

# Biblical Archaeology Review

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**ON THE COVER** This two-foot-high, square, hollow cult stand from late 10th-century B.C.E. Taanach contains two depictions of the goddess Asherah. The first is as a nude woman in the middle of the left bottom register. She appears again in the third register from the bottom, this time as a branching tree flanked by ibexes. Both this and the bottom register feature lions on the outside column, an association seen in other depictions of Asherah. Author Ruth Hestrin traces the development of this important goddess's iconography in "Understanding Asherah," p. 50. Photo courtesy Israel Antiquities Authority/Israel Museum.



# The Temple Mount in Court

## Will Israel's Supreme Court Prevent the Destruction of Ancient Remains?

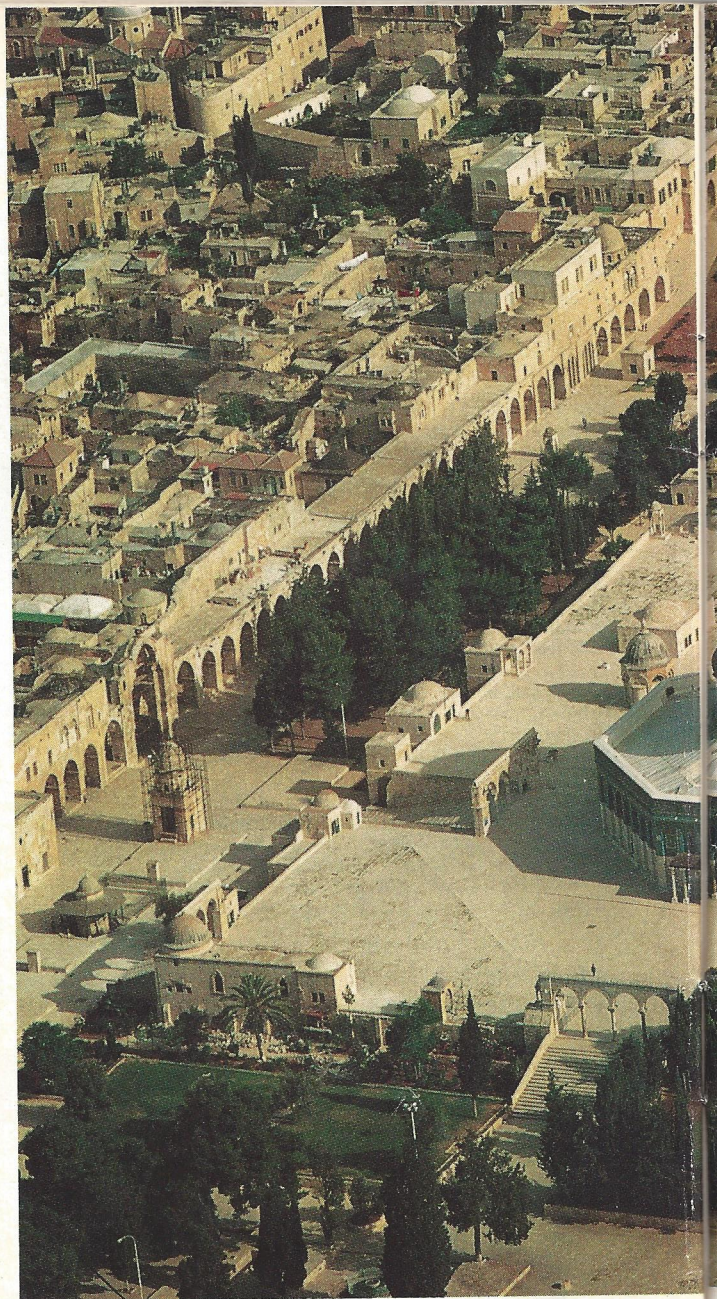
STEPHEN J. ADLER

**T**he question of Israel's responsibility to prevent the destruction of ancient remains on the Temple Mount in Jerusalem is now before Israel's Supreme Court. The case demands a difficult and complex balancing of Muslim rights to administer and control the Temple Mount, on the one hand, and the Israel government's obligation to enforce laws regarding the protection of archaeological sites, on the other.

Needless to say, in the political and religious cauldron that is the Middle East, other ramifications not strictly legal roil about the fringes of the case.

In 1983, **BAR** published an influential and widely cited article offering a new theory on the location of the First and Second Temple on the Temple Mount.\* Critical evidence for his theory, the author charged, had recently been covered up by dirt and plantings

\*Asher S. Kaufman, "Where the Ancient Temple of Jerusalem Stood," **BAR**, March/April 1983.

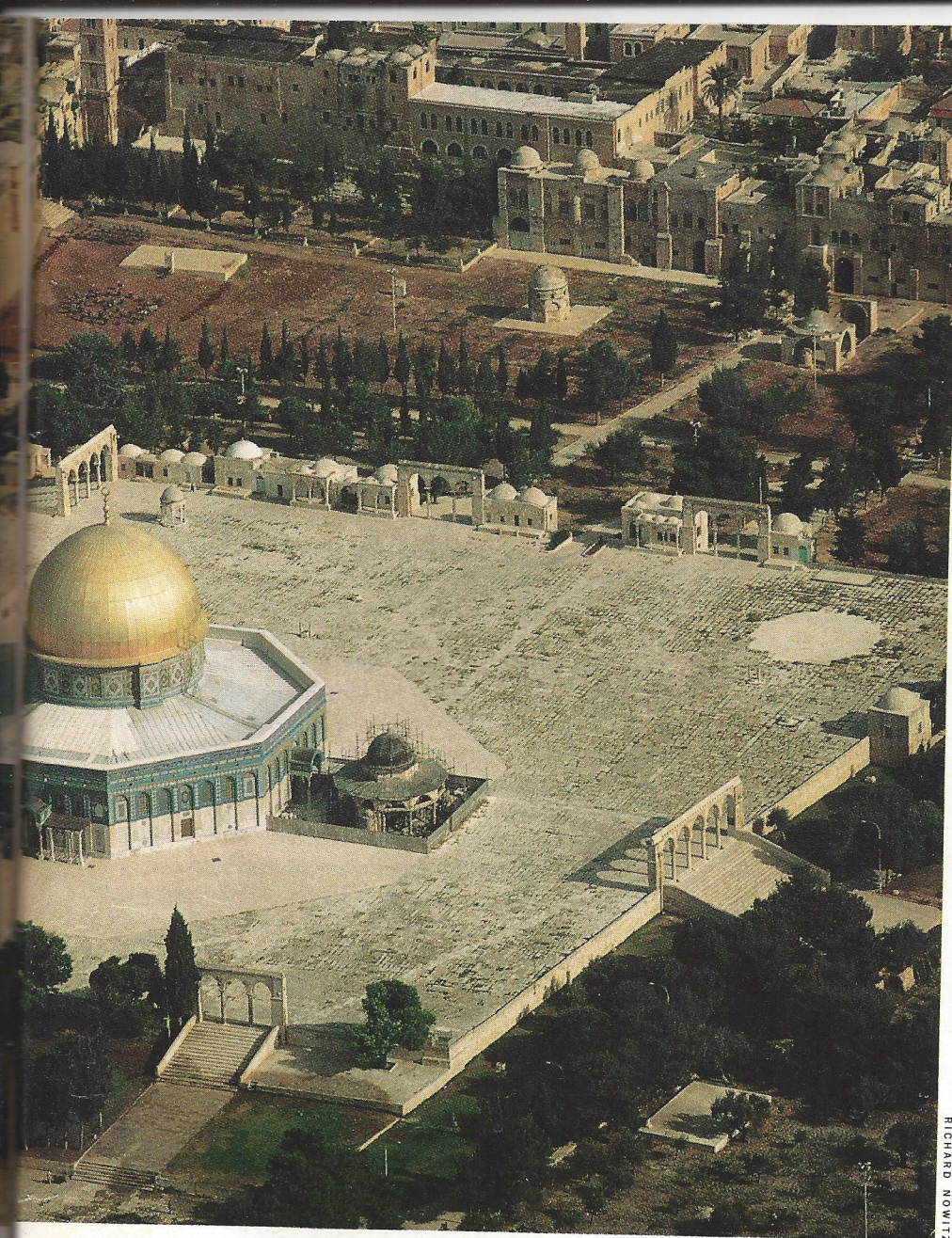


placed on the Temple Mount by Muslim authorities. Other evidence for the author's contentions regarding the location of the Temple had been covered by paving. This was not all. Unauthorized excavations by Muslim authorities for nonarchaeological purposes had uncovered ancient remains, including what was probably a Herodian wall 16 feet long and 6 feet wide; some of the remains were dismantled and the rest covered up—all without archaeological supervision and without even giving archaeologists an opportunity to study and record the remains.

A **BAR** editorial with "before" and "after" pictures detailed much of the archaeological damage (some of the photos are reprinted on p. 68).\*\* The editorial called on Muslim and Israeli authorities to cooperate in assuring the preservation of ancient remains and listed five governing principles:

\*\* "Ancient Remains on the Temple Mount Must Not Be Destroyed," **BAR**, March/April 1983.





**Who's in charge?** The golden Dome of the Rock glistens in the early morning sun in the middle of the Temple Mount in Jerusalem, the holiest site for Jews and the third holiest (after Mecca and Medina) for Muslims.

The Temple Mount is now the subject of a bitter legal battle over protection of remains at the site. A group of Jewish activists charges that the Waqf, or Muslim religious council, that controls the Mount has destroyed, damaged or covered ancient remains. The group seeks to prevent the Waqf from further altering the Mount.

Judaism venerates the Mount because it was the location of the Temples—the first built by Solomon and the second rebuilt after the Babylonian Exile and later enlarged and rebuilt by Herod. Jews today pray at the Western Wall (not shown), a segment of the retaining wall built by Herod to enclose the enlarged platform on which the Temple stood. Muslims believe the prophet Muhammad made a miraculous night journey to the Temple Mount and from there ascended to heaven. Both faiths share the belief that the patriarch Abraham prepared to sacrifice his son on the Mount.

Despite its obvious importance, no archaeological survey has been conducted on the Temple Mount since it came under Israeli control in 1967. A hundred years earlier the site was examined by Charles Warren for the London-based Palestine Exploration Fund.

RICHARD NOWITZ

1. No excavations for any purpose should be permitted on the Temple Mount except by qualified professional archaeologists.

2. No ancient remains should be removed.

3. The results of any excavations should be promptly and properly recorded and published.

4. No changes should be permitted to aboveground structures without competent archaeological approval.

5. Qualified scholars should be given access to all areas of the Temple Mount to record the existence of exposed ancient remains.

The editorial concluded:

"Israel has not only the right but the obligation to assure that . . . the archaeological remains on the Temple Mount [are protected. They] belong neither to Israel nor to the Moslem authorities (both are only the custodians); the ancient remains belong to all mankind, and not just to this generation, but to generations past and yet unborn."

The **BAR** article and editorial have been cited to the court in the recent Temple Mount litigation. With what effect remains to be seen.

In a forthcoming issue of **BAR**, Leen Ritmeyer locates King Solomon's Temple Mount and describes the expansion of the Temple Mount in subsequent times. Ritmeyer's analysis relies heavily on Charles Warren's 19th-century description of nearly 40 underground structures on the Temple Mount. Ritmeyer served as the architect to the archaeological expedition directed by Hebrew University Professor Benjamin Mazar that excavated south and southwest of the Temple Mount. However, even he has not been permitted to examine the vast majority of these underground structures, which are critical to his research. Ritmeyer too notes that evidence for his theory as to the location of the Temple has been covered by paving.

In short, although Israel has controlled the Temple Mount area since 1967, no archaeological survey has



yet been conducted there, even though this would involve no excavation and no disturbance to any existing feature.

The Temple Mount case now before the Israel Supreme Court (which has original jurisdiction in such cases) alleges that the Muslim Religious Council, the Waqf, has destroyed or damaged remnants of Solomon's Temple, the Second Temple, Crusader structures and other important archaeological remains. The petition to compel Israeli authorities to protect archaeological remains on the Temple Mount has been filed by a tiny radical fringe organization called "The Temple Mount Faithful." The defendants are Israeli authorities and the Muslim Waqf.<sup>1</sup>

The Supreme Court originally dismissed the case, based on representations by the Attorney General and the Jerusalem Municipality that they were considering bringing legal action against the Waqf for what it was doing on the Temple Mount. However, a few months later the Attorney General and the municipality decided not to initiate such action, so another petition was filed in the Supreme Court and the final hearing was held on June 24, 1991. In a procedure rare in the Supreme Court, the three justices hearing the petition visited the Temple Mount site. In another unusual development, the Waqf boycotted the final hearing, expressing its refusal to recognize Israeli sovereignty over Jerusalem. The Court's opinion has not yet been handed down.

An affidavit filed in the case by the then-official district archaeologist for Jerusalem, Dan Bahat, on behalf of the Israel Antiquities Authority, stated that the Waqf had built structures on the Temple Mount without permission and had systematically destroyed, damaged or covered up archaeological remains. Among the structures mentioned by Bahat were a 14th-century building that incorporated a Crusader building and another me-

**A visit to the scene. Two of the three Israeli Supreme Court justices hearing the Temple Mount case, Menachem Elon (center) and Gavriel Bach (right), tour the Mount in June 1991. A decision regarding who controls archaeological remains at the site has yet to be handed down.**



RACHAMIM ISRAELI

dieval edifice called Makam el-Khadr (Saint George). Bahat noted that it is difficult to assess accurately the damage done throughout the Temple Mount because a scientific archaeological survey of the area has never been done.

The Waqf maintains that it enjoys exclusive control of the Temple Mount and is not bound by Israeli laws regarding the protection of archaeological sites.

Muslim control of the Temple Mount is defined by an arrangement known as the Status Quo that goes back several centuries and has its origins in rivalries among religious communities for the control of Christian Holy Places. Today the Status Quo controls rights to all Holy Places, regardless of the religion.

In the 18th century, inter-Christian strife over the Holy Places resulted in international political pressures on the Ottoman rulers, who in 1757 decided to describe the existing situation in a firman (legal decree) defining the rights of the Catholic and Eastern Orthodox churches in various Holy Places. The most complete description of the Status Quo is contained in an 1852 firman issued by the Ottoman Sultan Abdulk Mejid.<sup>2</sup> In 1855, the major European nations upheld the Status Quo in the Treaty of Paris. The 1878 Treaty of Vienna, signed at the termination of the Russo-Turkish war, stated that no change shall be made in the Status Quo without the signatories' permission.

When General Edmund H. H. Allenby captured Jerusalem on December 11, 1917, he immediately announced that British policy would continue the Status Quo at the Holy Places. The British governed Palestine between July 1, 1920 and May 14, 1948 by virtue of a League of Nations Mandate.<sup>3</sup> Section 13 of the Mandate obligated Britain to preserve existing rights and ensure the requirements of public order and decorum in the Holy Places, without interfering with the "purely Muslim sacred shrines." Section 14 of the Mandate ordered a study of the various religious communities' rights in the Holy Places. One result was the Cust report,<sup>4</sup> which replaced the 1852 firman as the most comprehensive description of the Status Quo.

The Christian denominations considered part of the Status Quo are the Greek Orthodox, Roman Catholic and Armenian Orthodox. The Syrian church and the Coptic church have limited privileges to perform their religious rites. Protestant Christians are not granted any rights under the Status Quo.

The Status Quo specifies what rite may be practiced, at what time and in what place. It also governs the decoration of altars and shrines, use of lamps, candelabra, tapestry and pictures and who officiates in the worship. According to the Status Quo, the right to repair a roof or floor, or even to hang a lamp, implies exclusive possession of the area involved.<sup>5</sup> The Status Quo relates especially to the Church of the Holy Sepulchre, although it also includes the adjoining Convent of Deir al Sultan, the Tomb of the Virgin, the Sanctuary of the Ascension, the Church of the Nativity in Bethlehem, the Grotto of the Milk and Shepherd's Field, also in Bethlehem.

These Christian Holy Places have been divided into



areas of common usage, areas of exclusive usage, disputed areas and areas of qualified or limited usage. Little flexibility or innovation is allowed. Urgently needed repairs are generally done by the government, since the various denominations cannot agree on who will do them.

Between 1948 and 1967, when Jordan ruled the Holy Places, its announced policy was to enforce the Status Quo regarding Christian Holy Places.<sup>6</sup> However, in 1953 Jordan passed laws restricting the right of Christian religious communities to own or purchase property near a Holy Place.<sup>7</sup> This law was used to prevent the Roman Catholic Patriarch of Jerusalem from purchasing property on the Mount of Olives. Jordan's Council of Ministers justified this action by claiming that the patriarch's purpose was "to exploit the property."<sup>8</sup>

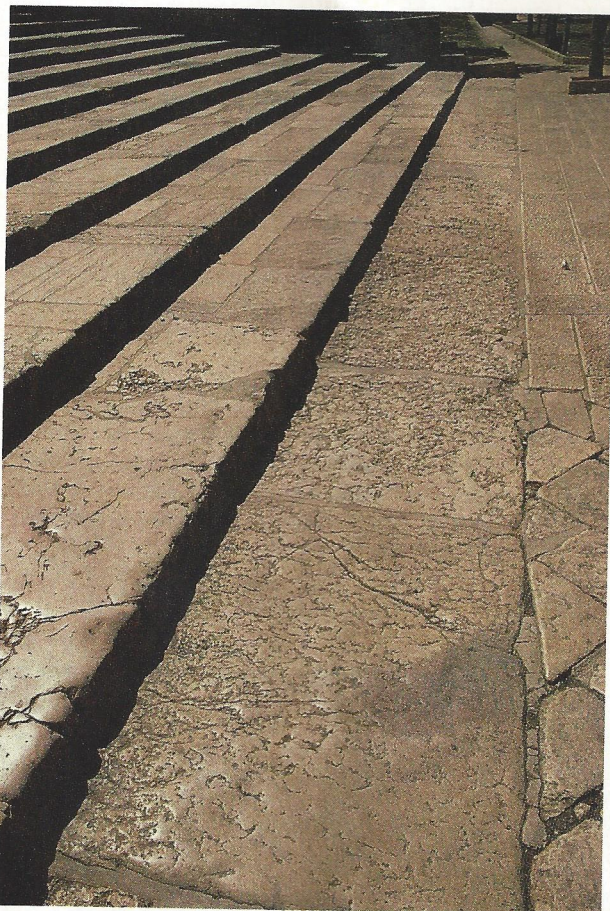
In 1964 Jordan further limited Christian rights by prohibiting the churches from purchasing real estate anywhere in Jerusalem. A Christian Arab member of the Jordanian Parliament complained that these measures were "discriminatory . . . , an abridgment of the rights of a certain group of citizens."<sup>9</sup>

Jordan was also responsible for some slight damage to the mosques on the Temple Mount. Jordanian snipers were positioned there during the 1967 war and fired on Israeli soldiers from that position. Israeli soldiers suffered casualties because Israel's policy of not endangering the Holy Places precluded the use of heavy weapons to dislodge the snipers. This policy was criticized by several Jewish groups, but various church groups praised it.<sup>10</sup>

Since 1967 the Holy Places have been under Israeli rule. Israeli law guarantees all residents freedom of religion, including freedom to perform their religious rites, subject to the limitation that they do not disturb the public order.<sup>11</sup>

Israel's policy has been to continue the Status Quo at the Holy Places and to entrust administration of a

Holy Place to the religion to which it is holy. This policy is applied without regard to whether the church recognizes the government of Israel; for example, the Vatican does not recognize the state of Israel, but Israel honors the interests of the Catholic church in the Christian Holy Places. Israel also gives financial sup-

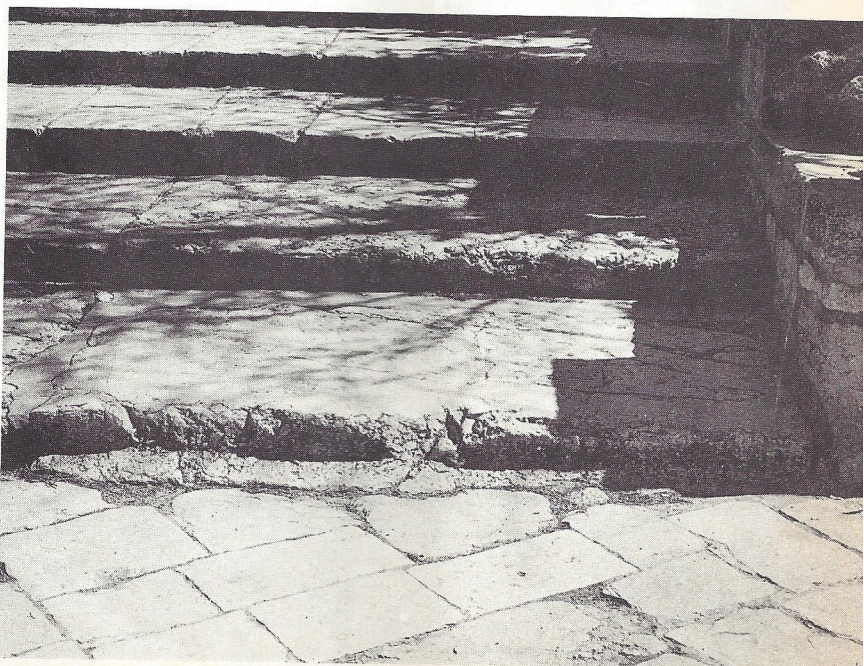


HERSHEL SHANKS

**Almost obliterated.** These large ashlars (top photo), now the bottom step of a stairway on the Temple Mount, may offer a crucial clue regarding the position of the First Temple. (This stairway, at the northwestern corner of the Temple Mount platform and with an arched gateway at its top, can be seen just beyond and to the left of the dome in the photo on pp. 60-61.)

Leen Ritmeyer, co-author of the exhaustive article on Herod's Temple Mount in the November/December 1989 BAR, argues in a forthcoming article that the step at the bottom of the stairway was, in fact, part of the western wall of the original, pre-Herodian, Temple Mount platform. Ritmeyer came to that conclusion in part by examining the black and white photo at right, which shows that the large stones in this step had margins and bosses on the side by which the wall could be identified and dated. The earlier paving, shown in the black and white photo, abuts the boss, leaving the margin exposed above it. The later paving (upper right in the color photo) has been laid over the boss.

That crucial clue can no longer be seen; were it not for the old photograph, this important piece of evidence would have escaped notice. Proponents of a systematic archaeological survey of the Temple Mount point to examples such as this to prove their point.



LEEN RITMEYER



port for the upkeep and restoration of the Holy Places and grants the recognized religious communities tax and custom concessions.

Israel has adopted *The Protection of Holy Places Law*,<sup>12</sup> which makes it a crime to desecrate a Holy Place or restrict access to a Holy Place. *The Basic Law: Jerusalem, Capital of Israel*,<sup>13</sup> reiterates the right of free access to the Holy Places and prohibits their desecration. Other laws, especially the Criminal Code, protect the Holy Places against criminal acts (such as theft, assault, improper conduct).

The Holy Places in the West Bank (those in

**Here today, gone tomorrow?** *Archaeological architect Leen Ritmeyer squats next to Herodian paving stones (color photo below) located about 200 feet north of the stairway shown on page 63. He identifies this area as part of the northern court of Herod's expanded Temple Mount platform. The slabs are identical in size and workmanship to the stones used to pave the streets of Herodian Jerusalem.*

*The photograph at right shows Ritmeyer next to a sill, the remains of a doorway in a substantial Herodian or Roman building. These exposed remains suggest that a wealth of information could be gleaned from an unintrusive surface survey of the Temple Mount. They also raise a disturbing thought: Were a survey to be conducted one day in the future, what guarantee is there, given the fate of the bottom step on page 63 (and of the items shown on p. 68), that features visible today will not have been covered or altered by then?*

Bethlehem and Hebron), which is not part of Israel but is administered by Israel, are protected by an Order of the Military Administration.<sup>14</sup>

Israel has permitted archaeological digs at Holy Places, but only in cooperation with the churches involved.\*

The Israel Supreme Court considers disputes involving rights of religious denominations at a Holy Place to be a political dispute for the government to solve, and not a judiciable dispute. Thus, the court refused to intervene in a dispute between the Copts (Egyptian church) and Abyssinians (Ethiopian church) concerning control of the Convent of Deir al Sultan, adjoining the Church of the Holy Sepulchre.

The 1852 firman describing the Status Quo does not mention the Jewish Holy Places. These include the Western Wall of the Temple Mount (the Wailing Wall); the Temple Mount itself; Rachel's Tomb, outside of Bethlehem; the Patriarch's Tomb, in Hebron; and the ancient Jewish Cemetery on the Mount of Olives.<sup>15</sup>

Although the 1852 firman does not refer to Jewish Holy Places, Jewish rights to access and prayer at the Western Wall were recognized as part of the Status Quo. Cust, in his description of the Status Quo at the Holy Places, states: "The Jewish custom of praying here [at the Western Wall] is of considerable antiquity, being mentioned by Rabbi Benjamin of Tudela [second

\* See, for example Dan Bahat, "Does the Holy Sepulchre Church Mark the Burial of Jesus?" *BAR*, May/June 1986.



LEEN RITMEYER



half of 12th century] and has now become an established right."<sup>16</sup>

Under Ottoman and British rule Jews were allowed to administer, and pray at, sites that were claimed only by them or were of minor importance to Muslims (Rachel's Tomb, the Western Wall and the cemetery on the Mount of Olives). Between 1948 and 1967, however, Jordan denied Jews access to these sites.

For Muslim pilgrims, the Holy Places in the Holy Land are the Temple Mount and the Patriarch's Tomb in Hebron.<sup>17</sup> These sites are also Jewish Holy Places. Under Ottoman, British and Jordanian rule, Jews were denied the right of access to or prayer at sites that were holy both to Jews and Muslims.<sup>18</sup> They were placed under Muslim administration and only Muslims could pray there.

Since 1967 Israel has allowed Jews to visit these sites. Jews may pray at the Patriarch's Tomb, but organized Jewish prayer is not allowed on the Temple Mount.

The Temple Mount is revered by both Jews and Muslims as the site where Abraham offered to sacrifice his son. This is the Jews' most holy site, where Solomon's Temple and the Second Temple stood. It is reported that there was a synagogue on the Temple Mount from the seventh century until the end of the eleventh century. After its destruction, another synagogue was built near the Western Wall.<sup>19</sup>

Muslims consider this their third most holy site, after Mecca and Medina. Although neither Jerusalem

nor the Temple Mount is specifically mentioned in the Koran, Surah 17 speaks of Muhammad's journey "from the Sacred Temple to the Furthest Temple." Muslims interpret this as a night journey (flight) from Mecca to Medina to the Temple Mount in Jerusalem. Located on the Temple Mount is the Dome of the Rock (Qubbat es-Sakhra), erected in 691 A.D., and El-Aqsa mosque, erected between 705 and 715 by Caliph Walid the First of the Omayyad dynasty.

Israel has allowed the Waqf to continue administration of the Temple Mount. The Waqf keeps its offices here, guards the site, controls the entrances and conducts prayers.

Until the *intifada* began in 1987, Muslims were allowed unlimited access to the Temple Mount. However, during the uprising Arabs held political demonstrations on the site, burned tires and threw rocks at Israeli police. As a result, when public safety and order requires, police limit the number of Arabs who may enter the site at one time, and sometimes prevent potential demonstrators from entering.

Jews have no role in the administration of the Temple Mount. The government has made no provisions for Jews to pray on the Temple Mount and prohibits organized Jewish prayer there. This policy is based on:

1. The preservation of the Status Quo.

2. The Orthodox Rabbinate prohibition against Jews entering the site because of the possibility that they might step on a Holy Place, as the precise location of the Holy Temple is unknown.

3. The preservation of public order, since there was fear of Arab riots if Jews were allowed to pray there.

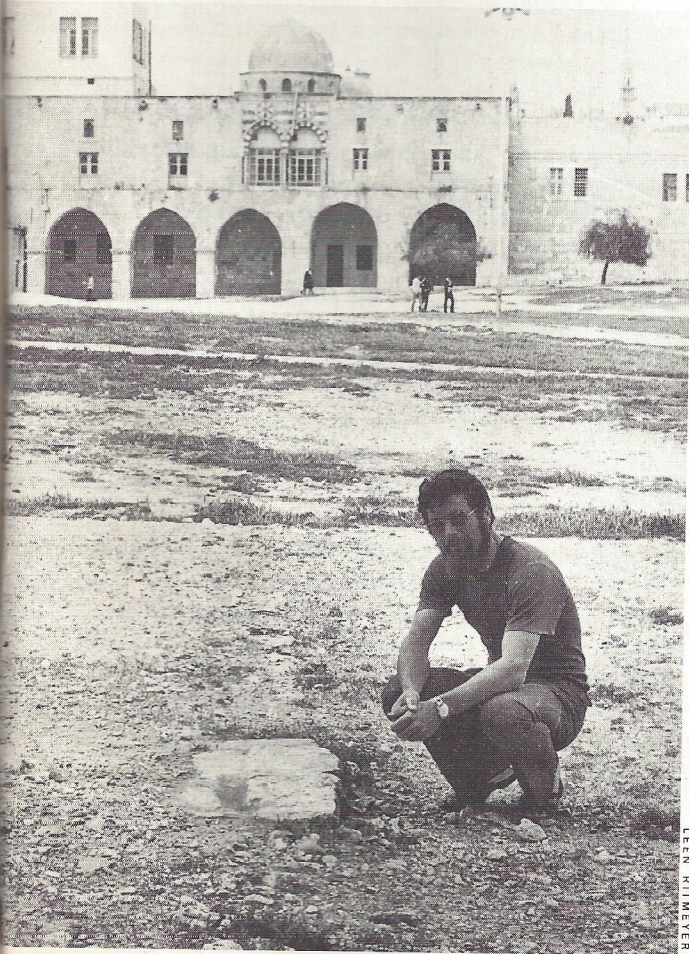
4. Since Orthodox Jews cannot enter the site, the requests by the Temple Mount Faithful are considered political demonstrations and not prayer services—the Temple Mount, as a Holy Place, is not an appropriate place for political demonstrations.

5. The desire not to alienate the Muslim world.

Israel has been extremely careful about the protection of Muslim religious shrines on the Temple Mount. There is a small Israeli police station on the site, usually manned by two Muslim policemen. However, since Israel has entrusted the protection of the Temple Mount area to the Waqf, which employs its own guards, the responsibility for protection of the site is shared by the police and the Waqf. In this way, the Status Quo has been applied to Muslim Holy Places as well.

The adjudication of disputes regarding Holy Places is governed by a 1924 Mandate law;<sup>20</sup> the Israel Supreme Court has ruled that this law still applies. According to the 1924 law, matters relating to religious rights in the Holy Places (including not only disputes between denominations of the same religion, but also disputes between religions) are to be decided by the government, and cannot be adjudicated in the courts. However, matters concerning Holy Places not relating to religious rights and interests—such as charges of criminal acts, assault and improper conduct—are justiciable.

Thus, two early Supreme Court cases refused to interfere with police policy not to allow Jews to pray on





the Temple Mount. One case involved organized prayer services and the other individual prayer.<sup>21</sup> Although the courts have spoken of Jews' historical right to pray on the Temple Mount<sup>22</sup> subject to appropriate government regulations, this is apparently a matter left to the government, not the courts.

The 1924 Mandate law permits the courts to intervene to ensure public order and proper conduct at the Holy Places.<sup>23</sup> Thus, the court has upheld police prevention of political demonstration by Jews in the guise of prayer outside an entrance to the Temple Mount when there was an immediate probability of danger to public order. However, the court has also said that freedom of speech, including the right to demonstrate, is a fundamental right under Israeli law. Therefore, the police must protect Jewish demonstrators outside the gates of the Temple Mount from Arab violence.<sup>24</sup>

### Why Has Israel's Antiquities Authority Failed to Survey the Temple Mount?

In the accompanying article Stephen J. Adler stresses that, although Israel has exercised sovereignty over Jerusalem since 1967, no archaeological survey has been conducted on the Temple Mount. A survey would not involve excavations, nor would it damage or change any existing installation or monument. A survey would involve only looking and recording—giving all who are interested in this holy site a precise picture of what is there, so as to better understand the ancient remains.

One might suppose that the reason no such survey has been undertaken by Israel's Antiquities Authority is that the Muslim authorities who control the Temple Mount have objected to such a survey.

Yet, according to a recent report in the *Jerusalem Post*, archaeologists from the Authority, who accompanied three Israeli Supreme Court justices on an inspection tour of the Temple Mount in connection with the lawsuit described in Adler's article, "claim they [archaeologists from the Antiquities Authority] regularly inspect the [Temple] Mount."

If that is so, why haven't they conducted an archaeological survey of the Temple Mount?

Antiquities Authority archaeologists, according to the *Jerusalem Post* story, "praise the Waqf [the Muslim religious council] for restoration work it carries out in ancient Islamic structures in the area." What does the Antiquities Authority say to the Waqf about the changes made on the Temple Mount, as described and pictured in the accompanying article, changes that have obliterated evidence critical to continuing scholarly efforts to understand the archaeological history of the area and its structures?

We believe the Antiquities Authority should make every effort to conduct a thorough archaeological survey of the Temple Mount and work with the Waqf to ensure that before any additional changes in the Temple Mount are made, a complete record of existing conditions is available.—Ed.

In general, in a conflict between government policy at the Holy Places and the law's guarantee of freedom of religion, the Supreme Court has upheld government policy (such as not allowing Jews to pray on the Temple Mount). However, when freedom of speech and expression are concerned, the courts have upheld these freedoms, subject to the preservation of public order.

Undoubtedly, the most important precedent in the pending Temple Mount case (in which the court's jurisdiction is being invoked to prevent damage to ancient remains) is a recent case involving a menorah, or candelabra, erected on the roof of a religious building on the Western Wall plaza.<sup>25</sup> Rabbi Shlomo Goren, formerly the Chief Rabbi of Israel, is now the head of a center for advanced religious study called Kolel Haidra. The center is located in a building on the Western Wall plaza, one of the Jews' most important Holy Places. Rabbi Goren decided to erect a monument to Jews killed in the Holocaust on the roof of the building. The monument consisted of six large lanterns (for the six million killed by the Nazis), designed by the famous Israeli artist-sculptor Yaacov Agam. After the monument was dedicated, the Jerusalem municipality initiated criminal proceedings to remove it on the grounds that it had been erected without the necessary building permit. In his defense, Rabbi Goren relied on the 1924 law that prevented adjudication of disputes concerning a Holy Place.

The court rejected this defense, holding that a violation of a criminal law can be adjudicated, even when the criminal act is committed at a Holy Place for religious purposes.

The petitioner in the Temple Mount case will undoubtedly rely heavily on this case. Rabbi Goren violated the legal requirement that he obtain a building permit to erect the menorah on the roof. In the Temple Mount case, the law requires the Waqf to obtain a building permit before altering structures and forbids damaging or destroying ancient remains.

But there is a difference. In Rabbi Goren's case, the government took action and Rabbi Goren said the government could not interfere. In the Temple Mount case, the government has failed to take action and a private party is seeking to compel it to do so.

In short, Rabbi Goren's case concerns the Court's refusal to enjoin criminal action already instituted, while the Temple Mount case is an attempt to compel the government authorities to institute such proceedings.

However, in some cases the Supreme Court has accepted citizens' petitions to compel the government to institute criminal proceedings.<sup>26</sup> The petitioner in the Temple Mount case will claim that since the municipality had prosecuted Rabbi Goren for building without a permit in the Western Wall plaza, which adjoins the Temple Mount, then failure to prosecute the Waqf for building without a permit at the same Holy Place is discriminatory and unfair.

Furthermore, if the government took action to prevent a relatively minor and unimportant change—the placement of the Holocaust memorial on the roof—surely it should prevent damage to important historical





M. EYNI

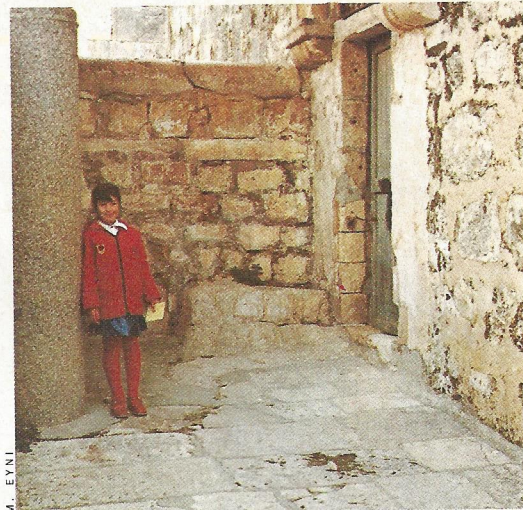


M. EYNI

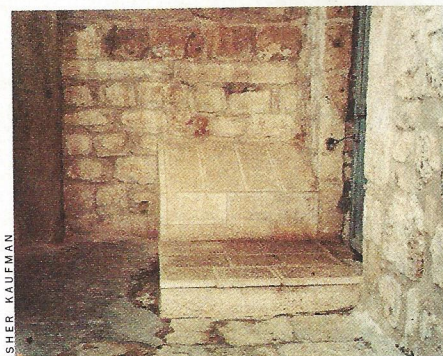
**Covering the evidence.** Two examples of the damage caused by uncontrolled building on the Temple Mount are shown here. The pair of photos above show how the remains of a wall in the northern portion of the Mount looked before (left) and after (right) the construction of a path across it. Before the landscaping the two sides of the wall appeared as parallel rows of stones flush with the ground. The wall, according to BAR author Asher Kaufman, formed the foundation for the eastern wall of the Temple compound; its approximately 6-foot

width is also important for determining the length of the cubit, the unit used in the Bible and Talmud in describing the dimensions of the Temple.

To the left of the bottom of the door in the photo at top right is a hewn rock ledge that, according to Kaufman, may have been part of a gateway leading to the Second Temple's Inner Court and part of the western wall of the First Temple. But the ledge can no longer be studied: In May 1978 a flagstone step (bottom right) was built over it, completely obscuring it.



M. EYNI



ASHER KAUFMAN

buildings and ancient remains on the Temple Mount.

The decision in the Rabbi Goren case was handed down about a year and a half after the petition was filed. The original petition in the Temple Mount case was filed on March 23, 1986. Will the Court, despite the Rabbi Goren case, decide that the Temple Mount case is nonjusticiable and decline to exercise jurisdiction over the dispute? Will the Court hold that government officials were acting with reasonable discretion when they decided not to prosecute violations of the law and not to correct damage done by the Waqf to archaeological sites on the Temple Mount? If the petition is accepted, the government will have to act. If it is denied, the ball will be thrown to the Israeli government: It has exclusive decision-making authority. Will it intervene?

The Israeli government has a clear obligation to protect the religious and archaeological structures on the Temple Mount. On the other hand, Israel has maintained the Status Quo on the Temple Mount, with one exception: Jews may enter the site during certain hours, but Muslim rights of prayer and access have been preserved and the Waqf continues to administer the site, just as it did prior to 1967.

There is, however, a serious question as to whether Israel has fulfilled its obligation to protect the ancient remains on the Temple Mount from destruction or damage by the Waqf. According to evidence presented in the Temple Mount case, the Antiquities Authority does not enforce, on the Temple Mount, the laws protecting archaeological remains. It has not even conducted a comprehensive archaeological survey of this important site. Furthermore, the municipality does not enforce, on the Temple Mount, the building laws, which prohibit building or changing existing structures without permits.

Israel is responsible to Christians, Jews and Muslims throughout the world, and to future generations, to ensure the preservation of archaeological remains on the Temple Mount.

Israel's caution is doubtless part of an effort to convince the Arab world to accept her existence. Is the Israeli government being oversensitive in interpreting the protection of ancient remains as interference with Muslim religious rights? Or should the protection of the archaeological record on the Temple Mount override any international outcry that may result? □

Endnotes for this article can be found on page 72



**Endnotes for "Temple Mount in Court," p. 60**

- <sup>1</sup>H.J.C. (High Court of Justice; The Supreme Court) 193/86, *The Temple Mount Faithful v. The Commissioner of Police, The Mayor of Jerusalem, The Minister of Education, The Director of the Antiquities Authority and the Moslem Wakf*.
- <sup>2</sup>Another firman in 1852 related to the rights of the Greek Orthodox church. In 1868 and 1869 the Sultan Abduk Mejid issued firmans reiterating the 1852 decree.
- <sup>3</sup>The Mandate for Palestine was given to Great Britain at San Remo, Italy, on April 25, 1920. On July 1, 1920, the civil administration began and ended British military rule.
- <sup>4</sup>L.G.A. Cust, *The Status Quo in the Holy Places* (His Majesty's Stationery Office, 1929).
- <sup>5</sup>The accepted description of the rights of each denomination is Cust, *The Status Quo*.
- <sup>6</sup>*General Administration Law of Palestine*, no. 17 (1949): section 5, published in the *Jordanian Official Gazette* 975 (March 16, 1949); sections 5 and 6, *Jordanian Official Gazette* 1002 (Dec. 1, 1949). See also Section 14 of the Jordanian Constitution, 1952, *Jordanian Official Gazette* 1098 (Jan. 8, 1952) (in Arabic).
- <sup>7</sup>*Law for the Disposition of Immovable Property by Legal Persons*, no. 61 (passed March 25, 1953), published by the Jordanian Bar Association in *Majumai al-Qawanin wa al-Anthima* (collection of Jordanian laws and regulations), vol. II, pp. 228-231 (1958) (in Arabic).
- <sup>8</sup>*Majumai al-Qawanin*, vol. II, pp. 223-233. See also *Proceedings of the Jordanian House of Representatives*, Nov. 28, 1964, and Dec. 2, 1964; vol. 9, no. 8, 8th Session, pp. 263-264, 266.
- <sup>9</sup>*Proceedings of the Jordanian House of Representatives*, vol. 9, no. 8, Dec. 28, 1964, p. 267. See Nasser H. Aruri, *Jordan: A Study in Political Development* (The Hague, Neth.: Martinus Nijhoff, 1972); P. Le Nail, "Les Problems de

- l'Internationalization de Jerusalem," *These Dactylographie* (Paris, 1956), pp. 67-70. See also *The Times* (London), January 18, 1955; *Falastin*, January 11, 1955 (in Arabic); *Al-Difa*, January 19, 1955 (in Arabic).
- <sup>10</sup>Statement of the Greek Orthodox Patriarch, *Jerusalem Post*, June 9, 1967; statement of the National Council of Churches, *Jerusalem Post*, June 19, 1967.
  - <sup>11</sup>Section 83 of the Palestine Orders in Council, 1922-1947.
  - <sup>12</sup>*Protection of Holy Places Law, 5727-1967, L.S.I.* (Laws of the State of Israel), vol. 21, p. 76. This law states: "1. The Holy Places shall be protected from desecration and any other violation and from anything likely to violate the freedom of access of the members of the different religions to the places sacred to them or their feelings with regard to those places. 2. Whosoever desecrates or otherwise violates a Holy Place shall be liable to imprisonment for a term of seven years. Whosoever does anything likely to violate the freedom of access of the members of the different religions to the places sacred to them or their feelings with regard to those places, shall be liable to imprisonment for a term of five years."
  - <sup>13</sup>*The Basic Law: Jerusalem, L.S.I.*, vol. 34, p. 209.
  - <sup>14</sup>*Order Concerning the Holy Places (Judea and Samaria)*, (No. 327) 5727-1967. Section 2 states that the Holy Places shall be protected against any act that may interfere with freedom of access to them by a member of any religion.
  - <sup>15</sup>Other sites of religious importance to Jews are protected as Jewish Holy Places by regulations issued by the Minister of Religion (*Kovetz Hatakanot* 4252, June 16, 1981, p. 1212 [in Hebrew]) but they are not Holy Places under the Status Quo.
  - <sup>16</sup>Cust, *The Status Quo*, p. 44.
  - <sup>17</sup>Other sites of religious importance to Muslims are protected by law, but are not Holy Places

- under the Status Quo.
- <sup>18</sup>Zeev Vilnay, *Jerusalem, the Capital of Israel* (Jerusalem: Acheaver, 1970), part 1, p. 282 (in Hebrew).
  - <sup>19</sup>Shiller, *The Mosque of Omar* (Ariel Publishers, 1976), p. 29 (in Hebrew).
  - <sup>20</sup>The main law passed to guarantee application of the Status Quo was *The Palestine (Holy Places) Order-in-Council*, July 25, 1924, in *The Laws of Palestine*, vol. 3, p. 2805.
  - <sup>21</sup>H.C.J. 222/68, *Nationalistic Society v. The Minister of Police*, 24(2) Sup. Ct. Dec. 141, regarding organized groups; H.C.J. 99/76 *Cohen v. The Minister of Police*, 30(2) Sup. Ct. Dec. 505, regarding individual prayer.
  - <sup>22</sup>H.C.J. 222/68, see p. 179, n. 43 (Justice Kister); Bagatz 537/81, *Stenger v. The Government of Israel*, 45(4) Sup. Ct. Dec. 673.
  - <sup>23</sup>H.C.J. 222/68, *Nationalistic Society v. Minister of Police*.
  - <sup>24</sup>H.C.J. 292/83, *The Temple Mount Faithful v. The Jerusalem Police Commander*, 38(2) Sup. Ct. Dec. 449.
  - <sup>25</sup>H.C.J. 267/88, *Kolel Haidra and Rabbi Goren v. The State of Israel and the Court for Local Matters*, 43(3) Sup. Ct. Dec. 728.
  - <sup>26</sup>H.C.J. 935/89, *Ganor and others v. The Attorney General*, 44(2) Sup. Ct. Dec. 485; the court ordered the Attorney General to reconsider instituting criminal proceedings against senior bank officials who were allegedly responsible for the 1983 government bond crash. H.C.J. 425/89, *Gamal and others v. Chief Army Prosecutor*, 43(4) Sup. Ct. Dec. 718; the court ordered the army to prosecute an officer who allegedly beat Arabs during the suppression of civil unrest. H.C.J. 223/88, *Sheftal v. The Attorney General*, 43(4) Sup. Ct. Dec. 356; the court ordered prosecution of Holocaust survivors who attacked the lawyer of a Nazi war criminal (Ivan "the Terrible" Demjanjuk).

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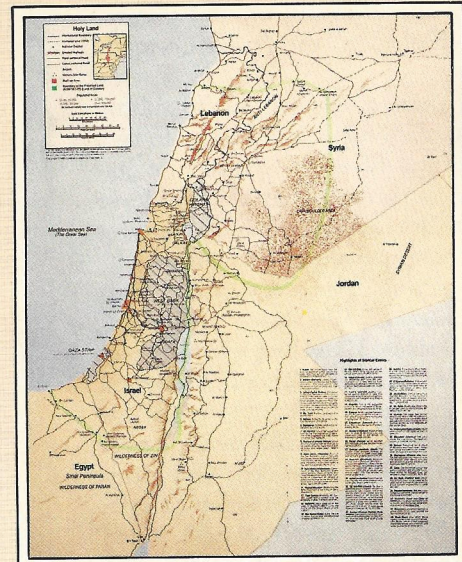
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