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H.C.J. 10356/02

H.C.J. 10497/02

1. Yoav Haas The Petitioners in H.C.J. 10356/02
2. MK Mossi Raz
3. Yesh Gvul Movement

1. The City of Hebron The Petitioners in H.C.J. 10497/02
2. The Hebron Rehabilitation Committee
3. Abed Elhafez Adris
4. Haj Hader Rabay
5. Na'aman Shukri Dana
6. Kamal Moustafa Jabbar
7. Ahmed Hamed Jabbar
8. Mahmoud Abed Jabbar

Versus

1. The IDF Commander in the West Bank, The Respondents in H.C.J. 10356/02  
GOC Central Command
2. The State of Israel
1. Major General Moshe Kaplinsky, The Respondents in H.C.J. 10497/02  
IDF Commander in Judea and Samaria
2. Civilian Administration for Judea and Samaria
3. The Government of Israel

At the Supreme Court sitting as the High Court of Justice

[4 March, 2004]

The Honorable Chief Justice A Barak

The Honorable Justice M. Cheshin

The Honorable Justice A. Procaccia

Petitions for order nisi and interim order

For the Petitioners in H.C.J. 10356/02 – Adv. Yossi Arnon; Adv. Ishay Niv

For the Petitioners in H.C.J. 10497/02 – Adv. Shlomo Lecker

For the Respondents in both proceedings – Adv. Yochi Gnessin

## Judgment

Justice A. Procaccia:

### The Question

1. The Jewish inhabitants of Kiryat Arba wish to exercise their right to pray at the Machpela Cave, which is regarded as a holy site by Judaism and Islam. Pedestrian access from Kiryat Arba to the Machpela Cave passes through a route that is approximately 730 meters long (the "**Worshippers' Route**"). A large number of pedestrians – men, women and children – pass through this route on the Sabbath and holidays on their way to pray at the Machpela Cave. In the area adjacent to the Worshippers' Route many murderous attacks occurred over the recent few years by terror organizations which claimed human lives. Due to the security risk threatening the pedestrians in the route, the IDF Commander in Judea and Samaria (the "**Area Commander**") wishes to take various measures to increase the security of those passing through the route. For this purpose, he wishes, *inter alia*, to widen the path in the northern part of the route and to protect it in various ways. He also wishes to widen the path in the southern part by the Machpela Cave in order to allow security and rescue vehicles to pass through, which is impossible today due to the narrowness of the path. In order to widen the path along the route, it is necessary to requisition areas of land alongside of the route and to partially demolish two buildings and a part of another building which are uninhabited and situated in the southern part of the route. In order to execute the said measures, the Area Commander issued a requisition and demolition order. The legality of the Area Commander's action is subject to judicial review in this proceeding. We shall examine the scope of his authority to issue the order, and shall discuss in this regard the question of the relation between the worshippers' right of movement and worship vis-à-vis the property right of the owners of the land situated within the area the order applies to.

### The Background

2. On Friday evening, 15 November 2002, shots were fired by a terrorist cell at security forces and worshippers walking along the Worshippers' Route from Sabbath prayer at the Machpela Cave to their homes in Kiryat Arba. In the battle that ensued between the terrorists and the security forces that were at the site, twelve security personnel from the IDF, the Border Police and the Kiryat Arba Duty Unit were killed. As a result of the said event, and following a number of previous terror incidents which occurred in proximity to the said place, the Area Commander decided to take measures to increase the level of security in the Worshippers' Route in order to protect the safety and the lives of those using it on their way to prayer. The main steps taken were widening the path and executing the required actions therefor. In order to carry out the said plan the Commander issued on 29 November, 2003, "an order for the requisition of land" (the "**Requisition Order**") in which he ordered the requisition of parcels of land situated along the route, and the demolition of a number of buildings along the route. Originally, the order was intended to allow the following measures to be taken: in the northern part of the route (which extends from the "Pishpesh" to the crossroads of the "Zion", "Erez" and "Goren" routes) – building a concrete defense wall for the protection of the worshippers against flat-trajectory shooting from the east and widening the road for the purpose of paving a pedestrian sidewalk which shall be protected by a concrete component the purpose of which shall be to prevent pedestrians from being ran over by a vehicle travelling on the road. In the junction itself, a change is planned in the level of the routes crossing it in order to prevent congestion of vehicles in the junction, which in itself creates a security risk. The southern part of the route is a very narrow alley the main part of which passes by the houses of the Hebron east casba, and leads to the Machpela Cave. The said alley, due to the narrowness thereof, does not allow the passage of vehicles through it. Alongside the alley, there are abandoned buildings which might be used as a refuge for terrorists and might endanger the lives of pedestrians passing through, sometimes in their thousands, on their way to prayer. At that spot, a widening of the alley was planned according to the original order, to a total width of 8 meters, in order to allow the passage of military vehicles and rescue vehicles for the purpose of accompanying and protecting the worshippers, and for rescue purposes in case of an attack. In order to allow such widening, the demolition of approx. 13 abandoned buildings alongside the path was planned. The order was limited in time.

#### The Petitions

3. There are two petitions before us against the Requisition Order. In one petition, the Petitioners are the 'Yesh Gvul' Movement and some of its activists, and in the other petition, the Petitioners are the City of Hebron, the Hebron Rehabilitation Committee, and a group of right owners in the land contemplated in the Requisition Order. The petitions challenge the legality of the Requisition Order and attribute thereto extreme lack of reasonableness and lack of proportionality in view of the purpose for which it was issued, in view of the severe harm to the property of the right owners in the land alongside the route, and in view of the planned harm to buildings of unique archeological value. It is claimed that the issuance of the order by the Area Commander was due to irrelevant considerations, while the security reason given for issuing the

order was a disguise for a predominantly political reason the main purpose of which is to create a territorial sequence between Kiryat Arba and the Machpela Cave by means of building a promenade which shall enable the expansion of the Jewish settlement in the area in the future. In this regard it is claimed that there is no real objective connection between the attacks which occurred in the area and the measures planned within the framework of the Requisition Order, including the houses' demolition, and since the area contemplated in the order was previously declared a closed military area and was emptied of its inhabitants, it is not required for security purposes. The Petitioners from among the inhabitants of Hebron emphasized in their claims that the implementation of the order might result in the destruction of an important part of the historical city of Hebron, which includes buildings from the Mamluk period and other houses designated for preservation, and that the Antiquities Law which applies in the area does not allow such activities from an archeological point of view. This claim was supported by a professional opinion of professionals engaged in preservation of old buildings and by an architectural opinion.

It was further claimed by the Petitioners that the land requisition and the demolition of buildings contemplated in the order are contrary to the international law which requires the Area Commander to exercise his authority to ensure the order and security in an occupied territory within the framework of Article 43 of the Hague Convention of 1907 (the "**Hague Convention**") and are contrary to Article 53 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949 (the "**Geneva Convention**") which prohibits the demolition of real properties of civilians in an occupied territory unless such action is necessary and required for purposes of military operations. The Requisition Order is also contrary to the international law which applies to preservation of archeological assets. According to their position, the Order also does not satisfy the requirements of the Israeli constitutional law, as it results in an unbalanced outcome when weighing the worshippers' right to exercise their freedom of religion and worship against the right of the landowners alongside the route, who are entitled to defend their property. The property right owners from among the Petitioners further claim that their right to be heard and to challenge the legality of the order before the Area Commander, was not upheld.

#### The Original Position of the State

4. In the original position of the state in respect of the petitions it was argued that the sole purpose of the Requisition Order was security-oriented, and that it did not serve as a disguise for obtaining another purpose. It was issued as a direct response to the continuous risk of terrorist acts, which constantly threatens the Jewish inhabitants who use the Worshippers Route and in view of the military commander's responsibility to ensure their safety. In order to enhance the security measures along the route, careful discretion was exercised and alternative ways were considered with regard to the pedestrian passage of worshippers to the Machpela Cave on the Sabbath and holidays, while making a strenuous effort to diminish, insofar as possible, the harm to the local inhabitants and to the right owners in the adjoining land. Eventually it was

found that the passage through the route was the most appropriate solution compared with the other alternatives, taking into account the security needs on the one hand, and the need to restrict insofar as possible the harm to the area's inhabitants, on the other hand.

In response to the Petitioners' claim that their right to be heard before the Area Commander as against the order was prejudiced, it was claimed that the required measures were taken in order to render the Requisition Order known to the right owners concerned. A reasonable period of time was given for the purpose of filing objections, but no such objections were filed during the period of time allocated therefor, until the filing of the petitions.

As to the normative level, it was claimed that the Area Commander's authority to requisition land in the area was based on Article 43 of the Hague Convention, which establishes a duty to maintain the security in an occupied territory and on the proviso stipulated in Article 23(g) of the Convention which stipulates a qualification to the prohibition of the demolition of enemy property where it is required for combat purposes. Article 52 of the Hague Convention allows the requisition of land for purposes of ensuring the public order and security even in non-combat times, and it also serves as a basis for the action carried out. The duty to preserve cultural assets which is based in the international law does not negate recognition of urgent security needs that override the duty to preserve cultural assets in certain circumstances, as aforesaid. By virtue of these sources, the Area Commander is authorized and even obliged to protect the security of the pedestrians in the Worshippers' Route, and the issuance of the Requisition Order is within the said authority and responsibility. The said order satisfies the constitutionality test in view of the security needs required in respect of the passage through the route within the framework of the worshippers' right of worship, and the inevitable harm to the Petitioners' property as a result thereof is proportional in view of the fact that the buildings have been abandoned for some time now, and in view of the existence of a right for monetary compensation for said harm. The action of the Area Commander reflects a proper balance between the various values involved in this matter, and it is essential to the public interest, it is reasonable and proportional, and there is no room to intervene in order to change it.

#### The Sequence of Proceedings

5. On 18 December, 2002, an order nisi was issued in respect of the petitions, whereas an interim order prohibiting the demolition of buildings according to the Requisition Order was limited so it would not apply to the northern part of the route up to the junction. Within this framework, additional time was given to the right owners to object to the Requisition Order. Of the 13 right owners in the houses due to be demolished according to the original order, 6 objections were filed in respect of 6 buildings. One building found to be inhabited was excluded from the scope of the order.

Before a decision is given regarding the petitions, the Area Commander was requested by the court to reconsider other possible alternatives to the action plan according to the original order, in an attempt to diminish the anticipated harm to the area inhabitants – such as, sealing houses instead of demolishing

them, stationing soldiers for the protection of the route when pedestrians pass through it, directing worshippers to alternative walking route, etc.

Approximately six months after the court's decision in this regard, the state informed, first, that other alternatives had been examined in respect of a pedestrian passage of worshippers to the Machpela Cave other than through the Worshippers' Route. Those were found to be incompatible, whether because they involve a greater risk for pedestrians, whether because preparing the route requires much greater harm to the property owners, or since they involve the risk of increasing the friction between the Jewish worshippers and the Muslims who come to pray in the Cave. The great risk involved in such friction was discussed in the Report of the Committee of Inquiry into the Massacre at the Machpela Cave in Hebron, 5754-1994 (the "**Shamgar Committee Report**"). The said disadvantages negated, in the opinion of the Area Commander, the compatibility of other alternatives for a pedestrian route of worshippers to the Machpela Cave on the Sabbath and holidays, and the Worshippers' Route remained the most reasonable alternative in terms of the terrain conditions and the scope of measures required for securing the area.

Under these conditions, the Area Commander decided there was no choice other than to secure the Worshippers' Route itself as the pedestrian route for large numbers of pedestrians and that for this purpose a requisition order is required. He also decided, after re-consideration, that stationing soldiers in security positions or sealing houses was insufficient, and that widening the path and inevitably demolishing a small number of buildings were required. However, after re-consideration, it was decided to significantly reduce the scope of harm to the property owners in the area with regard to the original Requisition Order. Whereas the original order refers to widening the route to a total width of 8 meters, according to the updated position widening the route to a total width of 4 meters only is sufficient. Said width satisfies the minimum required for passage of security vehicles in one direction. Even though in the opinion of the Area Commander, such minimal widening shall result in a certain security risk since it does not allow two-directional traffic of vehicles along the route, he is currently prepared to be satisfied for a more limited widening which shall enable unidirectional traffic only in order to minimize the damage to the owners of the land adjacent to the road. The minimization of the widening area of the route also involves significant decrease in the number of buildings designated to be demolished. Whereas according to the original plan, 13 buildings were designated to be demolished, the plan currently calls for a partial demolition of two buildings and a part of a third building, which are situated alongside the route and are abandoned. The demolition shall be carried out under professional supervision in order to protect, to the extent possible, important archeological foundations and to minimize, insofar as possible, the scope of harm to the buildings. It is also planned to seal openings in additional uninhabited buildings along the route, to install nets in the inhabited buildings, to pave an unpaved part of the path in order to protect against the planting of explosives, and to place lamp posts and guard posts along the route. As to the northern part of the route, the state undertook not to widen the route beyond 2 meters on both sides of the road (court transcript of 23 November, 2003). In order to make the aforesaid

adjustments to the original plan, the Requisition Order is required to be amended accordingly.

The essence of the order in its limited format as brought for examination before us, is, therefore, the following: in the northern part of the route – widening the route in a scope of 2 meters on each side; in the southern part of the route – widening the road to a total width of 4 meters; partial demolition of two buildings and a part of an additional building; requisition of land parcels alongside the route, as required for the expansion thereof.

## Decision

### The Right to be Heard

6. The right owners in the land claim that their right to challenge the validity of the Requisition Order before the military commander prior to filing their petition was not upheld.

There is no disagreement that the right to be heard is available to anyone who might be harmed by a government act. There is no need to expend on the importance of said right, which is firmly rooted in the Israeli administrative system. However, under the circumstances of this case, the right of the Petitioners to be heard was not prejudiced. The order, according to its language, regulates the particulars of publication and the manner of the delivery thereof to the right owners who might be harmed by its provisions. The provisions of the order were complied with in this respect. The Requisition Order was distributed in the area designated for requisition, and was affixed to each of the buildings designated for demolition. It was delivered to the mayor of Hebron and to the legal advisor of the municipality. Copies of the order were deposited at the Hebron liaison and co-ordination office and in the other offices of the qualified Israeli and Palestinians authorities in the area. The issuance of the order was announced in the media. In addition, a tour of the route contemplated in the order was held, with the participation of military personnel and the representatives of the right owners in the land and time was given to those who might be harmed to challenge the order before the Area Commander. Prior to the filing of the petitions, no objections were filed within the period of time designated therefor. Within the framework of hearing the petitions, additional time was given to the Petitioners to file their objections. At this stage of the proceedings, objections were filed in respect of some of the buildings designated for demolition according to the original plan. The said objections were examined by the state. In view of the aforesaid data, the Petitioners' rights to be heard and to file objections were satisfied within the framework of this proceeding.

### The Legality of the Requisition Order

7. The issued Requisition Order, which involves requisition of private land and demolition of buildings, constitutes a legal action which prejudices the Petitioners' property rights. The legality of the said action should be examined within the framework of the international law, the local law and the Israeli law, all of which apply to the actions of the Area Commander (H.C.J. 4212/02

Gussin v. The IDF Commander PDI 56(4) 608; H.C.J. 7015/02 Ajuri v. The IDF Commander in the West Bank, PDI 56(6) 352, 382.

The question to be decided is whether the Requisition Order, in its limited version, satisfies the criteria required with regard to the legal validity thereof, or whether it suffers a defect which justifies legal intervention to the end of the revocation or the amendment thereof. When considering the said question we shall review the source and scope of the Area Commander's authority to issue the said order; we shall examine whether there is a basis to the Petitioners' concern that irrelevant considerations are at the basis of the issuance of the order; and we shall inquire the various values and rights which are in conflict in respect of the said issue – the freedom of worship and the right of movement, the value of protecting the safety of the living, and the protection of the private property right, in order to determine whether they have been properly balanced the one against the other within the order, and whether it satisfies the rules of constitutional law.

#### The Responsibility and the Scope of Authority of the Area Commander

8. The governmental authorities of the Area Commander derive from several sources: the rules of public international law concerning belligerent occupation, the local law prevailing in the area which is composed of the law prior to the belligerent occupation and the new local legislation enacted by the military government, and from the principles of the Israeli law (H.C.J. 393/82 Askan v. The IDF Commander, PDI 37(4) 785, at para. 10; C.A. 6860/01 Hamada v. The Israel Insurance Pool, Takdin – Supreme Court Rulings 2003(1) 506, at paras. 6-7). Within the sphere of international law, the law of war regulates the acts which the commander of a military force responsible for an area under belligerent occupation is permitted and prohibited from performing (H.C.J. 7015/00 Ajuri v. The IDF Commander in the West Bank, PDI 56(6) 352, 358; H.C.J. 3286/00 The Association for Civil Rights in Israel v. The IDF Commander; H.C.J. 2461/01 Canaan v. The IDF Commander; H.C.J. 393/82 Al Massatoulia v. The IDF Commander in Judea and Samaria, PDI 37(4) 785, 793). Within the sphere of the Israeli law, he is subject, *inter alia* to the rules of the public law, including the rules of natural justice and the administrative reasonability (H.C.J. 591/88 Taha v. The Minister of Defense, PDI 45(2) 45, 52).

Israel's belligerent occupation is subject to the principal norms of the customary international law based in the Hague Convention. The question as to the extent of the application of the Geneva Convention to the matter has not yet been finally decided, but the humanitarian principles thereof were adopted in practice by the state and the Area Commander, and therefore we shall assume that they apply in our matter (*cf.* the Askan affair, *ibid.*, at para. 11).

The Hague Convention authorizes the Area Commander to operate in two main spheres: one – ensuring the legitimate security interest of the occupier, and the other - ensuring the needs of the local population in an area under belligerent occupation. The local population in this regard includes both the Arab and Israeli inhabitants. One is a military need and the other is a civilian-humanitarian need. The first focuses on concern for the security of the military

force occupying the area, and the other – on the responsibility for maintaining the inhabitants' welfare. Within the latter the Area Commander is responsible not only for maintaining the inhabitants' order and security but also for protecting their rights, particularly the constitutional human rights conferred to them. The concern for human rights lies at the heart of the humanitarian considerations which the commander must consider. According to Article 43 of the Hague Convention, the force in control of an occupied area is responsible for taking all measures available to it in order to rehabilitate and to ensure, to the extent possible, public order and security in the area, while respecting the law prevailing in the area insofar as possible. In carrying out his duty of maintaining order and security, the Area Commander must, therefore, ensure the legitimate security interest on the one hand, and protect the interests of the civilian population on the other (the Askan affair, *ibid*, at p. 794). A proper balance is required to be made between those two focal points of responsibility. Indeed, "the law of war usually creates a gentle balance between two magnetic poles: a military need, on the one hand, and humanitarian considerations on the other hand). Y. Dinstein, *Legislative Authority in the Occupied Territories*, 2 *Tel Aviv Law Review* (1973) 505, 509. Among his considerations, the commander must concentrate on the needs of the area, and he must not take into account the considerations of the state, by virtue of whose belligerent occupation of the area he exercises his powers.

The Area Commander's authority to issue orders for security purposes, including orders regarding requisition of land, is stipulated both in the international law and the Israeli law. The said orders are the law in Judea and Samaria (H.C.J. 2717/96 *Wafa Ali v. The Minister of Defense et al.*, PDI 50(2) 848, 851; H.C.J. 69/81 *Abu Ita v. The Commander of Judea and Samaria*, PDI 37(2) 197, 228-230.

#### Requisition of Land

9. Requisition of land may constitute a necessary measure in the exercise of the authorities and responsibility of the military commander. It might be required both for the exercising of military and security needs and both for the purpose of exercising the commander's duty to protect the interest of the civilian population in the area.

The international law of war prohibits the requisition or demolition of private property in an area under belligerent occupation other than where necessary for combat needs. According to Article 23(g) of the Hague Convention, it is prohibited for the occupying force "to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."

Article 52 of the Hague Convention stipulates that no requisition of land shall be performed other than for purposes of the army. The said provision was broadly interpreted in the case law as extending both to requisition for purposes of establishing military positions and outposts, and to paving roads in order to protect Israeli inhabitants residing in the area (H.C.J. 24/91 *Timraz v. The IDF Commander in Judea and Samaria*, PDI 45(2) 325; H.C.J. 2717/96

Wafa Ali, *ibid*, at p. 856; H.C.J. 401/88 Abu Rian v. The IDF commander in Judea and Samaria, PDI 42(2) 767.

Article 53 of the Geneva Convention prohibits, on its part, the demolition of any asset of real estate or chattel which belongs to the individual or the state by the occupying force, subject to the following exclusion:

"except where such destruction is rendered absolutely necessary by military operations".

In J. Pictet's interpretation commentary on the Geneva Convention (1958, at p. 302), the commentator explains the nature of the said exclusion stating the following:

"The prohibition of destruction of property situated in occupied territory is subject to an important reservation: it does not apply in cases 'where such destruction is rendered absolutely necessary by military operations'. The occupying forces may therefore undertake the total or partial destruction of certain private or public property in the occupied territory when imperative military requirements so demand. Furthermore, it will be for the occupying power to judge the importance of such military requirements. It is therefore to be feared that bad faith in the application of the reservation may render the proposed safeguard valueless; for unscrupulous recourse to be the clause concerning military necessity would allow the occupying power to circumvent the prohibition set forth in the convention. The occupying power must therefore try to interpret the clause in a reasonable manner: whenever it is felt essential to resort to destruction, the occupying authorities must try to keep a sense of proportion in comparing the military advantages to be gained with the damage done"

In the spirit of the aforesaid commentary, before deciding to requisition or destroy property of civilians in an occupied territory, the military commander is required by virtue of the international law to exercise very careful consideration. He is entitled to do so where essential military-security needs so require, and where the requisition balances proportionately between the importance of the military need and the extent of the anticipated damage to the property owner as a result of the requisition. Within the framework of the said balance, he must consider, *inter alia*, the existence of other alternatives which might prevent harm to human rights (the Timraz affair, *ibid*, at para. 4; H.C.J. 834/78 Salama v. The Minister of Defense, PDI 33(1) 471. Requisition of property as aforesaid may also occur in extreme situations where it shall be required in order to satisfy essential living needs of the population residing in the area; thus, for example, the need for the requisition of private land for the purpose of paving roads and access routes to various locations in the area has been recognized. In exceptional cases, certain damage to private property may also occur for the purpose of protection of other constitutional human rights of population living in the area, where these are contrary to an individual's property right in a specific case. But under all circumstances, a condition for the legal validity of such harm is that it meets the test of the proper balance required by the standards prevailing in constitutional law.

Alongside the rules of international law, the rules of Israeli law which apply to the Area Commander require that he avoids damaging the property of inhabitants of the area, other than where such harm shall be intended to obtain a purpose which is among his powers, and where an essential need so requires. The said authority, both from an international law point of view and from the point of view of the public Israeli law, should be exercised for a proper purpose, reasonably and proportionately, while carefully and moderately considering the essentiality of the purpose to be obtained and the nature and scope of the harm involved in obtaining it.

10. This court exercises judicial review in respect of the legality of the discretion exercised by the Area Commander in fulfilling a public figure according to law. Within said review, the court does not convert the discretion of the commander with its own discretion, and it does not purport to be an expert in security and military matters *in lieu* of the commander (H.C.J. 302/72 Hilu v. The Israeli government, PDI 27(2) 169). According to the international law as well, the military commander is given broad discretion to decide the extent of intensity of the required need (Hyde, International Law, 2<sup>nd</sup> ed. Vol. 3, at para. 656, at page 1802). The role of judicial review is to maintain the borders and ensure compliance with the legal rules which bound the Area Commander's discretion (the Ajuri affair, *ibid*, at para. 30; H.C.J. 619/78 Altalya v. The Minister of Defense, PDI 33(3) 505, 512). Strictness is required when examining the legality of the Area Commander's discretion, including the relevance, reasonableness, and proportionality of his considerations in view of all of the circumstances of the given case (H.C.J. 1005/89 Agga v. The IDF Commander, PDI 44(1) 536, 539).

#### The Levels of Examination of the Legality of the Requisition Order

11. The Petitioners claims require examination of the legality of the Requisition Order in its limited format on two levels: one – whether the reason which underlies the issuance of the order is a genuine security reason, or whether the motivation therefor is the intention to obtain another objective, such as creating a territorial sequence between Kiryat Arba and the Machpela Cave in order to strengthen the Jewish settlement in the Hebron area.

On the other level it should be examined, assuming that the Requisition Order was issued due to relevant security considerations, to what extent the commander's decision meets the test of constitutional balance, when permitting the causing of damage to the private property of one person in order to allow the taking of relative security measures which are intended to assist the fulfillment of the right of worship and prayer at a holy site of another.

#### The Purpose of the Order in Reinforcing Security Measures and Irrelevant Considerations

12. According to basic concepts of the administrative law, an administrative authority must exercise its powers based on relevant considerations only. It must take into account the relevant facts and data, including the relevant values and principles only. It is precluded from taking into account irrelevant

considerations (H.C.J. 5016/96 Horev v. The Minister of Transportation, PDI 51(4) 1, 34; I. Zamir, *The Administrative Authority*, 1996, at pp. 741-2). Applying an irrelevant consideration may lead to the invalidation of the decision where it may be assumed that had it not been taken into account, the decision of the authority would have been different (H.C.J. 390/79 Dwikat v. The Government of Israel, PDI 34(1) 1, 20). Identifying the relevant considerations in respect of exercising the authority is derived from the purpose of the qualifying legislation (H.C.J. 5688/92 Wechselbaum v. The Minister of Defense, PDI. 47(2) 812, 824; H.C.J. 987/94 Euronet Golden Lines Ltd. v. The Minister of Communications, PDI 48(5) 412, 432.

The Area Commander denies the existence of a hidden political motivation for the issuance of the order, and insists that the plan for widening the Worshippers' Route, the requisition of the parcels adjacent to the route and the demolition of the buildings involved therein, are essential for security needs and necessary for the protection of the lives of the persons using it.

The action of the military commander in issuing the Requisition Order falls under the presumption of administrative propriety as long as no sufficient factual foundation indicating otherwise has been established. In our case, no sufficient factual foundation was established in respect of the claim according to which the consideration of the Area Commander in issuing the order in its limited format involved irrelevant motivations and a hidden objective which was not, in fact, the addition of necessary security measures in the Worshippers' Route. The right of the worshippers to arrive by foot from Kiryat Arba to the Machpela Cave on Sabbath and festivals was not negated. The commander, being responsible for the safety of life and the public order in the area, and being responsible for the protection of the security of all the area's inhabitants – Jews and Arabs alike - believes that it is essential to increase the safety measures in the Worshippers' Route in order to protect the pedestrians using it. The said position is explained, *inter alia*, in view of the large number of persons who need to use the route, and the great security risks inherent therein in view of its topographic characteristics. The said position is not *prima facie* unfounded, and it is supported by a bitter past experience associated with terror attacks which occurred in the area of the route and which have claimed human casualties. The position of the commander is, *prima facie*, reasonable as a matter of logic and common sense. No major effort of persuasion is required in order to prove that a major security risk is to be expected due to the passage of thousands of pedestrians in an area prone to attacks, whose alleys are so narrow that a vehicle cannot pass through certain parts of them, and abandoned buildings alongside of which might serve as hideouts for terrorists. Such terrain conditions justify, *prima facie*, taking measures to reinforce the security of pedestrians in the passage. They may not support the claim according to which, it is an irrelevant, hidden, motivation which led to the issuance of the order. A separate question is to what extent, assuming that it is a security motivation which lies at the basis of the order, the order satisfies the constitutional test in respect of balancing between the worshippers' freedom of religion and the right of worship on the one hand, and the Petitioners' right of private property on the other.

Constitutional Balance: Exercising the Right of Prayer and Worship under Conditions of Relative Security against Relative Impairment of the Right of Private Property

13. The essence of the Requisition Order is in taking security measures in the Worshippers' Route in order to ensure, even relatively, the lives of pedestrians on Sabbaths and festivals. In order to obtain the said goal, the requisition of land alongside the route, and the partial demolition of uninhabited two buildings and another part of a building are required. Is it within the military commander's scope of authority to issue a Requisition Order in order to reinforce the security of the worshippers using the route, in order to allow the exercising of their right to pray at a holy site under the conditions of relative security, where it involves a violation of the right of private property, and does it meet a constitutional test?

The Responsibility of the Military Commander for the Safety of the Area's Inhabitants

14. In addition to the Area Commander's responsibility to ensure the safety of the military force which he commands, he must ensure the safety, security and welfare of the area's inhabitants. The said duty applies to him in respect of all the inhabitants, regardless of their identity – Jews, Arabs or foreigners. The question of the legality of the settlement of various groups of population in the area is not currently required to be decided by us. The duty of the Area Commander to guard the safety of their lives and their human rights is derived from their mere residence in the area. It coincides with the humanitarian aspect under the responsibility of the belligerent occupying military force (H.C.J. 72/86 Zalum v. The IDF Commander, PDI 41(1) 528; H.C.J. 469/83 United Bus Company v. The Minister of Defense; H.C.J. 4363/02 Zindah v. The IDF Commander; the Gussin affair, *ibid*, at para. 6). The Commander's duty to ensure the orderly living in the area extends to all spheres of life and goes beyond security issues and immediate existential needs. It applies to the inhabitants' various living needs, including welfare, sanitary, economic, education, and society needs, and other needs a person in a modern society requires. It also extends to measures required to ensure "growth, change and development" (the Askan affair, *ibid*, at para. 26). Within his responsibility for the welfare of the area's inhabitants, the commander must also see to the provision of proper protection to constitutional human rights of the area's inhabitants, within the limitations posed by the conditions and factual circumstances in the field. Such protection also applies to all kinds of population residing in the area – Jews and Arabs alike. Among the protected constitutional rights are the freedom of movement, the freedom of religion and worship, and the property right. The Area Commander must use his power in order to maintain the security and public order in the area while protecting human rights. At times, such protection requires deciding between two conflicting human rights. Such decision requires balance which satisfies the constitutional test, namely, the existence of a proper purpose and proportionality in harming the one right in order to allow the relative exercising of the other right. When issuing the Requisition Order, the Area Commander requested to reinforce the security measures of pedestrians in the Worshippers' Route on their way to the Machpela Cave. In this manner, he sought to allow the exercising of their constitutional right to freedom of

religion and worship under the conditions of life safety, albeit relatively. By doing so, a relative impairment of private property rights of the Petitioners was required. Was the balancing made proper and proportional?

#### The Freedom of Movement and the Freedom of Religion and Worship

15. The area inhabitants have a constitutional right to freedom of religion and worship. This is the case with regard to the Arab inhabitants of the area and with regard to the Israeli residents therein. The area inhabitants are entitled to freedom of movement, by which, *inter alia*, the right of access to holy sites may be exercised. The right of movement and access to holy sites has a great constitutional dominance (the Horev affair, *ibid*, at p. 49; H.C.J. 448/85 Dahar v. The Minister of Interior, PDI 40(2) 701, 708; H.C.J. 2481/93 Dayan v. Commissioner Yehuda Wilk, PDI 48(2) 456, at para. 17). In the present case, the freedom of movement is closely involved and associated with the right of exercising of the freedom of religion and worship. It is a value intended to exercise the right of Jewish worshippers to arrive by foot to the Machpela Cave on Sabbath and festivals.

The freedom of worship as an expression of freedom of religion is one of the basic human rights. It extends to the freedom of the individual to believe and act according to his belief while practicing its commandments and customs (H.C.J. 1514/01 Gur Arie v. The Second Authority for Television and Radio, PDI 55(4) 267, 277; H.C.J. 650/88 Israel Movement for Progressive Judaism v. The Minister of Religious Affairs, PDI 42(3) 377, 381; H.C.J. 3267/97 Rubinstein v. The Minister of Defense, PDI 52(5) 481, 528). The said freedom is related to the exercising of the individual's own identity. Within the limits of said freedom, the desire of the believer to pray at holy sites is recognized. Such recognition is a part of the broad constitutional protection given to the right of access of members of the various religions to their holy sites and the prohibition of offending their feelings in respect of such places (Section 1 of the Protection of Holy Sites Law, 5727-1967). The freedom of religion is regarded as a branch of the freedom of expression in the sphere of religious belief. It was recognized by the legislator already in Section 83 of the Palestine Order in-Council, 1922, and in the Declaration of Independence, which declares that every citizen in the state shall be guaranteed freedom of religion and conscience. The said freedom was recognized in the case law as an individual's basic constitutional right (H.C.J. 292/89 The Temple Mount Faithful Movement v. The District of Jerusalem Police Commissioner, PDI 38(2) 449, 454; H.C.J. 650/88 The Israel Movement for Progressive Judaism v. The Minister of Religious Affairs, PDI 42(3) 377, 381; H.C.J. 7128/96 The Temple Mount Faithful Movement v. The Government of Israel, PDI 51(2) 509, 522-3; the Gur Arie affair, *ibid*, at pp. 276-7).

The freedom of religion and worship is granted as a constitutional right to the population residing in the area – Jews and Arabs alike. It is regarded as a constitutional right of supreme status which should be exercised insofar as possible under the conditions allowed by the reality prevailing in the area, while protecting the safety of the worshippers' and the safety of their lives. The enhancement of the security measures for pedestrians in the Worshippers'

Route was intended to allow the Jewish inhabitants to exercise their constitutional right to pray at a holy site.

#### The Prayer at the Machpela Cave: Constitutional Worship Right of Jews and Arabs

16. According to the Jewish, Christian and Muslim traditions, the Machpela Cave is the burial place of Abraham and Sarah, Isaac and Rebecca, Jacob and Leah, and according to some of the non-Jewish traditions – even of Josef. According to the tradition, the cave is located on a burial ground purchased by Abraham for the burial of his wife, where the other patriarchs and matriarchs were buried thereafter, excluding Rachel. The historical and archeological research did not clearly discover who built the Machpela Cave, although most researchers attribute it to King Herod, and associate it with Idumeans (for an extensive review of this issue see the Shamgar Committee Report, *ibid*, at p. 95 *et esq.*)

The Machpela Cave was perceived as a holy site and a place of worship in as early as the period of the Mishnah, after the destruction of the Temple. The praying of Jews in the Cave is currently based on the decisions of the political echelon. Already in 1967, the government adopted a few resolutions regarding the renewal of the Jewish prayer at the Machpela Cave on Sabbath while determining arrangements for the coordination of the Jewish and Muslim prayer at the Cave, and determining proper security measures for the protection of the Jewish worshippers (the Shamgar Committee Report, p. 99 *et esq.*). Over time it was determined that Jews would be entitled to enter the Cave on Friday evening as well, for the Sabbath Eve Prayer. Commencing on 1972, the areas of prayer in the cave were re-determined in government decisions, and areas thereof have been added to Jewish prayer areas. Such expansion resulted from the increase in the Jewish settlement in the area, and the founding of Kyriat Arba, which increased the number of people wishing to pray at the Cave. On 4 August, 1975, a government resolution was adopted which regulates the arrangements for entering and exiting the Cave and the allocation of prayer times in the various areas in order to reduce the friction between the Jewish worshippers and the Muslim worshippers.

Over the years, the prayers at the cave occasionally involved violent frictions between Jews and Arabs, which at times resulted in human casualties on both sides. The conflicts peaked at the massacre at the Machpela Cave in 1994 when dozens of Muslim worshippers were murdered. The recognition of the Cave as a holy site for Jews and Muslims alike, led the government and the army, in coordination with the Muslim representatives, to determine arrangements which would allow the exercising of the right of prayer at the cave to persons wishing to do so, Jews and Muslim alike. In this context, security arrangements which aim to split the times and places of prayer between the believers of both religions were determined, with the intention to ensure that the basic rights of prayer of both sides would be upheld (the Shamgar Committee Report, at p. 107 *et esq.*). After the massacre at the Machpela Cave, the committee of inquiry recommended to preserve the prayer arrangements at the Cave for the members of both religions while strictly observing a physical separation between Jews and Muslims for security

purposes, and enhancing the security measures intended to protect worshippers of both religions from mutual attacks.

The main conclusions of the Shamgar Committee were concerned with the prayer and security arrangements required at the premises of the cave itself. The present case is concerned therewith in the manner that it deals with aspects associated with the security of the Jewish worshippers on their way to the cave, as part of the exercising of their right to freedom of worship at a holy site. However, the assumption is that the freedom of religion and worship is not absolute freedom but merely relative. It should be counterbalanced against other rights and values worthy of protection, including the value of private property (Chief Justice Barak, the Temple Mount Faithful Movement affair, *ibid*, at p. 455; Barak, Interpretation in Law, Vol. 3, at p. 255). In view of the above, the question as to whether it is necessary to ensure the safety of the worshippers justifies taking measures which include requisition of land and demolition of houses which are private property.

### The Property Right

17. The private property right in the land and buildings contemplated in the Requisition Order is a protected constitutional right. It is recognized in the international law, including within the Hague Convention and the Geneva Convention. It obtained a constitutional status in Israel in Section 3 of the Basic Law: Human Dignity and Liberty (H.C.J. 2390/96 Karasik v. The State of Israel, PDI 55(2) 625, 712; C.A. 5546/97 The Kiryat Atta Planning and Building Local Committee V. Holtzman, PDI 55(4) 629, 641). The individual's property right does not expire even in time of war (the Gussin affair, *ibid*, at para. 4). The property right has additional weight where a person's place of residence is concerned (L.C.A. 214/88 Tawil v. Rabbi Yehosua Deutch, PDI 44(3) 752, 754). The present case does not concern inhabited homes since the buildings designated for demolition were abandoned years ago. The buildings concerned are of archeological value and the historical value of which should be protected (H.C.J. 270/87 Kando v. The Minister of Defense, PDI 43(1) 738, 742). The Area Commander is under a duty, by virtue of the rules of international law, including the Hague Convention for the Protection of Cultural Property the Event of Armed Conflict, 1954, to preserve cultural treasures in an occupied territory, including assets of archeological value. He must act in this matter according to the basic principles of the administrative law.

An individual's right to property is not an absolute right. It is a relative right. It is exposed to impairment where other adequate social purposes should be promoted, including the advancement of other basic constitutional rights of other individuals (the Ajuri affair, *ibid*, at p. 365). What is the scope of permitted impairment to the property right as a constitutional right in such conflict of rights?

Two-Stage Balance: the First Stage – Freedom of Religion and Worship versus the Value of Protection of the Safety of Life; the Second Stage – Freedom of Worship versus the Value of Protection of Private Property

18. A confrontation between contradicting constitutional rights is usually a direct and frontal confrontation which requires a one-staged action of balancing and weighing. However, occasionally, the confrontation is more complex and may involve not only a conflict between constitutional human rights, but also a conflict between them and another general social value – such as the value of maintaining the public safety and security, which is integrated, under the circumstances, in the required balancing system. In such case, a need for two-stage balancing between the rights and values may arise, in order to determine the question of whether the administrative act is consistent with the constitutional standards. The present case demonstrates the latter possibility. It first raises the question of what is the proper manner of balancing between the worshippers' right to exercise the freedom of prayer at a holy site and the value of the safety of life which the Area Commander is responsible for. In the event that, within the framework of the said balancing, it is found that under the circumstances of a given case no proper balancing between the freedom of worship and the value of the safety of life is possible, then the latter value overrides and the right of worship gives way on account of the importance of the value of life. On the other hand, if it is found that it is possible, under the circumstances of a specific case, to balance between the said constitutional right and the value of the safety of life by taking increased security measures, then a second question arises – is impairing another constitutional right, such as the private property right, which is required as part of such measures, satisfies the rules of constitutional balance when conflicting with the right of prayer at a holy site.

#### The First Stage of Balancing: The Right of Worship versus the Value of the Safety of Life

19. Exercising of a constitutional right might involve risking the public's safety and security. Such risk also includes a risk to the safety and security of those who wish to exercise the constitutional right. There is a clear public interest in maintaining the social order and security. It is a necessary condition to ensuring life and human existence. Protecting the safety of life is a condition to the exercising of human rights and therefore the importance of such protection overrides the constitutional right, where there is a proper probability, in the sense of "near certainty", that the exercising of the right might result in major harm to the public's safety (President Barak in H.C.J. 292/83 *The Temple Mount Faithful Movement*, PDI 38(2) 494, 454. The public interest in protecting the safety of life affects the scope of the constitutional right and its relativity vis-à-vis other values. Where the exercise of the constitutional right would, with near certainty, result in serious harm to the public's safety, the constitutional right gives way to the public's safety (H.C.J. 2481/93 *Dayan v. The Jerusalem District Commissioner*, PDI 48(2) 456, 472). So it was determined for many years with regard to the Jews' right of prayer at the Temple Mount in Jerusalem, once it transpired that the exercise thereof in practice might, with near certainty, result in the eruption of large-scale riots, which might get out of control, both in and outside of Israel.

However, the existence of a risk to the public order and safety anticipated as a result of the exercising of the constitutional right does not justify in any case

an absolute negation of the exercising thereof. One should act, insofar as possible, in order to obtain a proper balance between the needs of protecting public safety and the value inherent in the exercising of the constitutional right, by way of creating an infrastructure of measures which shall reduce the probability of impairment. The need and ability to create such a balance are derived, on the one hand, from the dominance of the individual's constitutional right, and on the other hand, from the range of measures available to the competent authority for the purpose of satisfying the needs of order and public safety, required as a precondition for the exercising of the constitutional right.

The freedom of religion is an individual's basic constitutional right, of a preferred status even with regard to other constitutional human rights. The freedom of worship constitutes an expression of freedom of religion, and it is a branch of the freedom of speech. "A person expresses himself within the sphere of religious belief by means of worship" (I. Zamir in the Temple Mount Faithful Movement affair, *ibid*, at pp. 522-3). The constitutional protection provided to the freedom of worship is, therefore, similar, in principle, to the protection given to the freedom of expression, and the formula of constitutional balance which befits the one, is also applicable to the other (H.C.J. 292/83 The Temple Mount Faithful Movement, *ibid*, at p. 456). It is a constitutional right of great dominance and of great weight when balanced against conflicting social values.

Where the exercise of the right of worship creates near certainty of the occurrence of severe and heavy damage to the public's safety, and there is no solution to such a collision by means of use of reasonable measures which shall remove the danger, then the value of the public's safety shall prevail and the constitutional right shall give way to it (Barak, Interpretation in Law, Vol. 3, at pp. 225-6). However, where there are such reasonable measures which may reduce the danger of harm, the use thereof is possible and should be resorted to, in particular where they are confronted with a constitutional right of unique weight. Thus, insofar as the dominance of the constitutional right in the hierarchy of rights is greater, the need which increases is that of exhausting existing and available reasonable measures by means of which the danger to the public's safety may be diminished. The worshippers wishing to arrive at the Machpela Cave on foot on Sabbath and festivals wish to exercise the said right of freedom of worship at a holy site. Such right is of special importance and weight in the hierarchy of constitutional rights. Against the exercising of such right, there is the public's interest of ensuring the security and safety of the worshippers in the Worshippers' Route against danger of attacks which threaten them directly. The responsibility of the Area Commander is to secure the route and the persons using it against danger to human lives. In order to satisfy the security interest as aforesaid, the commander has two possible alternatives: to entirely prohibit the passage by foot of worshippers from kiryat Arba to the Machpela Cave on Sabbaths and festivals, or to allow such passage, while taking various measures which shall increase the security in the area. Given the constitutional power of the right of prayer at a holy site, the commander deemed fit to allow the passage while taking enhanced security measures. Such balance, *prima facie*, satisfies the reasonability test. Another

question is whether the measure harming the private property in order to obtain the said purpose satisfies the constitutional test.

#### The Second Stage of Balancing: The Right of Religion and Worship vis-à-vis the Right of Private Property

20. There might be situations where relative harm to a constitutional right may be possible in order to allow the exercising of another constitutional right under such conditions which shall ensure relative protection of the safety of life. It is conditional upon the relative balancing of the constitutional rights the one versus the other, according to the circumstances of the case. Such balancing, requires, in certain cases, a conceptual definition of the constitutional rights according to hierarchy of importance and dominance in order to examine whether the one right has preference and superiority to the other, or whether they are of equal importance and status. Sometimes such conceptual examination shall become redundant where it is found that a balancing made *de facto* satisfies also the constitutional standards required for the purpose of balancing between constitutional rights of equal status and ranking.

Under the special circumstances of the present issue, there is no need to take a decisive position regarding the conceptual hierarchy between the right of worship and the right of property in order to decide the question of how to balance them in case of a conflict. Under the circumstances of the concrete case, the balancing between them satisfies the constitutionality test (H.C.J. 153/83 Levy v. The Police Commissioner of the Southern District, PDI 38(2) 393, 400). Even in case we assume, for the purpose of this case, that we are concerned with constitutional rights of equal importance and status, even then, within the horizontal balancing between them, a certain diminution of the one may occur in order to allow the relative exercise of the other. Such diminution satisfies the constitutionality test if it befits acceptable social values, is designated for a proper purpose, and is not excessive in scope - in the spirit of the principles provided in the limitation clause in Section 8 of Basic Law: Human Dignity and Liberty. The said principles currently form a link between the basic law and the ensemble of rules of public law (the Horev affair, *ibid*, at pp. 41-43). They reflect a general balancing formula which assumes that among equally-ranking constitutional rights, no full protection should be given to the one right at the expense of full violation of the other right, but a common upholding of both should be sought while allowing a reciprocal diminution of both.

#### From the General to the Particular

21. The Area Commander has the responsibility for the security of the military force in the area under his supervision, together with maintaining the order, security and welfare of the inhabitants living therein. The primary priority within the responsibility for the area's population is the duty to maintain the safety of life but also the responsibility to protect the human rights of all of the area's inhabitants, Arabs and Israelis alike. One of the constitutional human rights which should be protected is the right of freedom of religion and worship. Within the realm of the said right, the Jewish inhabitants seek to express their belief by praying at the Machpela Cave, which is a holy site to

Judaism. The exercising of their said right on Sabbaths and Festivals requires walking from Kiryat Arba to the Machpela Cave. The risk of terror attacks and the terrain conditions require, as a condition to the passage on foot, the existence of minimal preconditions of security and protection for the worshippers against attacks. Such conditions require taking special measures for this purpose. The exercising of the said measures is involved in impairing the private property right of the Arab inhabitants of the area, whose lands are located alongside the route. The said inhabitants' property right is also of recognized constitutional status.

In issuing the Requisition Order, the Area Commander wished to make a proportionate balance between the conflicting constitutional rights with the aim of allowing the exercising of the right of prayer at a holy site under conditions of relative security to the persons using the route.

All the possible alternatives to a pedestrian route of the worshippers, other than the Worshippers' Route, have been examined, and it was found that any other alternative involves much greater costs in terms of security risks for the worshippers and anticipated harm and damage to the area's inhabitants. Once the Worshippers' Route was found to be the preferable alternative, the Area Commander limited the harm to private property alongside the route to the possible minimum. In the northern part, he reduced the widening of the road to 2 meters of each side. In the northern part of the route, he reduced the widening to a total route width of 4 meters. The said widening shall only allow unidirectional passage of rescue vehicles, as opposed to the possibility of bidirectional transportation which has been previously considered. The said reduction diminishes the harm to property on the one hand, and allows security measures of only the necessary minimum for the worshippers, on the other. All of the buildings contemplated in the Requisition Order are abandoned. One house found to be inhabited was excluded from the Requisition Order and the path of the route was changed accordingly. The reduction of the widening area of the southern route currently requires partial demolition of two buildings and a part of an additional building which have not been inhabited for many years. The demolition does not involve evacuating people from their homes. The scope of demolition should be supervised by professional factors in the field of preservation of buildings and archeology in order to protect to the extent possible cultural-historical values of the environment. The property owners have a right for usage fees and compensation for the requisition and demolition. The Requisition Order is limited in time. Should the security situation change and calm shall prevail in the area, the assumption is that the order shall not be extended and property which was requisitioned and can be returned, shall be returned to its owner.

The balance between the conflicting constitutional rights is not simple or obvious under the circumstances of this issue. It involves aspects of right of human expression by means of exercising religious belief and worship vis-à-vis rights and values which concern a connection to the land and property; in addition to all of these, there is the general value of responsibility for the safety of human life. The point of equilibrium between all of these factors is hard to find. However, at the end of the day it seems that the Requisition

Order in its limited format satisfies the constitutionality test, in relatively balancing between the constitutional rights. It allows the exercising of the right of worship while providing relative protection to the worshippers' security, which is made possible on its part by impairment of a limited scope of the conflicting private property right, accompanied by monetary compensation. It does not contradict accepted values of society, it is done for a proper purpose, and it does not derogate from the required proportionality. Had the Area Commander been refrained from relative impairment of the property rights, this would have meant failing to adopt necessary security measures in order to ensure the persons passing through the route. Had this been the case, it would have required total negation of the worshippers' right to arrive at the cave on Sabbaths and festivals for fear of lack of sufficient security measures to ensure their safety. Such negation would have constituted absolute and improper violation of the freedom of worship to pray at a holy site and severe violation of the freedom of movement and access required for the purpose of exercising the freedom of religion. Alternatively, it might have resulted in allowing the worshippers to walk through the route without special security measures required under the circumstances, while increasing the immediate risk to the safety and life of men, women and children using the route, sometimes by thousands. Such alternatives create great difficulty. In view of the above, maintaining the right of worship under conditions of relative protection to the worshippers' safety, while causing relative harm, limited to a minimum, to property rights of right owners along the route, satisfies, under the special circumstances of the present case, the conditions of constitutional balance in a manner which is not unreasonable.

Consequently, I find no cause to intervene in the discretion of the Area Commander in issuing the Requisition Order in its limited format, according to which the order is due to be amended.

#### Outcome

22. On the basis of the aforesaid, I shall offer my colleagues to deny the petitions and to recognize the validity of the Requisition Order in its limited format as indicated in the written notice of the state of 7 August, 2003, and in the statements made by the counsel for the Respondents in the court hearing held on 23 November, 2003, with regard to the scope of the widening of the route in its northern part. We have noted before us the Respondents' statement that an amended order to the original Requisition Order shall be issued in the spirit of the aforementioned notices of the state.

Chief Justice A. Barak

I concur.

Justice M. Cheshin:

I concur.

Therefore it was decided as aforesaid in the judgment of Justice Procaccia.

Issued today, 11 Adar, 5764 (4 March, 2004).