⁶

The report of the Shamgar Commission concludes that Baruch Goldstein massacred the Arabs and goes into great detail on this.²⁷ However, there is not even a mention of the plausible alternative theory that Goldstein performed a pre-emptive strike to prevent a massacre of Jews that morning in the Cave of the Patriarchs.

The Right of presenting a Defence

An individual can be harmed as the result of a Government Commission of Inquiry. The Israeli lawmakers realised this and thus incorporated into the Israel Law on Commissions of Inquiry passed in 1968 the following paragraph 15:

(a) Where it appears to a commission of inquiry that a particular person is likely to be harmed by the inquiry or by its results, the chairman of the commission shall notify that person in what respect he is likely to be harmed and shall place at his disposal, in such matter as he may think fit, such evidence relevant to that potential harm as is in the possession of the commission....

(b) A person notified under subsection (a) may attend before the commission either himself or through an advocate, make statements and examine witnesses (even if they have already testified before the committee), and the commission may permit him to present evidence, all in relation to the said potential harm.²⁸

This paragraph was put into practice fully during the proceedings of the Kahan Commission who were investigating the massacres at Sabra and Shatilla. During the course of the proceedings, nine people including the Prime Minister - Menachem Begin, the Minister of Defense - Ariel Sharon, and the Chief of Staff were given warnings that they were likely to be harmed by the Commission's investigation or its findings. Details of how they might be harmed

²⁵ Submission by Mordecai Saied, no.52, Exhibit 1137, (ISA 7647/3-27/gimmel)

²⁶ Michael Shaked, (Shamgar Commission) to Mordecai Saied, 12 April 1994, (Yisrael Goldstein (father of Baruch Goldstein) papers)

²⁷ Report, passim

²⁸ Commissions of Inquiry Law 5729 - 1968 para.15, (Laws of State of Israel – official English translation, [henceforth: L.S.I.] vol.23, pp.34-35)

were published by the Government Press Office.²⁹ All these nine people appeared to give evidence in their own defence.³⁰

Regarding the scope of a defence in a commission of inquiry, the Israeli Supreme Court has held that a person whose conduct is under investigation by such a commission is entitled to the same degree of defence as an accused has in a court of law.³¹

Needless to say, other countries also have provisions to protect individuals from the findings of Commissions of Inquiry. One of them is Britain that in the 1960s established a “Royal Commission” to study the working of “Tribunals of Inquiry”. They laid down cardinal principles which were stated in a lecture given at the Hebrew University of Jerusalem in December 1966 by the Chairman of the Commission, Lord Justice of Appeal, Sir Cyril Salmon. Included, is the right of any person called as a witness to be informed of any allegations which are made against him and the substance of the evidence in support of these allegations, having the opportunity to cross-examine witnesses, and the right to call any material witness to support his case.³²

According to the above quoted paragraph of the Israeli law, only a person still alive could utilise this paragraph of the act to clear his name. The relatives of a person who had meanwhile died had no recourse. However, the Knesset obviously came to realise the injustice of this and in 1979, they passed an amendment to this paragraph of the law, which would also confer this right of defence on the relatives of a person who had since died. The amendment reads:

The following shall be added at the end of subsection (a) [of the 1968 law quoted above]: If that first-mentioned person has died or the notification cannot be delivered to him for any other reason, the commission of inquiry may, if it deems it necessary in the interests of justice, decide that the notification shall be delivered to any such relative of his as it may prescribe, and the chairman of the commission shall place the evidence at the disposal of such relative.³³

²⁹ “Camp inquiry warns Begin...”, Jerusalem Post, 25 November 1982, p.2

³⁰ “Kahan Commission”, Encyclopaedia Judaica, Yearbook 1983-5, (Jerusalem: 1985), p.377

³¹ Israel Consumers’ Council... v. Chairman of Commission of Inquiry ..., Bagatz 335/68, (1969) 23(i) P.D. pp.325, 333

³² Cyril Salmon, “Tribunals of Inquiry”, Israel Law Review, vol.2, 1967, pp.329-30

³³ Commissions of Inquiry Law (Amendment no.2) 5739-1979, para.3, (L.S.I. vol. 33, p.100)

Despite this law, the family of Baruch Goldstein were given no opportunity whatsoever to present a defence, and thus a few days before the publication of the Shamgar Report, the Supreme Court heard a petition submitted by Yoel Lerner and Miryam Goldstein, the widow of Baruch, demanding that the Commission's work be disqualified. Among the reasons they put forward was that under paragraph 15 of the Commissions of Inquiry Law letters of warning must be sent out by the Commission to anyone likely to be harmed by its findings, and the reputation of Baruch Goldstein could be so harmed.³⁴ The Supreme Court rejected the petition, one of the reasons being that Lerner and Miryam Goldstein waited until the last moment to submit their petition.³⁵ It is however difficult to understand this ruling of the Court. The above law quite clearly and unambiguously states that the **Chairman of a Commission of Inquiry** must inform a person (or the relative of a deceased person) that they are likely to be harmed. There is nothing in this law saying that a person who could potentially be harmed by a Report must request a hearing, which is very logical. The reason being that in general, **only** the members of a Commission of Inquiry hear all the witnesses and see all the associated documents, especially when much of the evidence is heard behind closed doors. Therefore, they and only they can come to an assessment as to who could be harmed by their Report. Hence **they** are the people to send out the warnings.

The bottom line is that Dr. Baruch Goldstein's reputation was very grossly harmed, and thus Miryam Goldstein should have been given the opportunity to defend her husband.

Conclusions

There are three serious flaws in the actions of the Shamgar Commission:

1. The majority of the members of the Commission prejudged the issue by describing Baruch Goldstein as a murderer before hearing all the evidence. In addition, the title of the Commission indicates right from the start that what occurred was a "massacre".
2. The Commission declined to accept evidence giving a plausible alternative as to what had occurred,
3. Contrary to the law, the Commission did not give any opportunity for the Goldstein family to present a defense.

In addition, there is room for criticism of the membership of the Commission.

³⁴ Plea for order nisi... by Lerner and Miryam Goldstein, June 1994, Bagatz 3563/94, (Frishtik file)

³⁵ Lerner and Miryam Goldstein v. Chairman of Shamgar Commission, Bagatz 3563/94, (1994), (Takdin, vol.94(2) .