

The *Status Quo* at the Temple Mount in Jerusalem: The 1930 Wailing Wall Trial

Steven Eric Zipperstein

Department of Public Policy, University of California, Los Angeles, USA

Email address:

szipperstein@international.ucla.edu

To cite this article:

Steven Eric Zipperstein. The *Status Quo* at the Temple Mount in Jerusalem: The 1930 Wailing Wall Trial. *International Journal of Law and Society*. Vol. 6, No. 3, 2023, pp. 241-253. doi: 10.11648/j.ijls.20230603.19

Received: July 17, 2023; **Accepted:** August 2, 2023; **Published:** August 22, 2023

Abstract: The Temple Mount in Jerusalem is the world's most volatile flashpoint for religio-nationalist conflict. A shaky *Status Quo* arrangement has governed the administration of the Muslim Holy Sites since Israel captured East Jerusalem in the 1967 Six-Day War. The focus of conflict at the Temple Mount today is the al-Aqsa Mosque, Islam's third-holiest shrine. The Wailing Wall, Judaism's most sacred site, also forms part of the Temple Mount complex. Following a series of violent episodes at the Wall in the 1920s, the British Authorities and the League of Nations appointed an international commission in 1930 (the Lofgren Commission) to conduct a month-long courtroom trial between Arabs and Jews focusing on the legal rights and claims of Muslims and Jews to the Wailing Wall and the pavement in front of the Wall. The Commission issued a verdict defining the *Status Quo* as affirming Muslim ownership of the Wall, but also permitting certain Jewish devotional practices. Neither side was happy with the outcome, but both seemed to accept it, and no further serious outbreaks of violence occurred at the Wall during the remainder of the British Mandate. This article explores the 1930 trial and asks whether the Lofgren Commission might serve as a model for adjudicating modern-day disputes regarding the Status Quo at the Temple Mount in Jerusalem.

Keywords: Jerusalem, Status Quo, Temple Mount, Haram Al-Sharif, Wailing Wall

1. Introduction

Following Israel's capture of the Old City of Jerusalem in the June 1967 war, an informal *Status Quo* has prevailed at the Temple Mount (*Har Ha'Bayit* in Hebrew, or *Haram al-Sharif* in Arabic), the site of Abraham's near-sacrifice of his son Isaac as recounted in the Book of Genesis (or Ishmael as recounted in the Koran), as well as the site of the ancient Jewish Temples and later the Al-Aqsa Mosque and the Dome of the Rock. Muslims and Jews view the Temple Mount as highly sacred space.

The *Status Quo* since 1967 recognizes the Jordanian *Wakf* authorities as exercising administrative control of the Temple Mount and the Israeli authorities as responsible for overall security [1]. Jewish visitation at the site is permitted, but Jewish prayer is prohibited [2].

The Israel-Jordan Peace Treaty of 1994 recognizes "the present special role of the Hashemite Kingdom of Jordan in Muslim Holy shrines in Jerusalem."¹ As recently as March

2023 the Israelis, Jordanians, Palestinians and Egyptians issued a Joint Communique together with the United States reiterating their commitment to uphold "the historic status quo at the Holy Sites in Jerusalem, both in word and in practice, and reaffirmed in this context the importance of the Hashemite Custodianship/special role of the Hashemite Kingdom of Jordan."²

Despite the *Status Quo* arrangements, the Temple Mount today and for the past several decades has remained the world's most volatile flashpoint for religio-nationalist conflict, especially the Al-Aqsa Mosque (Islam's third holiest shrine after Mecca and Medina) [3]. Arab and Jewish provocateurs have stirred repeated clashes at the site. One such clash at the Al-Aqsa Mosque in May 2021 led Hamas to fire rockets from Gaza directly toward Jerusalem, quickly escalating into an eleven-day military conflict between Israel and Hamas.

²Joint Communique from the March 19 meeting in Sharm El Sheikh (19 March 2023),

<https://www.state.gov/joint-communique-from-the-march-19-meeting-in-sharm-el-sheikh/>, accessed 20 July 2023.

¹ Israel-Jordan Peace Treaty, UNTS 35325, Art. 9 (2) (26 Oct. 1994).

The Wailing Wall, forming part of the curtilage around the Temple Mount, is Judaism's holiest site and the last surviving remnant of the Herodian Temple. The Wall came under exclusive Israeli control in June 1967 and is not part of the modern-day *Status Quo* understanding. However, Jewish rights of access and prayer at the Wall, as well as Christian rights at their Holy Sites, were previously governed by a *Status Quo* regime during Ottoman rule prior to December 1917 [4]. The British continued the concept of the *Status Quo* when they ruled Palestine under a Mandate from the League of Nations between 1922-1948.³

Like the Temple Mount today, the Wailing Wall also saw occasional clashes and violent outbreaks, especially during the 1920s, when both Jewish and Arab nationalists viewed the Wall as a symbol of their conflicting claims to Palestine. Following the worst such violence in August 1929, the British government convened two investigatory commissions, one British (the Shaw Commission) and the other international (the Lofgren Commission, as recommended by Britain to the League of Nations), to conduct courtroom-style trials to determine the causes of the violence and to adjudicate conflicting Muslim and Jewish claims to the Wailing Wall and the-then narrow strip of pavement in front of the Wall.⁴

The Lofgren Commission conducted a four-week courtroom trial in Jerusalem in June-July 1930. The Muslim and Jewish sides were represented by counsel who made opening statements and closing arguments and cross-examined each other's witnesses.

The Lofgren Commission issued its report and verdict in December 1930, following a failed effort by a British official in Palestine to broker an out-of-court settlement. The verdict interpreted and reinforced the *Status Quo* at the Wailing Wall. Neither side was happy with the outcome, but both seemed grudgingly to accept it. Relative peace and calm prevailed at the Wall for the remainder of the British Mandate, a far cry from the bitter disputes of the 1920s and the modern-day tensions at the Temple Mount.

This article argues that a Lofgren-style Commission should be convened to adjudicate modern-day disputes regarding Muslim and Jewish rights atop the Temple Mount. Some on the Muslim side have taken an increasingly uncompromising view of the meaning of the *Status Quo* at the Temple Mount. They claim the site is exclusively Muslim, and that the *Status Quo* forbids Jews from not just from praying, but even visiting the site, which some Muslims still define as including the Wailing Wall.⁵

On the other hand, some Jews, and especially certain far-right extremist members of the current Israeli government, have likewise taken uncompromising positions, insisting the Temple Mount was home to King Solomon's Temple more than one thousand years before the Al-Aqsa Mosque was built on the same site, and therefore the Jews have at least equal if not greater rights at the Temple Mount than the Muslims. Many Muslims fear those extreme Jewish positions presage a potential Jewish attempt to build a new Temple atop the Mount. The extremist Jewish position also disregards the majority view of Jewish religious scholars, who have maintained for centuries that Jews should neither visit nor pray atop the Temple Mount, as it is forbidden to do so prior to the return of the Messiah.⁶

These modern-day arguments echo similar Muslim and Jewish claims regarding the Wailing Wall nearly a century ago in the Lofgren Commission trial. The success of the Lofgren trial could therefore provide a template for addressing the contours of the Temple Mount *Status Quo* regime today.

2. Historical Background: The Wailing Wall

2.1. Early History

The Western or Wailing Wall (*Kotel Ha'Maravi* in Hebrew) was perhaps the most contested religious site in the world during the 1920s and became ground zero for the Arab-Jewish conflict [5]. Jews revere the Wall as their holiest and most sacred place, the only surviving remnant of their ancient Temple, the place where Jews believe the *Shekhinah* or divine spirit continues to be felt most palpably.⁷

Muslims also regard the Wall as a holy place, known to them by the Arabic term *al-Buraq*, named for the Prophet Mohammed's steed who the Angel Gabriel tethered along the Wall at the end of Mohammed's celestial journey from Mecca to Jerusalem.⁸ Prior to the 19th Century, however, there was little or no evidence the Muslims viewed the Wall or the area in front of the wall with any particular reverence. "The pavement in front of the Wall – was not considered a holy place by the Muslims, and the residents of the Maghrebi quarter even used to throw their garbage there [6]."

The Wall formed a portion of the western exterior of the

3 Jordan, which occupied the Old City of Jerusalem from 1948-1967, refused to permit Jewish access to the Wall, in violation of the April 1949 Israel-Jordan armistice agreement. *Israel and Jordan General Armistice Agreement*, UN Doc S/1302/Rev.1, Art. VIII(2) (3 April 1949) (requiring "free access to the Holy Places").

4 At that time, unlike today, there was only a narrow strip of pavement facing the Wall on one side and an area of small dwellings for Moroccan/Moghribi pilgrims and workers on the other side.

5 See, e.g., "FM: Any Israeli attempt to alter status quo in Jerusalem akin to 'playing with fire,'" *Jordan Times*, 11 May 2022 ("The Jordanian minister recalled that in 1930, the League of Nations... confirmed that the Al Haram Al Sharif in its entirety is a place of worship purely for Muslims.").

6 The Chief Rabbi of Palestine, Abraham Issac Kook, testified before the Shaw Commission in 1929 that "In accordance with the commands in our Torah we are not even allowed, until the day of redemption, we are not even allowed to enter the area surrounding the Holy Temple..." Palestine Commission on the Disturbances of August, 1929, *Evidence Heard by the Commission in Open Sitings and a Selection from the Exhibits Put in During those Sitings*, Colonial Paper 48 at 687, para. 17,322 (1930).

7 C. Adler, *Memorandum on the Western Wall Prepared for the Special Commission of the League of Nations on the Wailing Wall on behalf of the Jewish Agency for Palestine* (hereafter "Adler Memorandum") at 4-5 (June 1930).

8 See, e.g., Letter to the *Times of London* from Haj Amin al Husseini, Grand Mufti of Jerusalem and President of the Supreme Muslim Council in Palestine, 27 Aug. 1929 ("[t] he *Burak*, called by Europeans the 'Wailing Wall' and by Jews 'Kotel Moravi,' is a part of the western wall of the Mosque of Omar, which is held by Moslems as a very sacred shrine sanctified by the text of the Koran.").

ancient Jewish Temples built atop Mount Moriah in Jerusalem in the area Jews refer to as the Temple Mount, or *Har Ha'Bayit*, and that Muslims refer to as the *Haram-al-Sharif*. King Solomon built the original Jewish Temple on that site nearly three thousand years ago. The Babylonians destroyed the original Temple in 587 B.C. The Jews rebuilt the Temple about 70 years later, after which it was destroyed again, this time by the Macedonians in 170 B.C. The Second Temple was reconstructed during the reign of King Herod. Roman invaders finally destroyed the Temple in 70 A.D. For centuries ever since the Jews have mourned the lost Temple at the Wailing Wall, the Temple's only surviving remnant.

2.2. The Wall Under Muslim and Ottoman Rule

The Muslim Arabs took possession of the *Haram*, including the Wall, by conquest in 637-38 A.D. Muslim Arabs and later Muslim Turks held the Wall continuously until 1967, other than a brief time during the Crusader period (late 11th until late 12th Century). The Muslims built the Mosque of Omar (Dome of the Rock) and the *al-Aqsa* Mosque (the third holiest shrine in Islam, after Mecca and Medina) in the seventh century on the site of the former Jewish Temples on Mount Moriah. In 1193 Saladin's son, King Afdal, declared the area in front of the Wall a *Waqf*, deeming it a religious or charitable area under Muslim *Sharia* Law.⁹

By the 19th Century the area in front of the Wall was sandwiched between the Wall on one side and an area of small, impoverished stone houses on the other side. Those small homes comprised the so-called Moghrabi, or Moroccan Quarter, which Abu Midian dedicated in 1320 to the Moroccan pilgrims as a separate *Wakf*.¹⁰ Access to the Wall was from a narrow lane from the north.¹¹

Written evidence of Jewish prayer at the Wall dates back to the 10th Century.¹² Jewish prayer at the Wall continued thereafter more or less without interruption.¹³

During Ottoman times the authorities occasionally took steps to regulate Jewish activity at the Wall. In 1727, in the earliest known example of the Muslims resorting to the law and legal process in their conflict with the Jews, the Moghrabis sued the Jews, complaining they prayed too loudly and littered the area in front of the Wall. The *Qadi* (Islamic Judge) ordered the Jews to desist from praying at the Wall, because they lacked a permit authorizing them to do so. Over time, however, the Jews were allowed to continue praying at the Wall on condition they did so without disturbing the Moghrabi residents, and only if they made no claims of ownership of the Wall [7].

In 1840, during the period of the Egyptian Pasha's occupation of Palestine, the Jews applied for permission to pave the narrow area in front of the Wall. The authorities responded with a decree rejecting the Jewish application,

saying "the Jews must not be enabled to carry out their paving, and they must be cautioned against raising their voices and displaying their books (or utterances) and informed that all that may be permitted them is to pay visits as of old."¹⁴

In 1912 the Turkish authorities issued a decree affirming Jewish rights of prayer at the Wall, but prohibiting the Jews from bringing certain items such as "chairs, screens, and similar articles, or any innovation be made which may indicate ownership."¹⁵

The Ottoman authorities, however, occasionally issued legal rulings permitting Jewish prayer at the Wall. For example, in August 1889 the Sultan issued a decree appointing a new Chief Rabbi of Jerusalem. The decree banned the authorities from interfering with the "devotional visits and pilgrimage" to the Wall.¹⁶ Similar rulings were issued in 1893 and 1909.¹⁷ On other occasions the Ottoman authorities turned a blind eye to their own edicts, allowing the Jews to bring chairs and benches to the Wall in exchange for small payments.

3. Status Quo Disputes During British Rule

3.1. Disputes During the Mid-1920s

Immediately following the British conquest of Jerusalem near the end of World War I, General Edmund Allenby issued a proclamation declaring Britain's intention to maintain and protect all the Holy Places "according to the existing customs and beliefs of those to whose faiths they are sacred."¹⁸ This was the first official endorsement of the concept of maintaining the *Status Quo* at the Holy Places. The League of Nations codified the status quo in Article 13 of the Mandate for Palestine, adopted in July 1922 and appointing Britain as Mandatory. Britain treated the *Status Quo* as having the force of law, requiring it to maintain the same practices prevailing at the Wailing Wall as during Ottoman times.

During the 1920s the Wall emerged as a powerful symbol of conflicting Jewish and Arab nationalist aspirations in Palestine. The conflation of conflicting religious claims to the Wall with conflicting nationalist claims to the Wall created a highly tense and volatile situation for the British authorities.

The Jews pushed for as many rights as possible at the Wall. For example, in 1919 the Administrative Council of Jerusalem issued a decree banning the bringing of chairs, benches "and the like" to the Wall area. The Jews nevertheless brought benches to the Wall during Passover 1922 and on *Yom Kippur*

9 C. Adler, *op. cit.* at 11-12.

10 *Id.*

11 Lofgren Commission Report, *op. cit.* at 8.

12 Lofgren Commission Report, *op. cit.* at 11-12, discussing writings of Ben Meir, Rabbi Samuel ben Paltiel, Solomon ben Judah, and Benjamin of Tudela.

13 Lofgren Commission Report, *op. cit.* at 11-12.

14 Lofgren Commission Report, *op. cit.* at 67, appendix VI.

15 *Id.* at 70, appendix VIII. The Decree was rescinded in January 1912. Lofgren Commission Transcript, *op. cit.* at 312-14.

16 Lofgren Commission Report, *op. cit.* at 67-69, appendix VII.

17 *Id.* at 13.

18 Allenby Proclamation (11. Dec. 1917) [emphasis added], <https://static.timesofisrael.com/www/uploads/2017/12/Proclamation-Reuters-Telegram-Liddell-Hart-Centre-for-Military-Archives-King%E2%80%99s-College-London-300x480.jpg>, accessed 21 July 2023.

in 1923 and 1925, sparking controversy.¹⁹

The Muslims vigorously contested alleged Jewish violations of the *status quo*, fearing the Jews intended to encroach on Muslim rights until gaining *de facto* control and ultimately *de jure* ownership of the Wall. The Grand Mufti of Jerusalem, Haj Amin Al-Husseini, repeatedly claimed the Jews had a secret plan to rebuild their ancient Temple on the *Haram al Sharif* [8].

In 1927 a Jerusalem-based British Official, Administrative Officer Lionel George Archer Cust, prepared a lengthy memorandum attempting to define the *Status Quo* applicable to all Holy Places in Jerusalem and elsewhere for all religions.²⁰ Cust described the *Status Quo* at the Wall as follows:

“The Jewish custom of praying [at the Wall] is of considerable antiquity... and has now become an established right. This right to pray is, however, accompanied by the claim of the actual ownership of the Wall. The Moslems resist this on the ground that the Wall is an integral part of the enclosure Wall of the *Haram al Sharif*, and that the space in front of it is a public way, and part of the premises of the Abu Midian Waqf. For this reason, the Moslems have always protested against the placing of benches or chairs in front of the Wall by the Jews as causing an obstruction in this public way and implying possessory rights. Though benches have certainly from time to time been introduced, there is a resolution taken by the Administrative Council and confirmed by the *Mutasarrif* under the old Regime that chairs or tents or curtains (to divide the women from the men) are not to be allowed. This is still enforced, but portable camp-stools or boxes or tins with cushions are permitted for the convenience of worshippers.”²¹

3.2. The *Yom Kippur* 1928 Incident

Yom Kippur began the evening of 23 September 1928. Shortly before sunset, the British Deputy District Commissioner for Jerusalem, Edward Keith-Roach, accompanied by a British police official, Constable Douglas Duff, visited the *Haram* area to obtain a view of the Wall. Keith-Roach observed the Jews had made “various innovations... which violate the *Status Quo* and infringe the legal rights of the owners of the pavement, the Abu Midian Wakf.”²² The innovations included five petrol lamps (instead of the customary two), a number of mats placed on the ground at the southern end of the Wall, a large “tabernacle” (instead of the customary small stand to hold the Torah), and a screen to divide men and women.

Keith-Roach and Duff went to the Wall and spoke to the Jewish Beadle, telling him the screen had to be removed by

early the next morning, but that the other items could remain until the end of *Yom Kippur*. Keith-Roach warned the Beadle that if the screen were not removed by early morning, then Duff would do so.

The next morning, however, the screen was still at the Wall. Duff waited until 9:20 for the Beadle to remove it, but the Beadle was reluctant to do so during *Yom Kippur*. Duff asked the worshippers to remove the screen, but they refused due to the holiness of the day. Duff then ordered the police under his command to remove the screen. According to Duff’s report, as the police were removing the screen “a certain amount of opposition was shown particularly by the women and one Rabbi who clung on to the screen. As he [the Rabbi] refused to release it, he was carried bodily with the screen outside.”²³ Another officer reported “some women hung on to the end of the screen and would not release it.”²⁴

The incident provoked an immediate protest from Jewish leaders in Palestine and abroad.²⁵ Muslim reaction to the incident was equally strong. In November 1928 the Mufti launched the so-called “*Buraq* Campaign” to galvanize Muslim religious and nationalist sentiment around the Wall.

3.3. The 1928 British White Paper

On 19 November 1928 the British Government issued a White Paper addressing the *Yom Kippur* incident and announcing its policy regarding the Wall. The White Paper repeated the common formulation that although Wall and the pavement in front of the Wall were legally “the absolute property of the Muslim community... the Jewish community have established an undoubted right of access to the pavement for the purposes of their devotions... but may bring to the Wall only those appurtenances of worship which were permitted under the Turkish regime.”²⁶ The White Paper criticized the Jews for provoking the Muslims by making “innovations” to their prior practices on *Yom Kippur* without the prior agreement of the Muslims and the Mandatory Government.

The Muslims received the White Paper favorably, but their reaction quickly turned to disappointment with the British for not enforcing it. On 27 December 1928, the Mufti wrote to the Deputy District Commissioner for Jerusalem, urging the Government to enforce the White Paper “as early as possible” so that “the *status quo* in force during the Turkish rule should be observed.”²⁷

As succeeding months went by, the Muslims grew increasingly frustrated with the British for failing to enforce the White Paper.

19 Storrs Memo, *op. cit.* at para. 10.

20 Cust, L. G. A. (1927). Jerusalem, The Status Quo, Its Origin and History Till the Present Time. Jerusalem: High Commission. Chancellor Papers, MSS. Brit. Emp. S.284, Box 24/2. Bodleian Libraries, Oxford.

21 *Id.*

22 CO 733/160/16, E. Keith-Roach, Deputy District Commissioner, Jerusalem, Report (Confidential) No. 15853/28 to Chief Secretary at 1-2, para. 2 (25 Sept. 1928).

23 CO 733/160/16, Roach, *op. cit.* at 2-3, paras. 6-8.

24 Roach, *op. cit.* at 3, para. 9.

25 *Id.* at 3-5, paras. 9-11.

26 Cmd. 3229, *The Western or Wailing Wall at Jerusalem* at 3-4 (1928). The parties could not agree on whether the word “permitted” meant *legally* authorized, or authorized in everyday practice. Memorandum on the Immediate Causes of the Disturbances in Palestine Beginning on the 23d August, 1929 at 21, Chancellor Papers, MSS. Brit. Emp. S. 284, Bodleian Libraries, Oxford Box 12/6.

27 Cmd. 3530, *Report of the Commission on the Palestine Disturbances of August, 1929* at 34 (1930) (hereafter “Shaw Commission Report”).

3.4. August 1929 Riots

By early August 1929, tensions in Palestine regarding the Wailing Wall had grown to a fever pitch, fueled by the anger and resentment that had been building on both sides since the *Yom Kippur* 1928 incident. Both the Arab and Jewish press had been agitating on behalf of their constituencies for months. Both sides had flooded the High Commissioner's office with Petitions complaining about each other. Both sides had formed organizations for "the defense" of the Wall.

The week beginning Sunday, 11 August 1929 contained two important religious days. The Jewish fast day of *Tisha b'Av*, commemorating the destruction of the ancient Temples, was Thursday, 15 August. The prophet Mohamed's birthday was to be celebrated on the Muslim Sabbath, Friday, 16 August.

A Jewish march to the Wall on 15 August provoked a violent Muslim counter-demonstration the next day. Tensions reached a boiling point over the next few days, culminating in riots in Jerusalem on 23 August and the massacre of 60 Jews in Hebron on 29 August.²⁸ Over the next few days spasmodic violence spread throughout the country. The situation largely subsided by 30 August. A total of 133 Jews and 87 Arabs had been killed.

3.5. British Attempts to Reinforce the Status Quo

On 1 October 1929 the Palestine Government issued a set of "Instructions regarding Use of Wailing Wall" to the Palestine Police, providing the Jews would have access to the Wailing Wall "for the purposes of prayer and devotion at all times."²⁹ The Instructions were intended to be temporary and without prejudice to the ultimate rights and claims of either the Muslims or the Jews regarding the Wall and the pavement.

The Instructions allowed the Jews to bring a portable stand containing ritual lamps, a portable washbasin and a portable water container. On the Sabbath and Holidays the Jews would also be allowed to place a stand at the northern end of the Wall for prayer books, two tables, one for the Ark containing the Torah, and another upon which to lay the Torah for reading. On *Rosh Hashana* and *Yom Kippur*, each Jewish worshipper would be permitted to bring a prayer mat, to be placed close enough to the Wall to avoid obstructing passage along the pavement.

The Instructions prohibited the Jews from bringing benches, stools, chairs or screens to the Wall at any time. The Instructions required the Muslims to keep the new door at the southern end of the Wall locked during the Jewish Sabbath and Holy Days. Finally, the Instructions banned the driving of animals along the pavement in front of the Wall during the mornings of the Sabbath and Holy Days. On *Yom Kippur* animals could only be driven along the pavement between dawn and 7:00am.³⁰

Although not mentioned specifically in the Instructions, the British later prohibited the Jews from sounding the *Shofar* at the Wall on *Yom Kippur* after receiving a complaint from the Supreme Muslim Council regarding the use of the *Shofar* at the Wall on the second day of *Rosh Hashana*. According to the complaint a Jew "sounded yesterday at the *Buraq* a bugle-horn which they usually sound during their prayers at synagogues... While Jews were prohibited under all circumstances from raising their voices in the *Buraq*, how dare they use and sound a bugle-horn."³¹ The *Shofar* ban obviously upset the Jews, who sent a formal letter of protest to the High Commissioner on 13 October 1929.³²

The Muslims also objected to the Instructions [9]. The Muslims argued, in much the same way they do today regarding the Temple Mount, that under the *status quo* the Jews enjoyed, solely as a favor granted by the Muslims that could be withdrawn at any time, merely the right to make a "simple visit and devoid of any ceremony, article or voice."³³

The British High Commissioner in Palestine, Sir John Chancellor, grew so frustrated with the constant pressures of dealing with Muslim-Jewish conflict regarding the Wailing Wall that he confided to his son in a 24 October 1929 letter, "I am so tired and disgusted with this country & everything connected with it that I only want to leave it as soon as can do so without failing in my duty."³⁴

4. Formation of the Lofgren Commission

High Commissioner Chancellor began urging the British Government in October 1929 to appoint as soon as possible an "authoritative body... commanding general confidence both in Palestine and abroad in respect of its composition and procedure" to adjudicate the rights and claims of the Jews and Muslims to the Wailing Wall and the surrounding area.³⁵

The British Government therefore asked the Permanent Mandates Commission (PMC) on 18 November 1929 to authorize the formation of a "Holy Places" Special Commission. On 14 January 1930 the Council of the League of Nations adopted a British-proposed Resolution³⁶ authorizing the appointment of a three-member commission, on condition that none of the members be British.³⁷

The Muslims initially opposed the formation of a special

Transcript and Exhibits") (Letter from Chief Secretary Mills to Chief Rabbi Kook, 1 Oct. 1929).

31 CO 733/163/5, Letter from Muhammad Amin, President, Supreme Moslem Council to Chief Secretary, 7 Oct. 1929.

32 CO 733/163/5, Letter from Chief Rabbi Kook et al. to High Commissioner (13 Oct. 1928).

33 Shaw Transcript and Exhibits, *op. cit.*, Vol. III, Exh. 109 (Letter from Society for the Guardianship of the Mosque *al-Aksa* and the Moslem Holy Places to Chief Rabbi Kook, 14 Nov. 1929).

34 Chancellor Papers, *op. cit.*, Box 16/2, Letter from Chancellor to his son Christopher (24 Oct. 1929).

35 CO 733/163/5, Telegram Nos. 252 (15 Oct. 1929) and 264 (19 Oct. 1929) from the High Commissioner to the Secretary of State for the Colonies.

36 CO 733/179/4, C.41.1930. VI, British Proposal to League of Nations (12 Jan. 1930).

37 *Id.*, C.70.1930. VI, Resolution Adopted by the Council of the League of Nations (14 Jan. 1930).

28 Shaw Commission Report, *op. cit.* at 64..

29 CO 733/163/5 (1 Oct. 1929).

30 Col. 48, Palestine Commission on the Disturbances of August, 1929, Evidence Heard by the Commission in Open Sitings and a Selection from the Exhibits Put in During those Sitings, Vol. III, Exh. 41 at 1047-48 (1930) (hereafter "Shaw

commission to render judgment on the relative rights of Muslims and Jews regarding the Wailing Wall. The Muslims claimed absolute ownership of the Wall and the pavement in front of the Wall, and thus objected to any legal proceeding that might find differently. The Muslims argued any such Commission would lack jurisdiction over the Wailing Wall for two reasons: first, the Palestinian Arabs did not accept the Palestine Mandate as legitimate; and second, only a Muslim Court applying *Sharia* Law could adjudicate matters pertaining to the Wall and the pavement, both of which had been dedicated as *Wakfs* centuries earlier.³⁸

Nevertheless, the Muslims eventually decided to participate, albeit under protest. The Mufti worked behind the scenes to persuade representatives from several Muslim countries to attend and testify at the Lofgren Commission hearings [10].

The British Government consulted with the Arab and Jewish sides as it considered who to appoint to the special commission. The Mufti met with High Commissioner Chancellor and “expressed the hope that no French or Italians would be appointed to the Commission,” as “these nations had interests in Palestine and would intrigue.”³⁹ The Mufti also objected to French or Italian representation on the special commission because the “Jews would bribe” them.⁴⁰ The Mufti said he preferred commissioners from countries with no interests in Palestine, “such as Scandinavians.”⁴¹ The Colonial Office also noted potential Jewish objections to anyone from the Roman Catholic powers as potentially anti-Zionist.

The British ultimately acceded to the Mufti’s wishes and appointed the former Swedish Foreign Minister and Minister of Justice, Eliel Lofgren, as Chair of the Commission. The British appointed two other Commissioners, Charles Barde, the Vice President of the Swiss Court of Appeal at Geneva and President of the Austro-Romanian Mixed Arbitration Tribunal, and C.J. Van Kempen, a member of the Dutch Parliament and formerly Governor of the East Coast of Sumatra in the Dutch East Indies. The Council of the League approved the composition of the special commission on 15 May 1930.⁴²

5. The Trial

5.1. Opening Session and Jewish Opening Statement

The Lofgren Commission convened in Jerusalem on 23 June 1930 for its opening session, and decided to conduct the proceedings as a courtroom trial:

“What is expected of us is to make an impartial and, if possible, complete inquiry into the questions in connection with the so-called Wailing Wall, and, as a result of that inquiry, to give a verdict exclusively based on our honest understanding of law and equity in the case... As the

Commission has the duty, not only to investigate, but to give a verdict in the matter, it seems to be in consistency with justice and with the interests of the Parties to apply as far as possible the ordinary judicial methods.... Thus, the Counsel for the Parties were to call and examine witnesses, to procure and lay before the Commission relevant expert and documentary evidence, to cross-examine the witnesses called by the other Party and to plead in the case whenever they deemed it expedient.”⁴³

After a further discussion of procedure, the Commission decided the Jewish side would be considered the plaintiff and would present its case first. The Commission designated the Muslim side as the defendant.

The substantive portion of the trial began on 25 June 1930, with Dr. Mordechai Eliash, one of the most famous lawyers in Jerusalem, delivering the opening statement for the Jewish side [11]. The Arab lawyers chose not to make a formal opening statement.

Dr. Eliash began by discussing Articles 13 through 16 of the Palestine Mandate. Dr. Eliash argued those provisions required Britain to do three things regarding the Holy Places: first, to preserve the existing rights of the various religious communities; second, to provide free access to the Holy Places; and third, to guarantee free exercise of worship.

Dr. Eliash then noted the Muslim side had made arguments based on (i) their claimed property rights to the Wall and the pavement; (ii) their rejection of any special right of the Jews to access and prayer at the Wall; and (iii) their fear that granting the Jews any such rights would lead to the eventual Jewish takeover of the entire *Haram al Sharif*.⁴⁴

Regarding Muslim property rights, Dr. Eliash challenged the Moslem side to produce evidence establishing their property rights to the Wall and the pavement. Dr. Eliash argued the custom of Jewish prayer at the Wall predated by hundreds of years the establishment of the *Wakfs* in the vicinity of the Wall, and thus “an important question arises as regards the *Wakf*, and its power to annul existing Jewish rights of prayer and access.”⁴⁵

Dr. Eliash turned next to Muslim fears about Jewish designs on the *Haram*, insisting such fears were unfounded, as the Jews had repeatedly disavowed any such designs.⁴⁶

Dr. Eliash concluded his opening statement by discussing ownership of the Wall. This involved a difficult strategic question for the Jewish side. The Jews could have argued the Wall (perhaps not the pavement, but certainly the Wall) rightly belonged to them as the last surviving remnant of King Solomon’s Temple, notwithstanding the intervening Babylonian, Macedonian, Roman, Arab, Ottoman and British conquests. The Jews had maintained their connection to the Wall for centuries and never waived their rights or title in a

38 CO 733/179/5, Letter from Supreme Moslem Council to Secretary General, League of Nations (17 Feb. 1930).

39 CO 733/179/4, enclosure to note from Shuckburgh to Rendell (21 Mar. 1930).

40 *Id.*

41 *Id.*

42 CO 733/179/5, Telegram No. 42 from H. H. Consul (Geneva, 15 May 1930).

43 Lofgren Commission Report, *op. cit.* at 4-6.

44 Wailing Wall Commission, *Minutes of the Session at Jerusalem* (1930), King’s College London, Foyle Special Collections Library, Foreign and Commonwealth Office Historical Collection FOL. DS126 INT’ (hereafter “Lofgren Commission Transcript”) at 36.

45 *Id.* at 37.

46 *Id.* at 38-40.

legal sense. The Jews had inscribed Hebrew writing into the lower courses of the Wall, cleaned the Wall when it was defiled, and paid to repair the pavement in front of the Wall, all without Muslim objection. Why not use the opportunity of the formation of an International Commission, vested with the authority of the international community through the League of Nations, to try to obtain a verdict of *ownership* for the Jewish people?

But the Jewish side made no effort to persuade the Commission it *owned* either the Wall or the pavement, perhaps for fear of provoking a backlash among the Palestinian and global Muslim communities. Nevertheless, it was equally difficult for the Jews to admit Muslim ownership of the Wall.

Dr. Eliash put the argument this way:

“Now I come to the last point. The question of ownership of the Wall. That has been stated time after time in documents that the ownership of the Wall is vested in Moslem authority. *Let me say it quite openly and quite clearly that we have not come to discuss the question of ownership of that Wall.* We have come here to discuss the rights and claims of people to worship in a human and venerable way.”⁴⁷

5.2. Conflicting Witness Testimony

The vast majority of the proceedings before the Commission consisted of the testimony and cross-examination of witnesses for both sides regarding Jewish rights of access to the Wall, Jewish and Muslim repairs to the pavement, Jewish prayer practices and appurtenances at the Wall, and the alleged Muslim lack of affinity for the Wall, including alleged Muslim defilement of the Wall. Both sides relied on lay and expert testimony regarding these and other issues. The testimony was in conflict on nearly every point.

5.2.1. Jewish Right of Access

Sanctity of the Wall to Jews. Both sides called witnesses to testify regarding traditional Jewish rights of access to the Wall and the pavement. One Muslim witness, Sheikh Ismail Effendi Hamaz of the *Sharia* Court of Appeal, testified at length as to whether the Jews had obtained a right of servitude under *Sharia* Law for the pavement and the Wall area. Sheikh Hamaz testified that passing along a *public* way would not be considered as giving rise to a servitude. Passage along a *private* way, such as the pavement in front of the Wall, could give rise to a servitude, but only if the property owner (in this case, the *Wakf*) had formally granted such a right to the Jews and registered it with the *Sharia* court.⁴⁸ Hamaz also noted *Sharia* law prohibited non-Moslems from practicing their religion on *Wakf* property.⁴⁹

Dr. Eliash attempted to rebut this testimony by introducing documentary evidence and witness testimony demonstrating how Turkey, the former ruling Muslim power in Palestine, had long permitted the Jews rights of access to and prayer at the

Wall.⁵⁰

5.2.2. Benches and Chairs

Both sides called several witnesses to testify regarding the presence (or lack) of benches at the Wall before and after World War I. The Jewish witnesses testified benches had been placed at the Wall as early as the 1880s, and that after the war the Jews rented a small room from one of the Moghrabis to store the benches at night.⁵¹

The Muslim side called witnesses who denied there were ever any benches at the Wall. For example, Hassan Ghuneim, a former police official who served under the Turkish regime, denied seeing benches or chairs at the Wall.⁵²

5.2.3. Screen

The presence or absence of a screen, which had provoked so much controversy on *Yom Kippur* 1928, was also the subject of considerable and conflicting testimony from both sides. A longtime British resident of Palestine, Richard Hughes, had a hazy recollection of the Jews using a screen to separate men from women, “but that seemed a new thing, it was not the usual thing before the War.”⁵³ The Chief Rabbi of Jaffa, Ben Zion Uziel, testified a screen is required to partition men from women, and “the Service would not be exactly perfect without a screen.” The Rabbi also admitted, however, that “I would not say the Service would be incomplete” in the absence of a screen.⁵⁴

5.2.4. Torah

The Muslims argued the Jews had not customarily brought the Torah to the Wall, given that services at the Wall were not the same as in a synagogue. The Muslims vigorously objected that allowing the Jews any right to bring the Torah to the Wall would constitute a step toward converting the Wall into a synagogue, leading to the eventual creation of a new Temple on the site of the *Haram*. The Jews, on the other hand, argued the Torah was an essential component of their religious services at the Wall, and they had customarily brought the Torah to the Wall without objection from the Ottomans.⁵⁵

One Jewish witness, however, Rabbi Abraham Schorr, the Head of the Hassidic Religious Court of Jerusalem, seriously undermined the Jewish case when he admitted during cross-examination that the Torah had been brought to the Wall only “about eight to ten years ago. It may be that this practice had taken place before,” Rabbi Schorr recalled, “but I myself have not seen it.”⁵⁶ The lead counsel for the Muslim side,

47 *Id.* at 55 [emphasis added].

48 *Id.* at 778-83.

49 *Id.* at 717.

50 *See, e.g., id.* at 343 (cross-examination of Muzahim Amin Bey Bajaji).

51 *Id.* at 107-11, 127-30 (testimony of Zion Issacharoff); *see also id.* at 154-58 (testimony of Richard Hughes); *id.* at 336 (testimony of Mordechai Goldberg, “all along the back wall there were benches”).

52 *Id.* at 558; *see also id.* at 590 (testimony of Mohamed Kamel Aintabi – never saw a bench at the Wall); *id.* at 695 (testimony of Mikhail Hieronimos – never saw benches or chairs at the Wall).

53 Lofgren Commission Transcript. at 156 (testimony of Richard Hughes).

54 *Id.* at 224.

55 Lofgren Commission Transcript at 263 (testimony of Raphael ben Rahamin Meyuhass); *see also id.* at 110-12 (testimony of Zion Issacharoff); *id.* at 209-16 (testimony of Chief Rabbi Ben Zion Uziel of Jaffa).

56 *Id.* at 187.

Auni Bey Abdul Hadi, repeatedly referred to this admission throughout the remainder of the hearings and during his closing argument.

5.2.5. *Shofar*

The debate over whether blowing the *Shofar* at the Wall comprised part of the customary Jewish prayer practices was also hotly contested. The Sephardi Beadle, Raphael ben Rahamim Meyuhas, testified “there were always worshippers there, and they used to bring the Scroll of the Law and they used to blow the *Shofar*.”⁵⁷ Other Jewish witnesses were not as definitive, but still testified the *Shofar* would be blown at the Wall on *Rosh Hashanah* and *Yom Kippur*.⁵⁸

5.2.6. *Other Appurtenances*

Various Jewish witnesses testified about other appurtenances the Jews customarily brought to the Wall for prayer services, such as lamps, candles, a wash basin, prayer books, a small table for the Torah, and other items.⁵⁹ The Muslims called one of their own representatives, Jamal Hussein of the Palestine Arab Executive, to testify “[i]n no one single case did I see any bench, chair, table or partition or awning there, or anything else...”⁶⁰

5.2.7. “Prayer” v. “Devotion.”

The parties vigorously disputed whether the Jews had customarily engaged in actual “prayer” at the Wall. The Jewish side called several witnesses to describe their customary prayer practices at the Wall. Dr. Eliash also screened a short film for the Commission showing Jewish prayer at the Wall prior to World War I.⁶¹

The Muslim side spent considerable time arguing the Jews had never actually prayed at the Wall individually or in congregation, but instead merely made individual or group “devotional” visits to the Wall to lament and mourn the destruction of their lost civilization.⁶²

The Muslim side also called to the stand Sheikh Ismail Effendi Hafez of the *Sharia* Court of Appeal. Judge Hafez testified, “according to the *Sharia* Moslem Law, the Jews are prohibited to hold or perform any prayer at the *Buraq*...”⁶³

57 *Id.* at 262.

58 *See, e.g., id.* at 113 (Issacharoff); *id.* at 201, 216 (Rabbi Uziel states “the blowing of the *Shofar* on the Day of Atonement is the conclusion of the Service and it is essential,” but later admits he had not actually seen the *Shofar* at the Wall but had heard it blown from the area of the Wall).

59 *See id.* at 109 (Isaacharoff – prayer books); *id.* at 161 (Hughes – recalled prayer books but no other objects); *id.* at 201 (Rabbi Uziel – phylacteries, prayer shawls and other appurtenances necessary); *id.* at 265-66 (Meyuhas – Ark, Torah Scroll, table, water for washing, lantern, candles).

60 Lofgren Commission Transcript at 746.

61 *Id.* at 190-91, 225. The film can be accessed and viewed at <https://www.youtube.com/watch?v=T0zpbDGjHAE>, accessed 29 Aug. 2019. The footage showing the Wailing Wall begins at 18: 58.

62 *Id.* at 175; *see also id.* at 625-62 (testimony of Mordecai Lebanon regarding whether Ottoman permission for Jewish religious visits to Holy Places included the Wailing Wall).

63 *Id.* at 723-24; *see also id.* at 748 (testimony of Jamal Hussein, “I believe to the best of my knowledge that I never had the impression that the Jews actually pray at the Wailing Wall”); *id.* at 507 (testimony of Sheikh Mohamed al Ghuneim el Taftazani, “I have already told you that the Jews do not pray at that place”); *id.* at

5.2.8. *Pavement Repairs*

Dr. Eliash called 70 year-old Joseph (Yossel) Giva Goldsmith to testify regarding the re-paving of the area in front of the Wall in 1895. Goldsmith described how in the 1890s a sewage drain had been dug in the middle of the pavement area along the Wall. Two Rabbis protested to the Ottoman Mayor of Jerusalem, who ordered the work halted. The Jews then filed a petition seeking permission to re-pave the area in front of the Wall, which the Municipality granted. Goldsmith said he bought the paving stones in Bethlehem, and an Armenian whose name he could not recall performed the paving work.⁶⁴ One other Jewish witness corroborated Goldsmith’s testimony.⁶⁵

The Muslim side called several witnesses to rebut Goldsmith’s testimony. Two Arab stone dressers, Salim Salameh Iskafi and Jirgis Baud Daou, both testified the Jews did not pave the area in front of the Wall and did not bring any paving stones from Bethlehem.⁶⁶

5.2.9. *Sanctity of the Wall and Pavement to Muslims*

The Jewish side argued the concept of the *Buraq* as a holy place was relatively new in Islam, suggesting it may have been invented simply to create enhanced Moslem rights to interfere with Jewish prayer at the site. The Jewish side argued the Koran did not mention the Western Wall as the place where Mohamed had tethered his steed; indeed, the Koran says *nothing* about Mohamed tethering his steed anywhere.⁶⁷

In response, Judge Hafez testified the Western Wall was, in fact, the *same* place where Mohamed had tethered his horse, because that was where the Muslims had dedicated the Moghrabi *Wakf* and established the *Zawiyah*.⁶⁸ Other Muslim witnesses agreed. For example. Muzahim Amin Bey Bajaji, an Iraqi diplomat, testified Muslims regard the Wall as “very sacred.”⁶⁹ Salah al Din Bey Osman Beyham, Vice President of the Supreme Moslem Council of Beirut, testified the Wall was sacred to Muslims and that Jews had only prayed there for the past six or seven years.⁷⁰

5.2.10. *Alleged Defilement of the Wall*

Dr. Eliash also called witnesses to testify about alleged Muslim desecration of the Wall.⁷¹

The Muslim side called a Christian Arab tour guide, Hanna Daoud Yasmini to refute the allegations that the Muslims had defiled the Wall.⁷²

742 (testimony of Sheikh Ismail Effendi Hafaz, “I do not admit that the Jews held any prayer [at the Wall].”).

64 *Id.* at 68-102.

65 *Id.* at 236, 247 (testimony of Eliahu Mordecai Eisenstein).

66 *Id.* at 548 (Iskafi); *Id.* at 567 (Daou).

67 Adler memorandum, *op. cit.* at 68-75.

68 Lofgren Commission Transcript, *op. cit.* at 719-20.

69 *Id.* at 342.

70 *Id.* at 359, 363.

71 *Id.* at 114-15 (testimony of Zion Isaacharoff that Muslims built a lavatory next to the Wall and would sometimes spread donkey excrement on the Wall); *see also id.* at 458 (testimony of Abraham Jacob Brewer, during Passover 1922 “the southern end of the Wall for a few metres was besmirched with human excreta.”).

72 Lofgren Commission Transcript at 524-25.

6. Closing Arguments

6.1. Eliash Closing Argument

Dr. Eliash conceded in his closing argument that the Jews did not claim ownership of the Wailing Wall, a position unthinkable for the modern State of Israel to take:

“I have stated that the Jews have not come before this Commission to claim any right of ownership of the Wall itself. I have underlined it time and again that the sacredness of the Wall, the very reverence with which we pronounce its name, the sanctity with which we treat it, prevent us from using the term ownership.”⁷³

Dr. Eliash then discussed the legal impact of the establishment of *Wakfs* in the vicinity of the Wall and the pavement, arguing the creation of *Wakfs* did not legally divest the pre-existing, centuries long Jewish rights of access to and prayer at the Wall.⁷⁴

Dr. Eliash then discussed the customary Jewish practices at the Wall regarding benches, a screen, and bringing the Torah for services, reviewing the witness testimony supporting the Jewish position on all three points.⁷⁵ Dr. Eliash offered something of a compromise suggestion regarding benches, indicating the Jews would be willing to agree in writing “that the seating accommodation which has been provided for the Jews could not possibly create any right of ownership against the *Wakf*.”⁷⁶

Dr. Eliash concluded by restating the Jewish demands under Articles 13 and 15 of the Mandate: first, that the Jews be allowed free access to the Wall; and second, that they be allowed free exercise of worship at the Wall, without interruption or interference, meaning “truly free access.”⁷⁷

6.2. Zaki Pasha Closing Argument

Ahmed Zaki Pasha delivered the first closing argument for the Muslim side. Zaki rejected all Jewish claims or rights at the Wall:

“The Arabs are here for thirteen centuries, so do not turn against us and do not show ingratitude... [I]f your temple has been destroyed certainly it is not our fault. We Moslems came to the country six and a half centuries after its complete destruction. We have conquered the country and are therefore the masters of the country... Since the Crusaders conquered the country you have been in the diaspora all over the world and I cannot understand what you have to claim now.”⁷⁸

6.3. Mohamed Ali Pasha Closing Argument

Ali Pasha accused the Jews of harboring designs on the *Haram*, arguing “this Zionism has as one of its fundamental aims to take possession of the Mosque of Omar and its whole area in order to construct on that site a Jewish temple as was

the case thousands of years ago in the times of King Solomon.”⁷⁹

Ali Pasha then reiterated both the Wall and the pavement were sacred to Muslims, arguing “[t]he sanctity of the pavement is derived from the fact that it is the place where the Burak of the Prophet ascended at the end of his celestial journey on which he passed to the same place in the wall of the mosque of Omar where he tied his Burak.”⁸⁰ Ali Pasha also slammed the claim of Jewish religious affinity for the Wall as the Jewish side’s “weakest point.”

6.4. Auni Bey Abdul Hadi Closing Argument

Auni Bey began by challenging Jewish religious affinity for the Wall, suggesting it was merely a place for curiosity seekers which the Zionists were using for propaganda purposes.⁸¹ He further argued the Jews had failed to establish the Wall was sacred to them as a religious shrine and had failed to establish any preexisting rights of access or prayer. He reiterated Ali Pasha’s argument that the Jewish side had failed to prove the 1912 order banning benches had been rescinded.⁸² He noted the Mandatory Government forced the Jews to remove the screen they had placed at the Wall in 1928, leading to the issuance of the White Paper.

7. Closing Statement of Chairman Lofgren

Following the closing arguments of both sides, Chairman Lofgren made a brief statement, expressing hope the parties might be able to “arrive at a friendly settlement in the spirit of mutual understanding and respect,” without a verdict from the Commission.⁸³ Lofgren said the Commission would therefore allow the parties six weeks (until 1 September 1930) to attempt to meet and confer and submit proposals to the Commission to settle the matter. In the meantime, the High Commissioner’s 1 October 1929 instructions were to remain in effect, and “no innovations should be made or actions taken on behalf of the parties of a nature to alter the present conditions at the Wall.”⁸⁴

8. Settlement Negotiations

During and after the hearings the Commissioners attempted to mediate the dispute, holding several meetings with the Muslim and Jewish sides, both jointly and separately.⁸⁵ Those efforts were not successful, but following the Commission’s

73 *Id.* at 905-06.

74 *Id.* at 919-20.

75 *Id.* at 934-59.

76 *Id.* at 948.

77 *Id.* at 968.

78 *Id.* at 1112-13.

79 *Id.* at 1116.

80 *Id.* at 1123.

81 *Id.* at 1141-42.

82 *Id.* at 1150-52.

83 *Id.* at 1178.

84 *Id.*

85 Lofgren Commission Report, *op. cit.* at 7; “Arabs Won’t Yield on Wailing Wall,” *see also New York Times*, 19 July 1930 at 6 (“a five-hour secret meeting between members of the Wailing Wall Commission and Jewish and Moslem representatives broke down today through refusal of the Moslems to concede the Jews more than the mere right to visit the Wall.”).

departure from Palestine the Mandatory Government continued the mediation effort.⁸⁶

Spenser Davis, the Treasurer of the Palestine government, together with Palestine Attorney General Norman Bentwich, engaged with both the Jewish and Muslim sides in “a sustained effort to bring about a settlement of the Wall trouble” [12]. Davis’ patient and even-handed efforts ended several weeks later in failure. The Mufti told Davis on 5 October 1930 that he would rather suffer an unfavorable verdict imposed on the Muslims than agreeing to a settlement contrary to his convictions. In reply to a statement from High Commissioner Chancellor urging him to seize the chance to appear statesmanlike and agree to a negotiated settlement, the Mufti said “he was not a statesman but a man of religion.”⁸⁷

Chancellor wrote to his son about the 5 October meeting with the Mufti and other Muslim leaders. Chancellor contrasted the Mufti’s refusal to settle with the concessions the Jews had made:

“We sat and talked for two hours; I was able to persuade them all to agree except the Mufti, who apparently does not want a settlement at all, & wishes to keep the Wailing Wall question as an open sore to be able to use it as a means of stirring up trouble whenever he thinks fit to do so. The Jews have behaved well about the negotiations, & have made concessions to the Moslem point of view which I should never have expected them to make. They have disclaimed ownership in the Wall and have consented to restrictions in the use of appurtenances of worship at the Wall – one of the things which until recently they have refused to concede. They have in fact conceded almost every point that the Moslems had been pressing for during the past ear. The Mufti says that under the *Sharia* (Moslem Law) the Moslems have no power to grant unbelievers rights to pray on *Wakf* property.”⁸⁸

On 10 October Davis concluded the Mufti did not want to settle the dispute, as “[i]t is nevertheless apparent that in keeping alive the Wailing Wall controversy the [Mufti] retains politically in his hands a weapon that may be employed at his will.”⁸⁹ Chancellor formally notified the Colonial Office on 11 October the negotiations had reached an impasse and failed to produce a settlement.⁹⁰

9. The Lofgren Commission Report, Verdict and Reactions

The Lofgren Commission released its report and verdict to the Mandatory Government at the end of 1930. Lofgren

delivered the Report to the British Legation in Stockholm.⁹¹

9.1. The Report and Verdict

The Report contained an historical summary, a review of the Parties’ claims and the evidence they submitted, and an analysis and formal judicial verdict as to those claims. The Commission did not specify which law it applied, but referenced *Sharia* law, Ottoman law and the text of the Mandate in its ruling.

The verdict largely favored the Muslim side, although neither side was happy with the outcome. The verdict limited Jewish rights to the Wall and pavement solely to those longstanding practices prevailing under Ottoman rule. Lofgren himself admitted in a 9 December 1930 discussion with H.W. Kennard, a British diplomat based in Stockholm, that “the Moslem claims which had been more exaggerated than those of the Jews, had received as favourable consideration as possible.”⁹²

The Commission first rendered judgment regarding the ownership of the Wall and the pavement:

“The ownership of the Wall, as well as the possession of it and those parts of its surroundings that are here in question, accrues to the Moslems. The Wall itself as being an integral part of the *Haram-esh-Sharif* area is Moslem property... the Pavement in front of the Wall, where the Jews perform their devotions, is also Moslem property.”⁹³

The Commission also determined the area encompassing the pavement was designated a *Wakf* in approximately 1193 A.D. Approximately 127 years later Abu Midian had designated the dwellings comprising the Moghrabi Quarter as *Wakf*. The Commission accepted the testimony of the Muslim witnesses that the Wall itself was part of a *Wakf* dedicated for religious purposes.⁹⁴ The Commission also found the pavement to be of the same category as the Moghrabi *Wakf*, because “from the Moslem point of view the Pavement is chiefly looked upon as a passage existing for the benefit of the [Moroccan] inhabitants.”⁹⁵

The Commission concluded, however, that the pavement was *not* sacred to the Moslems, because the pavement itself did not bear any direct connection to the Muslim belief regarding the place where Mohamed had tethered his steed.⁹⁶

As to the Wall, the Commission found it was indeed sacred to the Muslims because it bore a closer physical relationship to the Moslem beliefs regarding Mohamed’s celestial journey with his steed. But the Commission made clear this finding did not preclude the sanctity of the Wall to the Jews, and it found the Wall was sacred to the Jews as well.⁹⁷

Moreover, the Commission found the Wall was used *solely* by the Jews as a religious site. Therefore, the Commission

86 Lofgren Commission Report, *op. cit.* at 7.

87 CO 733/179/7, Notes of Interview with High Commissioner at 4 (5 Oct. 1930).

88 Chancellor Papers, *op. cit.*, Box 16/2, Letter from Chancellor to his son Christopher (5 Oct. 1930). Chancellor met with Kisch the same day (5 Oct.) and thanked him for the “conciliatory attitude the Jews had taken up in regard to the Wailing Wall negotiations & the generous concessions they had made...” *Id.*

89 CO 733/179/7, Note from Davis to Luke (10 Oct. 1930).

90 CO 733/179/7, Despatch (Confidential) No. 3723/30 from High Commissioner for Palestine to Secretary of State for the Colonies (11 Oct. 1930).

91 CO 733/179/9, Letter from Lofgren to H.W. Kennard, British Legation Stockholm (9 Dec. 1930).

92 *Id.*, despatch E 6745/101/65 from Kennard to Foreign Office (10 Dec. 1930).

93 Lofgren Commission Report, *op. cit.* at 39-40.

94 *Id.* at 40.

95 *Id.* at 41.

96 *Id.*

97 *Id.* at 42.

held “in support of the claim of the Jews to free access to the place, there does exist a practice constituting a right *ab antiquo*.”⁹⁸ The Commission further noted that “[e]ven if no special statute can be adduced in support of the fact, yet it can hardly be denied that in Palestine established rights and prevalent usage, more especially with regard to religious matters, have come very generally to recognize the principle that one party may have a limited right in the property of another.”⁹⁹

The Commission found the prior Ottoman decrees supported this view, as those decrees all acknowledged the longstanding practice of the Jews to visit the Wall for prayer, even as they prevented the Jews from expanding their rights by bringing chairs, benches, and other appurtenances.¹⁰⁰

The Commission therefore found the Wall was “a religious site, sacred to the Jews.”¹⁰¹ But the Commission, well aware of the Muslim sensitivity regarding the term “prayer,” held only that the Jews had the right to access the Wall “for certain devotional purposes.”¹⁰²

The Commission next determined exactly what that right entailed.

The Commission considered and largely rejected the Jewish argument that Jewish rights of free exercise of worship under Articles 13, 15 and 16 of the Mandate were broader than pre-existing practices during Ottoman rule:

“As regards the terms of the Mandate it is true that in Articles 13, 15 and 16 the principle of religious liberty is proclaimed and that Article 13 especially provides for ‘free exercise of worship’ for all concerned. But from this general rule the conclusion cannot be reasonably drawn that the partisans of any special confession should have the right to exercise their worship in all places without any consideration to the rights of others. If that were so then the whole structure of the *status quo* in the Holy Places and other religious sites would break down.”¹⁰³

The Commission therefore concluded the “established custom,” which it defined as “longstanding usage,” provided the proper basis for defining Jewish rights at the Wall.¹⁰⁴ This meant, according to the Commission, that “no sanction should be accorded the bringing of any object to the place other than those that were not objected to prior to the War but were tolerated as being established by time-honoured custom.”¹⁰⁵

On that basis the Commission, largely following the Mandatory Government’s 1 October 1929 provisional Instructions, banned the Jews from placing on the pavement in front of the Wall any benches, chairs or tents for the convenience of the worshippers or otherwise; any screens or curtains either for the purpose of separating men from women or for any other purpose; and any carpets or matings except

on *Rosh Hashana* and *Yom Kippur*.¹⁰⁶

The Commission, however, also ruled the Jews *would* be allowed to bring to the Wall a cabinet or ark containing the Torah and a stand or table to place the Torah for reading on *Rosh Hashana* and *Yom Kippur*, on other special holy days when the Torah would usually be brought to the Wall, and for special services at other times, but only when proclaimed by the Chief Rabbis of Jerusalem and only upon prior notice to the Mandatory authorities.¹⁰⁷ The Commission also ruled the Torah could not be brought to the Wall on “ordinary Sabbaths” because there was insufficient evidence showing a practice of sufficiently long-standing in that regard.¹⁰⁸

The Commission quickly listed the remaining elements of its verdict. It permitted the Jews to bring to the Wall a stand containing ritual lamps, a portable wash-basin and water container on a stand, and a stand containing prayer books during the Sabbath. The Commission, however, banned the Jews from blowing the *Shofar* at the Wall at any time, including *Rosh Hashana* and *Yom Kippur*.¹⁰⁹

The Commission also imposed certain limitations on the Muslims, banning the *Zikr* ceremony during the usual hours of Jewish worship, banning the driving of animals along the pavement at certain hours, requiring the new door at the southern end of the pavement be closed on the Jewish Sabbath and Holy Days, and ordering the Muslims to refrain from building activity on or near the Wall that would encroach the pavement area, inhibit Jewish access to the Wall, “or involve any disturbance to the Jews that is avoidable during their devotional visits to the place near the Wall.”¹¹⁰

The Commission further banned political speeches and demonstrations at the Wall, banned anyone from making engravings on the Wall, required the Muslims to keep the pavement clean, and granted sole authority to the Palestine Government for making repairs at the Wall, after consultation with Muslim and Jewish religious leaders.¹¹¹

Finally, the Commission made clear that in granting certain rights to the Jews, “the provisions of this present Verdict... shall under no circumstances be considered as, or have the effect of, establishing for them any sort of proprietary right to the Wall or to the adjacent Pavement.”¹¹²

9.2. Reactions to the Verdict

Neither side was happy with the verdict, but their reactions were fairly muted. As High Commissioner Chancellor reported via cable to the Colonial Secretary, Lord Passfield, several days following the publication of the Report:

“Majority of Jewish community have received report of Wailing Wall Commission quietly but extreme orthodox Party and revisionists are displeased with it. Moslems are dissatisfied with Report especially with regard to prohibition

98 *Id.* at 43.

99 *Id.* at 44.

100 *Id.* at 45.

101 *Id.* at 46.

102 *Id.*

103 *Id.* at 47.

104 *Id.*

105 *Id.* at 53.

106 *Id.* at 53, 56.

107 *Id.* at 54.

108 *Id.* at 55.

109 *Id.* at 56.

110 *Id.* at 57.

111 *Id.* at 59.

112 *Id.*

of *Zikr*, obligation to consult Rabbinical Council before repairs to Wall are undertaken and reference to *Haram* area in connection with prohibition to construct or demolish buildings near the Wailing Wall.”¹¹³

The *Times of London* characterized the Report as a victory for the Muslims and urged them to accept the Commission’s verdict.¹¹⁴ Nevertheless, the Muslims sent a telegram to the Colonial Office several days later protesting the verdict, proclaiming “Verdict Wailing Wall Commission converting Holy *Burak* open air synagogue granting Jews unprecedented concessions obvious trespass Moslem rights *violating Sharia Law*...”¹¹⁵

The Jewish side took a different approach, saying publicly the Commission’s findings “do not satisfy completely the Jewish aspirations, and there is therefore no reason to rejoice.”¹¹⁶ Nevertheless, the Jews acknowledged that “[s]ince the verdict... does not allow of any appeal, the Jewish side accepts it, although the prohibition of the use of the Scrolls of the Law at the Wall on the Sabbath is very disappointing.”¹¹⁷

9.3. Implementation and Enforcement of the Verdict

The Colonial Office prepared an Order-in-Council to implement and enforce the findings of the Lofgren Commission Report.¹¹⁸ The Order codified the Lofgren Commission’s verdict and vested jurisdiction to the district court of Palestine to hear cases involving violations of the Order.¹¹⁹ The High Commissioner was granted authority to issue regulations implementing the various provisions of the Order.¹²⁰

The first big test of the new Order-in-Council occurred during the *Tisha b’Av* observances beginning at sundown on 22 July 1931, six weeks after the issuance of the Lofgren verdict and the Order. The Jews asked for permission to carry candles to the Wall to assist in reading their prayers, as the lighting was poor. The Mandatory Government refused the request, as “the use of candles or tapers at the Wall had not previously been permitted and... no exception could be made.”¹²¹

The Chief Rabbinate submitted a formal protest to the Deputy District Commissioner, but no action was taken. When

the observances began after sundown on 22 July, the worshippers read their prayers without candles or extra lighting, but no incidents were reported. The next day “[e]xceptionally large crowds visited the Wall,” but the Muslims and Jews avoided each other and no incidents were reported. The Acting Deputy District Commissioner seemed to breathe a sigh of relief when he reported “[n]o instances of Moslem provocation took place and the whole of the proceedings passed off in an exceptionally orderly manner.”¹²²

10. Conclusion

The Lofgren Commission Report and Verdict satisfied the British desire for a “final settlement” of the Wailing Wall dispute. Neither the Muslim nor Jewish sides were happy with outcome, but both seemed to accept it.

Despite occasional subsequent disputes involving the Wall, the Lofgren Report and verdict achieved, “with surprising ease,” a measure of stability for the Wailing Wall and the surrounding area [13]. Both sides were given the opportunity to present their cases to three neutral judges from countries with no religious or political stake in the outcome. Peace, for the time being, had been restored to the Wall.

One observer, writing in 1959, hailed the Lofgren Commission, saying the Wailing Wall “was never afterwards to be a serious cause of trouble” [14]. Another more recent assessment asked whether “the commission’s outcome as a court verdict solve[d] the problem in an effective way,” and concluded “the answer is yes” [15]. Indeed, only one criminal prosecution seems to have occurred in the years following the Lofgren Commission’s verdict, when a young Jewish man was charged in 1946 with illegally blowing the *Shofar* at the Wall, but the charges were dismissed after the prosecution failed to prove in court that the defendant was in fact a Jew [16].

The Lofgren Commission’s modest success could be viewed as a template for how the law might play a role in helping resolve today’s disputes regarding the extent of Jewish and Muslim rights atop the Temple Mount (excluding the Wailing Wall). A neutral tribunal (assuming one could be formed, perhaps comprised of Hindu and Buddhist judges) could hear evidence from both sides regarding their respective historical and religious connections to the site and their assertions of various rights and claims. The Jewish side would have to reconcile its majority view that Jews should not set foot, much less pray atop the Temple Mount until the redemption with its minority view that both visitation and prayer are permitted. The Muslim side would have to defend its position that no one other than Muslims should be permitted to pray at the site, despite the site’s importance to Jews and other non-Muslims.

After receiving evidence from both sides, the neutral tribunal would need to define and articulate the contours of the modern-day *Status Quo* atop the Temple Mount. The neutral

113 CO 733/195/5, Paraphrase Telegram No. 157 from High Commissioner to the Secretary of State for the Colonies (16 June 1931).

114 *Times of London*, 9 July 1931 at 15 (“But before the Moslems oppose the verdict, they may usefully reflect that whatever their views as to the competence of the Commission they have in essentials won their case”).

115 CO 733/195/5, Telegram from President Secretary Wahide Elkahidi Matial Mogannam to the Secretary of State for the Colonies (22 June 1931).

116 *Jewish Daily Bulletin*, 10 June 1931 at 1.

117 *Id.*

118 CO 733/195/6, Memorandum by the Acting Attorney General on the Draft Palestine (Western or Wailing Wall) Order-in-Council at 1 (21 Apr. 1931).

119 Order-in-Council, para. 4 (2) (19 May 1931).

120 *Id.*, paras. 2-4.

121 CO 733/195/4, Despatch No. 732 from High Commissioner Chancellor to Secretary of State for the Colonies Lord Passfield (1 Aug. 1931), enclosing Memorandum from G. Sulman, Acting Deputy District Commissioner to Chief Secretary (24 July 1931).

122 *Id.*

tribunal would very likely reaffirm the parties' longstanding custom and practice since 1967 and uphold the administrative role of the Jordanian *Wakf* Department and the security role of the Israeli government. But the neutral tribunal would also need to define clearly and unambiguously the specific rights and responsibilities of Israel, Jordan and the Palestinian Authority regarding the Temple Mount, including visitation rights for non-Muslims (whether Jewish or otherwise); prayer rights for Muslims; rules for ensuring the sanctity and peace of the area atop the Mount; and rules of conduct for those visiting and praying at the site, including banning visitors and worshippers from bringing weapons and engaging in violence at the site.

Compliance with the neutral tribunal's verdict would be voluntary. The tribunal would lack power to enforce the verdict against the will of any of the parties. But a well-reasoned verdict rendered by a truly neutral tribunal following a fair trial would carry significant moral and persuasive weight with the international community, which might in turn convince the parties to comply and bring some measure of peace and stability to the world's most volatile religious and political site. If the Lofgren trial could restore calm to the Wailing Wall after 1930, then why not try a similar approach today for the area atop the Temple Mount?

References

- [1] International Crisis Group (2015). *The Status of the Status Quo at Jerusalem's Holy Esplanade*. Palestine-Israel Journal of Politics, Economics, and Culture, 20/21 (4/1): 175-76.
- [2] Lapidoth, R. & Treger, T. (2017). *The Temple Mount: Israel's Commitment to Preserve the Status Quo*. Israel Journal of Foreign Affairs, 11 (1): 15-24.
- [3] Zalzburg, O. (2020). *The Trump Plan Threatens the Status Quo at the Temple Mount/al-Haram al-Sharif*. Palestine-Israel Journal of Politics, Economics & Culture 25 (1/2): 127-131.
- [4] Medad, Y. (2020). *The Temple Mount and the Status Quo Revisited*. Israel Journal of Foreign Affairs, 14 (3): 399-415.
- [5] Report of the Commission Appointed by His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland, with the Approval of the Council of the League of Nations, to Determine the Rights and Claims of Moslems and Jews in connection with the Western or Wailing Wall at Jerusalem, 58-9096 (Dec. 1930).
- [6] Porath, Y. (1974). *The Emergence of the Palestinian-Arab National Movement, 1918-1929*. London and Portland: Frank Cass.
- [7] Cohen, H. (2015). *Year Zero of the Arab Israeli Conflict: 1929*. Detroit: Wayne State University Press.
- [8] Priestland, J. (ed.). (2002). *Records of Jerusalem 1917-1971*. Cambridge: Cambridge University Press, Archive Editions.
- [9] Lundsten, M. E. (1978). *Wall Politics: Zionist and Palestinian Strategies in Jerusalem, 1928*. Journal of Palestine Studies 8 (1): 3-27.
- [10] Mattar, P. (1983). *The Role of the Mufti of Jerusalem in the Political Struggle over the Western Wall, 1928-29*. Middle East Studies 19 (1): 104-118.
- [11] Lahav, P. (1997). *Judgment in Jerusalem: Chief Justice Simon Agranat and the Zionist Century*. Berkeley: University of California Press.
- [12] Bentwich, N. (1932). *England in Palestine*. London: Kegan Paul.
- [13] Townshend, C. (2002). *Going to the Wall: The Failure of British Rule in Palestine, 1928-31*. Journal of Imperial and Commonwealth History 30 (2): 25-52.
- [14] Marlowe, J. (1959). *The Seat of Pilate: An Account of The Palestine Mandate*. London: Cresset Press.
- [15] Reiter, Y. (2017). *Contested Holy Places in Israel-Palestine: Sharing and Conflict Resolution*. Abingdon, Oxon and New York: Routledge.
- [16] *Attorney General v. Karaewany*, Criminal Case No. 192/46, District Court of Jerusalem (Judgment of Acquittal, 18 Nov. 1946).