

HCJ 10356/02

1. Yoav Hass
 2. MK Musi Raz
 3. 'Yesh Gevul' Movement
- v.
1. IDF Commander in West Bank
 2. State of Israel

HCJ 10497/02

Hebron Municipality and others

v.

1. Major-General Moshe Kaplinsky, IDF Commander in Judaea and Samaria
2. Civilian Administration for Judaea and Samaria
3. Government of Israel

The Supreme Court sitting as the High Court of Justice

[4 March 2004]

Before President A. Barak and Justices M. Cheshin, A. Procaccia

Petition to the Supreme Court sitting as the High Court of Justice

Facts: The Machpela Cave is believed to be the burial site of Abraham and Sarah, Isaac and Rebecca, Jacob and Leah. As such, it is holy to Jews and Moslems. Over the years, the site has seen acts of violence by members of one religion against the other, resulting in casualties.

On Sabbaths and festivals, large numbers of Jews, sometimes in the thousands, go from the nearby town of Kiryat Arba to the Machpela Cave on foot, since the use of vehicles is prohibited by Judaism on these days. They go to the Cave by means of the 'worshippers' route,' a narrow passage that is not wide enough for security or rescue vehicles to pass in case of a terrorist attack.

The IDF commander in Judaea and Samaria decided to widen the worshippers' route, and for this purpose he made an order to requisition private land and to demolish certain buildings along the route. The petitioners challenged the constitutionality of this order.

Held: In view of the constitutional importance of the freedom of religion and the freedom of worship, a certain violation of property rights may be allowed to facilitate the freedom of worship. The buildings scheduled for demolition are uninhabited, and the widening of the route was kept to the absolute minimum, to allow only unidirectional traffic. In these circumstances, the requisition order satisfies the test of constitutionality.

Petitions denied.

Legislation cited:

Basic Law: Human Dignity and Liberty, ss. 3, 8.

Palestine Order in Council, 1922, art. 83.

Protection of Holy Places Law, 5727-1967, s. 1.

Israeli Supreme Court cases cited:

- [1] HCJ 4212/02 *Gussin v. IDF Commander* [2002] IsrSC 56(4) 608.
- [2] HCJ 7015/02 *Ajuri v. IDF Commander in West Bank* [2002] IsrSC 56(6) 352; **[2002-3] IsrLR 83.**
- [3] HCJ 393/82 *Jamait Askan Almalmoun Altaounia Almahdouda Almasaoulia Cooperative Society v. IDF Commander in Judaea and Samaria* [1983] IsrSC 37(4) 785.
- [4] HCJ 6860/01 *Hamada v. Israel Insurance Pool* [2003] IsrSC 57(3) 8.
- [5] HCJ 3286/00 *Association for Civil Rights in Israel v. IDF Commander in Judaea and Samaria* (unreported).
- [6] HCJ 2461/01 *Canaan v. IDF Commander in Judaea and Samaria* (unreported).
- [7] HCJ 591/88 *Taha v. Minister of Defence* [1991] IsrSC 45(2) 45.
- [8] HCJ 2717/96 *Wafa v. Minister of Defence* [1996] IsrSC 50(2) 848.
- [9] HCJ 69/81 *Abu Ita v. Commander of Judaea and Samaria* [1983] IsrSC 37(2) 197.
- [10] HCJ 24/91 *Timraz v. IDF Commander in Gaza Strip* [1991] IsrSC 45(2) 325.
- [11] HCJ 401/88 *Abu Rian v. IDF Commander in Judaea and Samaria* [1988] IsrSC 42(2) 767.

- [12] HCJ 834/78 *Salama v. Minister of Defence* [1979] IsrSC 33(1) 471.
- [13] HCJ 302/72 *Hilo v. Government of Israel* [1973] IsrSC 27(2) 169.
- [14] HCJ 619/78 *El Talia Weekly v. Minister of Defence* [1979] IsrSC 33(3) 505.
- [15] HCJ 1005/89 *Agga v. IDF Commander in Gaza Strip* [1990] IsrSC 44(1) 536.
- [16] HCJ 5016/96 *Horev v. Minister of Transport* [1997] IsrSC 51(4) 1; **[1997] IsrLR 149**.
- [17] HCJ 390/79 *Dawikat v. Government of Israel* [1980] IsrSC 34(1) 1.
- [18] HCJ 5688/92 *Wechselbaum v. Minister of Defence* [1993] IsrSC 47(2) 812.
- [19] HCJ 987/84 *Euronet Golden Lines (1992) Ltd v. Minister of Communications* [1994] IsrSC 48(5) 412.
- [20] HCJ 72/86 *Zaloom v. IDF Commander for Judaea and Samaria* [1987] IsrSC 41(1) 528.
- [21] HCJ 469/83 *Hebron National United Bus Co. Ltd v. Minister of Defence* (unreported).
- [22] HCJ 4363/02 *Zindah v. IDF Commander in Gaza Strip* (unreported).
- [23] HCJ 448/85 *Dahar v. Minister of Interior* [1986] IsrSC 40(2) 701.
- [24] HCJ 2481/93 *Dayan v. Wilk* [1994] IsrSC 48(2) 456; **[1992-4] IsrLR 324**.
- [25] HCJ 1514/01 *Gur Aryeh v. Second Television and Radio Authority* [2001] IsrSC 55(4) 267.
- [26] HCJ 650/88 *Israel Movement for Progressive Judaism v. Minister of Religious Affairs* [1988] IsrSC 42(3) 377.
- [27] HCJ 3267/97 *Rubinstein v. Minister of Defence* [1998] IsrSC 52(5) 481; **[1998-9] IsrLR 139**.
- [28] HCJ 292/83 *Temple Mount Faithful v. Jerusalem District Police Commissioner* [1984] IsrSC 38(2) 449.
- [29] HCJ 7128/96 *Temple Mount Faithful v. Government of Israel* [1997] IsrSC 51(2) 509.
- [30] HCJ 2390/96 *Karasik v. State of Israel* [2001] IsrSC 55(2) 625.
- [31] CA 5546/97 *Kiryat Ata Local Planning and Building Committee v. Holtzman* [2001] IsrSC 55(4) 629.
- [32] LCA 214/88 *Tawil v. Deutch* [1990] IsrSC 44(3) 752.
- [33] HCJ 270/87 *Kando v. Minister of Defence* [1989] IsrSC 43(1) 738.
- [34] HCJ 153/83 *Levy v. Southern District Commissioner of Police* [1984] IsrSC 38(2) 393; **IsrSJ 7 109**.

For the petitioners in HCJ 10356/02 — Y. Arnon, Y. Niv.

For the petitioners in HCJ 10497/02 — S. Licker.

For the respondents — Y. Gnessin.

JUDGMENT

Justice A. Procaccia

The question

1. The Jewish inhabitants of Kiryat Arba wish to realize 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 along a route that is approximately 730 metres long (hereafter — ‘the worshippers’ route’). A large number of pedestrians — men, women and children — pass along this route every Sabbath and festival on their way to pray at the Machpela Cave. In the area adjacent to the worshippers’ route, murderous attacks were made in recent years by terror organizations. Because of the security risk that threatens the pedestrians on the route, the IDF Commander in Judaea and Samaria (hereafter — ‘the area commander’) wishes to adopt various measures to improve the security of those passing along 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 at the southern part by the Machpela Cave in order to allow security and rescue vehicles to pass, something which is currently impossible because of the narrowness of the path. In order to widen the path along the route, it is necessary to requisition areas of land along the route, and to carry out a partial demolition of two buildings and part of an additional building that are situated in the southern part of the route and are uninhabited. In order to give effect to these measures, the area commander issued a requisition and demolition order. The legality of this action by the area commander is subject to judicial review in this proceeding. We will examine the scope of his authority to issue the order, and we will consider in this regard the question of the relationship between the worshippers’ right of movement and worship and the property right of the owners of the land situated in the area of the order.

Background

2. On Friday evening, 15 November 2002, shots were fired by a terrorist cell at the security forces and worshippers who were walking along the

worshippers' route from Sabbath prayers at the Machpela Cave to their homes in Kiryat Arba. In the battle that ensued between the terrorists and the security forces at the site, twelve security personnel from the IDF, the Border Police and the Kiryat Arba Duty Unit were killed. As a result of this event, and against the background of several previous terror incidents that occurred near that place, the area commander decided to adopt measures to increase the level of security on the worshippers' route in order to protect the safety and lives of those using it on the way to prayers. The main steps were widening the path and carrying out actions required for this purpose. In order to carry out this plan, on 29 November 2003 the area commander issued an 'Order for the Requisition of Land' (hereafter — 'the requisition order'), in which he ordered the requisition of parcels of land lying adjacent to the route, and the destruction of several buildings along the path. Originally, the order was intended to allow the following measures to be carried out: in the northern part of the route (which extends from the 'Pishpesh' route to the crossroads of the 'Zion,' 'Erez' and 'Goren' routes) — building a concrete defence wall to protect the worshippers against flat-trajectory shooting from the east and also widening the road for the purpose of paving a walkway for pedestrians that will be protected by a concrete barrier whose purpose is to prevent pedestrians from being trampled by a vehicle travelling on the road. At the junction itself, a change is planned in the level of the routes crossing it, in order to prevent an obstruction of vehicles at the junction, which in itself creates a security risk. The southern part of the route is a very narrow passage that passes mainly by the houses of the eastern *casba* of Hebron, and it leads to the Machpela Cave. This passage, because of its narrowness, does not allow vehicles to transverse it. Along it there are abandoned buildings that may be used as a refuge for terrorists and may endanger the lives of pedestrians that pass by, sometimes in their thousands, on their way to prayers. Here the original order planned a widening of the passage to a total width of eight metres, in order to allow the passage of military vehicles and rescue vehicles for the purpose of accompanying and protecting the worshippers, and for the purpose of rescue in case of an attack. In order to allow such a widening, it planned the destruction of approximately 13 abandoned buildings that are situated alongside the route. The order was for a limited time.

The petitions

3. Before us are two petitions against the requisition order. In one petition the petitioners are the 'Yesh Gevul' Movement and some of its activists, and

in the other petition the petitioners are the Hebron Municipality, the Hebron Buildings Renovation Association, and a group of owners of rights in the land included in the requisition order. The petitions attack the legality of the requisition order and allege that it is unreasonable in the extreme and disproportionate in view of the purpose for which it was made, in view of the severe harm to the property of the owners of rights in the land along the route and in view of the planned harm to the buildings which have an unique archaeological value. It is alleged that the order was issued by the area commander for improper reasons, and the security reason that was given for making the order is a smokescreen for a predominantly political motive whose main purpose is to create territorial continuity between Kiryat Arba and the Machpela Cave by means of establishing a promenade that will, in the future, allow the expansion of Jewish settlement in the area. In this regard, it was alleged that there is no real objective connection between the attacks that occurred in the area and the measures planned within the framework of the requisition order, including the demolition of the houses, and since the area governed by 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 arguments that the implementation of the order is likely to lead to the destruction of an important part of the historical city of Hebron, which includes buildings from the Mamluk period and other houses intended for conservation, and that the antiquities law that applies in the area does not allow such activities for archaeological reasons. This claim was supported in a professional opinion given by persons involved in the conservation of ancient buildings and in an expert architectural opinion.

It was also argued by the petitioners that the requisition of the land and the demolition of the buildings governed by the order is contrary to international law that requires the area commander to exercise his authority to ensure order and security in the occupied area within the framework of article 43 of the Hague Convention of 1907 (hereafter — the ‘Hague Convention’) and is contrary to article 53 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949 (hereafter — the ‘Geneva Convention’) which prohibits the destruction of the real estate assets of civilians in an occupied area unless this action is essential and required for military operations. The requisition order is also contrary to the international law that governs the conservation of archaeological assets. According to their position, the order also does not satisfy Israeli constitutional law, because it results in an unbalanced result when weighing the right of the worshippers to

realize their freedom of religion and worship against the right of the landowners along the route, who are entitled to protection of their property. The owners of the property rights among the petitioners also argue 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 response of the State to the petitions, it was argued that the sole purpose of the requisition order was security-oriented, and it did not serve as a disguise for achieving any other purpose. It was made in direct response to the continuing risk of terrorist acts, which consistently threatened the Jewish inhabitants who used the worshippers' route, and in view of the responsibility of the IDF commander to ensure their safety. In order to increase security measures along the route, discretion was exercised carefully and various alternative ways were considered for the pedestrian passage of worshippers to the Machpela Cave on Sabbaths and festivals, and the most strenuous efforts were made to minimize, in so far as possible, the harm to the local inhabitants and the owners of rights in the land adjoining it. Eventually it was found that using the route was the most appropriate solution, as compared with the other options, in view of security needs on the one hand, and the need to restrict the extent of the harm to the local inhabitants on the other.

In response to the petitioners' claim that their right to challenge the order before the area commander was not upheld, it was argued that the proper steps were taken to make the requisition order known to the owners of rights concerned. A reasonable period of time was allowed for submitting objections, but no such objections were submitted during the time allocated for this before the filing of the petitions.

In the normative sphere, it was argued that the authority of the military commander to requisition land in the occupied area is based on article 43 of the Hague Convention, which establishes a duty to maintain security in the occupied area, and on the proviso in article 23(g) of the Convention which provides a qualification to the prohibition against the demolition of enemy property when this is required for combat purposes. Article 52 of the Hague Convention allows land to be requisitioned for the purpose of ensuring order and public security even when there is no combat, and this also serves as a basis for the action that was carried out. The duty to conserve cultural assets that is enshrined in international law does not preclude recognition of urgent

security needs that in certain circumstances override the duty to conserve cultural assets as aforesaid. By virtue of these sources, the area commander is authorized, and even obliged, to protect the security of the pedestrians on the worshippers' route, and the making of the requisition order falls within this authority and responsibility. This order satisfies the constitutional test in view of the security needs required along the route within the framework of the worshippers' right of worship, and the inevitable harm to the property of the petitioners as a result is proportionate in view of the fact that we are concerned with buildings that were abandoned some time ago, and in view of the existence of a right to financial compensation for this injury. The action of the IDF commander reflects a proper balance between the various values involved in this case, and it is essential to the public interest, it is reasonable and proportionate, and there are no grounds for intervention in order to change it.

The sequence of proceedings

5. On 18 December 2002, an order *nisi* was made in the petitions, whereas an interim order that prohibited the demolition of buildings in accordance with the requisition order was restricted so that it would not apply to the northern part of the route up to the crossroads. Within this framework, additional time was given to the owners of the rights to object to the requisition order. Of the 13 owners of rights in the houses that were scheduled for demolition under the original order objections were filed with regard to six buildings. One building that was found to be inhabited was excluded from the requisition order.

Before a decision was made with regard to the petitions, the area commander was asked by the court to reconsider other possibilities for the plan of action under the original order, in order to minimize the harm that it was expected to cause the inhabitants of the neighbourhood, such as sealing houses instead of demolishing them, stationing soldiers in order to protect the route when pedestrians pass, directing worshippers to an alternative route, and the like.

Approximately six months after the decision of the court in this respect, the State gave notice, first, that other possibilities for the pedestrian route of worshippers to the Machpela Cave that do not use the worshippers' route were reconsidered. These were found to be unsuitable, either because they involve too great a risk to the pedestrians, or because preparing the route requires greater harm to the property owners, or because they involve a risk of increasing 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 Commission of Inquiry on the Massacre at the Machpela Cave in Hebron* (hereafter — ‘the Shamgar Commission Report’). In the opinion of the area commander, these defects make the other possibilities for the pedestrian route of the worshippers to the Machpela Cave on Sabbaths and festivals unsuitable, and the worshippers’ route remains the most reasonable option from the viewpoint of the conditions of the terrain and the scope of the measures required in order to safeguard the area.

In such conditions, the area commander decided that there was no alternative to increasing the security of the worshippers’ route itself as the pedestrian route for large numbers of pedestrians, and that for this purpose the requisition order was needed. He also decided, after a reconsideration, that the stationing of soldiers at security positions or the sealing of houses was insufficient, and the widening of the route and the unavoidable demolition of a small number of buildings were required. Notwithstanding, after a reconsideration, it was decided to reduce significantly the scope of the harm to the owners of the property in the area, as compared with the original requisition order. While the original order refers to the widening of the route to a total width of eight metres, according to the revised position a widening of the route to a total width of only 4 metres is sufficient. This width provides the minimum required to allow the passage of security vehicles in one direction. Even though, in the opinion of the area commander, such a minimal widening of the route involves a certain security risk in that it does not allow two-directional traffic of vehicles along the route, he is currently prepared to be satisfied with a more limited widening of the route that will allow only unidirectional traffic, in order to minimize the damage to the owners of the lands adjacent to the route. The reduction of the width of the route also involves a significant reduction in the number of structures that are scheduled for demolition. Whereas the original plan spoke of the demolition of 13 buildings, today the plan calls for a partial demolition of two buildings and a part of a third building that are situated at the ends of the route and are abandoned. The demolition will be carried out under professional supervision to protect, in so far as possible, important archaeological foundations and to restrict the extent of the harm to the buildings to a minimum. It is also planned to seal entrances to additional uninhabited buildings along the route, to install nets in inhabited buildings, to pave a part of a path that has not yet been paved in order to safeguard against the laying of mines, and to place lamp posts and guard posts along the route. With regard to the northern part

of the route, the State undertook not to extend the route to more than two metres from the two sides of the road (court record of 23 November 2003). In order to make the aforesaid revisions to the original plan, an appropriate amendment of the requisition order was required.

The essence of the order in its limited format as it is brought before us for review is, therefore, the following: in the northern part of the route — widening of the road to an amount of two metres from each side; in the southern part of the route — widening the road to a total width of four metres; a partial demolition of two buildings and a part of an additional building; the requisition of parcels of land alongside the route, as required for the purpose of widening it.

Decision

Right to be heard

6. The owners of the rights in the land claim that their right to challenge the validity of the requisition order before the military commander, before they filed their petition, was not upheld.

No-one disputes the existence of a right to be heard that is available to anyone who may be harmed by an executive act. There is no need to expand upon the importance of this right, which is firmly rooted in Israeli administrative law. However, in the circumstances of this case, the right of the petitioners to be heard was not violated. The order, according to its wording, regulates the details of how it should be published and the ways in which it should be delivered to the owners of the rights who may be harmed by its provisions. The provisions of the order were carried out in this respect. The requisition order was distributed in the area designated for the requisition, and it was affixed to each of the buildings scheduled for demolition. It was delivered to the mayor of Hebron and the legal adviser of the municipality. Copies of the order were deposited at the Hebron liaison office and at the other offices of the competent Israeli and Palestinian authorities in the area. The fact that the order had been made was announced in the media. In addition, a tour of the route in the order was made, with the participation of military personnel and representatives of the owners of the rights in the land, and time was given to those persons who were likely to be harmed to challenge the order before the area commander. Before filing the petitions, no challenges were filed within the time period fixed for this. Within the framework of the hearing of the petitions, additional time was given to the petitioners to file their challenges. At this stage of the

proceedings, challenges were filed with regard to some of the buildings scheduled for demolition under the original plan. These challenges were examined by the State. In view of the aforesaid facts, the petitioners' right to be heard and to file objections was satisfied within the framework of this proceeding.

Legality of the requisition order

7. The requisition order that was made involves the requisition of private land and the demolition of buildings, and it constitutes a legal act that harms the petitioners' property rights. The legality of this act should be examined within the framework of international law, local law and Israeli law that all apply to the actions of the area commander (HCJ 4212/02 *Gussin v. IDF Commander* [1], at p. 609; HCJ 7015/02 *Ajuri v. IDF Commander in West Bank* [2], at p. 382 {117-118}).

The question that must be answered is whether the requisition order, in its reduced version, satisfies the criteria required for its legality, or whether it suffers from a defect that justifies judicial intervention to set it aside or amend it. In considering this question, we will examine the source and scope of the area commander's authority to make the order under discussion; we will consider whether there is a basis for the petitioners' suspicion that irrelevant motives led to the making of the order; and we will scrutinize the various values and rights that conflict in this case — freedom of worship and the right of movement, the protection of human life, the protection of private property rights — in order to determine whether these were balanced against each other properly within the framework of the order, and whether the order satisfies the rules of constitutional law.

The area commander's responsibility and scope of authority

8. The executive powers of the area commander derive from several sources: the rules of public international law that concern belligerent occupation; the local law that prevails in the area, which is composed of the law prior to the military occupation and new local legislation that was enacted by the military administration; and the principles of Israeli law (HCJ 393/82 *Jamait Askan Almalmoun Altaounia Almahdouda Almasaoulia Cooperative Society v. IDF Commander in Judaea and Samaria* [3], at para. 10; HCJ 6860/01 *Hamada v. Israel Car Insurance Pool* [4], at paras. 6-7). Within the sphere of international law, his actions are subject to the laws of war that determine what is permitted and what is prohibited for the commander of a military force who is responsible for an area under

belligerent occupation (*Ajuri v. IDF Commander in West Bank* [2], at p. 358 {87}; H CJ 3286/00 *Association for Civil Rights in Israel v. IDF Commander in Judaea and Samaria* [5]; H CJ 2461/01 *Canaan v. IDF Commander in Judaea and Samaria* [6]; *Jamait Askan Alalmoun Altaounia Almahdouda Almasaoulia Cooperative Society v. IDF Commander in Judaea and Samaria* [3], at p. 793). Within the framework of Israeli law, he is subject, *inter alia*, to the rules of public law, including the rules of natural justice and administrative reasonableness (H CJ 591/88 *Taha v. Minister of Defence* [7], at p. 52).

Israel's belligerent occupation of the occupied territories is subject to the main norms of customary international law that are enshrined in the Hague Convention. The question to what extent the Geneva Convention applies in this sphere has not yet been finally determined, but the humanitarian principles have been adopted *de facto* by the State and the area commander, and therefore we will assume that they apply in our case (cf. *Jamait Askan Alalmoun Altaounia Almahdouda Almasaoulia Cooperative Society v. IDF Commander in Judaea and Samaria* [3], at para. 11).

The Hague Convention authorizes the area commander to act in two main spheres: the first is to ensure the legitimate security interest of the occupier, and the second is to ensure the needs of the local population in the area under belligerent occupation. The local population for this purpose includes both the Arab and Israeli inhabitants. The first need is a military need and the second is a civilian-humanitarian need. The first focuses on concern for the security of the military force that is occupying the area, and the second concerns the responsibility for preserving the welfare of the inhabitants. Within the latter sphere, the area commander is responsible not only for maintaining order and ensuring the security of the inhabitants but also for protecting their rights, especially their constitutional human rights. The concern for human rights lies at the heart of the humanitarian considerations that the area commander must consider. According to art. 43 of the Hague Convention, the force in control of the occupied area has the responsibility to take all the steps that it can to re-establish and guarantee, in so far as possible, public order and security in the area, while respecting the law in force in the area, in so far as possible. In carrying out his duty to maintain order and security, the area commander must therefore ensure the essential security interests on the one hand, and protect the interests of the civilian population in the area on the other (*Jamait Askan Alalmoun Altaounia Almahdouda Almasaoulia Cooperative Society v. IDF Commander in Judaea*

and Samaria [3], at p. 794). A proper balance is required between these two focal points of responsibility. Indeed, ‘the laws of war usually create a delicate balance between two magnetic poles: military needs on the one hand, and humanitarian considerations on the other’ (Y. Dinstein, ‘Legislative Authority in the Administered Territories,’ 2 *Iyunei Mishpat* (1973) 505, at p. 509). In his considerations, the commander must concentrate on the needs of the area; he should not take into account the concerns of the country that holds the area under belligerent occupation, as a result of which he is exercising his authority.

The authority of the area commander to make orders for security needs, including an order concerning the requisition of land, is established both in international law and in Israeli law. These orders are law in Judaea and Samaria (HCJ 2717/96 *Wafa v. Minister of Defence* [8], at p. 851; HCJ 69/81 *Abu Ita v. Commander of Judaea and Samaria* [9], at pp. 228-230).

Requisition of land

9. The requisition of land may be an essential step in the realization of the area commander’s powers and responsibility. It may be required both in order to realize military and security concerns, and in order to realize the duty of the commander to protect the interests of the civilian population in the area.

The laws of war in international law prohibit the requisition or demolition of private property in an area under belligerent occupation unless it is essential for combat purposes. According to article 23(g) of the Hague Convention, the occupying power is forbidden:

‘To destroy or seize the enemy’s property, *unless such destruction or seizure be imperatively demanded by the necessities of war*’ (emphasis supplied).

Article 52 of the Hague Convention provides that no requisition of land shall be made in an occupied area, except for military purposes. This article has been interpreted broadly in case law as applying also to the need to requisition land in order to establish military positions and outposts, and also in order to pave roads for the purpose of protecting Israeli inhabitants living in the area (HCJ 24/91 *Timraz v. IDF Commander in Gaza Strip* [10]; *Wafa v. Minister of Defence* [8], at p. 856; HCJ 401/88 *Abu Rian v. IDF Commander in Judaea and Samaria* [11]).

Article 53 of the Geneva Convention prohibits the destruction of any real estate or movable property that belongs to an individual or to the State by the occupying force, subject to the following exception:

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

In J. Pictet’s commentary on the Geneva Convention (1958, at p. 302), he explains the nature of the aforesaid reservation as follows:

‘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 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*’ (emphases supplied).

In the spirit of the aforesaid commentary, before he decides to requisition or to demolish civilian property in the occupied territory, the military commander is required by international law to exercise very scrupulous consideration. He is entitled to do this where essential military-security needs so demand, and when the requisition balances proportionately between the importance of the military need and the extent of the damage that is likely to be caused to the property owner by the requisition. Within the framework of this balance, he should consider, *inter alia*, the existence of alternatives that may prevent any harm to individual rights (*Timraz v. IDF Commander in Gaza Strip* [10], at para. 4; H CJ 834/78 *Salama v. Minister of Defence* [11]). The requisition of property as aforesaid will also be possible in exceptional cases where it is required in order to provide essential living requirements of the population living in the area; thus, for example, a need was recognized to

requisition private land for the purpose of paving roads and access routes to various places in the area. In exceptional cases, a certain harm to private property may be possible for the purpose of providing a proper defence to other constitutional human rights of the population living in the area, where these conflict with the property right of the individual in a specific case. But it is always a condition for the legal validity of such harm that it satisfies the proper balance test which is required in accordance with the criteria determined by constitutional law.

Alongside the rules of international law, the rules of internal Israeli law that apply to the area commander require that the property of the inhabitants of the area may not be harmed unless such harm is intended to achieve a purpose which falls within his powers, and an essential need makes this necessary. This power, both from the viewpoint of international law and from the viewpoint of Israeli public law, should be exercised for a proper purpose, reasonably and proportionately, after a careful and measured balance between the necessity of the purpose that he wishes to achieve and the nature and scope of the harm involved in achieving it.

10. This court exercises judicial review of the legality of the discretion exercised by the area commander as someone who holds a public office by law. In this review, the court does not replace the discretion of the commander with its own discretion, and it does not make itself an expert in security and military matters in the place of the commander (H CJ 302/72 *Hilo v. Government of Israel* [13]). Even under international law the military commander has broad discretion to decide the scope of the necessity (C.C. Hyde, *International Law* (second edition, vol. 3, 1947), at p. 1802). The role of judicial review is to stand on guard and ensure compliance with the legal rules that determine the limits of the area commander's discretion (*Ajuri v. IDF Commander in West Bank* [2], at para. 30; H CJ 619/78 *El Talia Weekly v. Minister of Defence* [14], at p. 512). We must be scrupulous when considering the legality of the discretion exercised by the area commander, including whether the considerations underlying his action are relevant, reasonable and proportionate, in view of all of the circumstances of the given case (H CJ 1005/89 *Agga v. IDF Commander in Gaza Strip* [15], at p. 539).

Levels of scrutiny of the requisition order's legality

11. The arguments of the petitioners necessitate an examination of the legality of the requisition order in its restricted format on two levels: first, whether the reason underlying the making of the order is a real security

concern, or whether the motive for it is intended to achieve another purpose, such as creating territorial continuity between Kiryat Arba and the Machpela Cave for the purpose of strengthening the Jewish settlement in the area of Hebron.

Second, we must examine to what extent, assuming that the requisition order was made for relevant security reasons, the decision of the commander satisfies the constitutional balance test, in permitting harm to the private property of one person in order to allow proportionate security measures to be adopted for the purpose of helping to achieve the right of worship and prayer of another person at a holy place.

Purpose of the order to increase security measures and irrelevant considerations

12. According to the basic principles of administrative law, an administrative authority is obliged to exercise its powers on the basis of relevant considerations only. It must take into account facts and data that are relevant to the case, including relevant values and principles only. It is prohibited from considering an irrelevant consideration (HCJ 5016/96 *Horev v. Minister of Transport* [16], at p. 34 {183}; I. Zamir, *Administrative Authority*, 1996, at pp. 741-742). Taking an irrelevant consideration into account may result in the decision being set aside where it can be assumed that, had the irrelevant consideration not been taken into account, the decision of the authority would have been different (HCJ 390/79 *Dawikat v. Government of Israel* [17], at p. 20). Identifying the relevant considerations for exercising the authority is based on the purpose of the authorizing legislation (HCJ 5688/92 *Wechselbaum v. Minister of Defence* [18], at p. 824; HCJ 987/84 *Euronet Golden Lines (1992) Ltd v. Minister of Communications* [19], at p. 432).

The area commander denies the existence of a concealed political motive for making the order, and insists that the plan to widen the worshippers' route, requisition the parcels adjacent to the route and demolish the buildings, all of which is included in the order, is essential for security needs and vital for the protection of the lives of the persons using it.

The action of the military commander in making the requisition order has the presumption of administrative propriety as long as no factual basis has been established to the contrary. In our case, no sufficient factual basis has been established for the claim that the considerations of the area commander in issuing the order in its narrow format were motivated by irrelevant

considerations and a concealed purpose that is not really the addition of essential security measures on the worshippers' route. The right of worshippers to walk from Kiryat Arba to the Machpela Cave on Sabbaths and festivals has not been denied. The commander, as the person responsible for the security of the inhabitants and public order in the area, and as the person responsible for protecting the safety of the inhabitants of the area — both Jews and Arabs — is of the opinion that it is essential to increase security measures along the worshippers' route in order to protect the pedestrians who use it. This position is explained, *inter alia*, against the background of the large number of persons who use the route, and the major security risks involved in it in view of its topographic characteristics. This position is not *prima facie* unfounded and it is supported by bitter experience associated with the terror attacks that have occurred in the area of the route and which have claimed human lives. The position of the commander, *prima facie*, is reasonable from the viewpoint of logic and clear reasoning. No major effort at persuasion is required to prove the existence of a major security risk created by the passage of thousands of pedestrians in an area infamous for terror attacks, whose alleys are so narrow that a vehicle cannot pass along certain parts of them, and abandoned buildings next to it may serve as hideouts for terrorists. These topographic features justify, *prima facie*, the adoption of measures to increase the security of the pedestrians in the passage. They do not support the claim that an improper, concealed motive is what led to the making of the order. A separate question is to what extent, assuming that it is indeed a security motive that underlies the order, it satisfies the constitutional test as to the manner in which it balances between the freedom of religion and right of worship of the worshippers on the one hand, and the right of private property of the petitioners on the other.

Constitutional balance: realization of the right of prayer and worship in conditions of relative security against a relative violation of the right of private property

13. The essence of the requisition order is the adoption of security measures along the worshippers' route in order to protect, albeit in a relative degree, the lives of the pedestrians on Sabbaths and festivals. In order to achieve this purpose, a requisition of land is required alongside the route, as well as a partial demolition of two buildings and a part of an additional building which are uninhabited. Is the military commander authorized to make a requisition order for the purpose of increasing the security of the worshippers who use the route, in order to allow them to realize their right to

pray at the holy site under conditions of relative security, where this involves a violation of the right of private property, and does this satisfy the constitutional test?

Responsibility of the military commander for the safety of the inhabitants of the area

14. In addition to the responsibility of the area commander to ensure the security of the military force that he commands, he must ensure the safety, security and welfare of the inhabitants of the area. He owes this duty to all the inhabitants, without any distinction as to their identity — Jews, Arabs or foreigners. The question whether the residency of various parts of the population is legal does not come before us today for a determination. Their very residency in the area leads to the duty of the area commander to protect their lives and their human rights. This is part of the humanitarian sphere for which the military force is responsible in a belligerent occupation (HCJ 72/86 *Zaloom v. IDF Commander for Judaea and Samaria* [20]; HCJ 469/83 *Hebron National United Bus Company Ltd v. Minister of Defence* [21]; HCJ 4363/02 *Zindah v. IDF Commander in Gaza Strip* [22]; *Gussin v. IDF Commander* [1], at para. 6). The duty of the commander to ensure proper living conditions in the area extends to all spheres of life and goes beyond security matters and immediate existential needs. It applies to the varied living requirements of the inhabitants, including medical needs, sanitation, economic concerns, education, social needs and other needs that people require in modern society. It applies also to measures required to ensure ‘growth, change and development’ (*Jamait Askan Almalnoun Altaounia Almahdoua Almasaoulia Cooperative Society v. IDF Commander in Judaea and Samaria* [3], at para. 26). Within the framework of his responsibility for the welfare of the inhabitants of the area, the commander must also concern himself with providing proper protection for the constitutional human rights of the inhabitants of the area, within the limits that the conditions and circumstances in the area allow. Such protection applies to all the population groups that live there, Jews and Arabs alike. Included among the protected constitutional rights are the rights to freedom of movement, freedom of religion and worship, and property rights. Sometimes this protection requires a decision between conflicting human rights. Such a decision requires a balance that satisfies the constitutional test, namely the existence of a proper purpose and proportionality in the harm to one right in order to allow the relative realization of the other right. In making the requisition order, the area commander is seeking to increase the security measures for pedestrians on

the worshippers' route on their way to the Machpela Cave. Thereby he is seeking to allow the realization of their constitutional right to freedom of religion and worship in conditions that provide protection to life, albeit relatively. In doing so, a relative violation of the petitioners' private property rights was necessary. Is the balance that was made a proper and proportionate one?

Freedom of movement and freedom of religion and worship

15. The inhabitants of the area have a constitutional right to freedom of religion and worship. This is the case for the Arab inhabitants and it is also the case for the Jewish inhabitants who live there. The inhabitants of the area also have the right of freedom of movement, by means of which it is possible to realize, *inter alia*, the right of access to holy places. The right of movement and access to holy places is of great constitutional strength (*Horev v. Minister of Transport* [16], at p. 49 {202-203}; HCJ 448/85 *Dahar v. Minister of Interior* [23], at p. 708; HCJ 2481/93 *Dayan v. Wilk* [24], at para. 17 {341}). In this case, the freedom of movement is closely associated with and incorporated in the right to realize freedom of religion and worship. It is a value that is intended to realize the right of Jewish worshippers to go on foot to the Machpela Cave on Sabbaths and festivals.

The freedom of worship as an expression of freedom of religion is one of the basic human rights. It is the freedom of the individual to believe and to act in accordance with his belief, by observing its precepts and customs (HCJ 1514/01 *Gur Aryeh v. Second Television and Radio Authority* [25], at p. 277; HCJ 650/88 *Israel Movement for Progressive Judaism v. Minister of Religious Affairs* [26], at p. 381; HCJ 3267/97 *Rubinstein v. Minister of Defence* [27], at p. 528 {200}). This freedom is related to a person's realization of his own identity. This freedom recognizes the desire of a believer to pray at a holy site. This recognition is a part of the broad constitutional protection given to the right of access of members of the various religions to the places that are holy to them, and the prohibition against injuring their sensibilities with regard to those places (s. 1 of the Protection of Holy Places Law, 5727-1967). The freedom of religion is regarded as a branch of freedom of expression in the sphere of religious belief. It was recognized by the legislator already in art. 83 of the Palestine Order in Council, 1922, and in the Declaration of Independence, which states that freedom of religion and conscience will be guaranteed to every citizen of the State. This freedom has been recognized in case law as a constitutional basic human right (HCJ 292/83 *Temple Mount Faithful v. Jerusalem District*

Police Commissioner [28], at p. 454; *Israel Movement for Progressive Judaism v. Minister of Religious Affairs* [26], at p. 381; H CJ 7128/96 *Temple Mount Faithful v. Government of Israel* [29], at pp. 522-523; *Gur Aryeh v. Second Television and Radio Authority* [25], at pp. 276-277).

The freedom of religion and worship is granted as a constitutional right to the population living in the territories, both Jews and Arabs. It is regarded as a constitutional right of supreme status that should be realized in so far as possible in view of the conditions prevailing in the territories, while protecting the safety and lives of the worshippers. Increasing the security measures for the pedestrians along the worshippers' route is intended to allow Jewish inhabitants to exercise their constitutional right to pray at a holy site.

Prayer at the Machpela Cave: a constitutional right of worship of Jews and Moslems

16. According to Jewish, Christian and Moslem tradition, the Machpela Cave is the site where Abraham and Sarah, Isaac and Rebecca, Jacob and Leah are buried, and according to some non-Jewish traditions, Joseph too is buried there. According to the tradition, the building of the Cave is located on a burial plot that Abraham acquired in order to bury his wife, and there all the other patriarchs and matriarchs, with the exception of Rachel, were buried. Historical and archaeological research has not clearly discovered who built the building of the Machpela Cave, although most researchers attribute it to King Herod and associate it with the Idumeans (for an extensive survey of this subject, see the Shamgar Commission Report, *supra*, at pp. 95 *et seq.*).

The Machpela Cave was regarded as a holy site and a place of worship already in the period of the Mishnah, after the destruction of the Temple. Praying by Jews at the Cave is recognized today in decisions of the political echelon. In 1967 the government made several decisions regarding the reinstatement of praying by Jews at the Machpela Cave on Sabbaths, and it made arrangements for coordinating the prayers of Jews and Moslems at the Cave, together with proper security measures for protecting Jewish worshippers (Shamgar Commission Report, at pp. 99 *et seq.*). Later it was decided that Jews would be entitled to enter the Cave also on Friday evening, for the Sabbath Eve prayers. As of 1972, the areas of prayer in the Cave were determined anew in a decision of the government, and the areas for Jewish prayers were extended. This extension resulted from a growth in the Jewish settlement in the area, and the founding of Kiryat Arba, which increased the number of people wishing to pray at the Cave. On 4 August 1975, the

government made a decision regulating the arrangements for entering and leaving the Cave, and the division of prayer times in the various areas, in order to reduce friction between Jewish worshippers and Moslem worshippers.

Over the years, the prayers in the Cave have, from time to time, been accompanied by violent friction between Jews and Arabs, which sometimes resulted in loss of life on both sides. The height of these conflicts occurred in the massacre at the Machpela Cave in 1994, when dozens of Moslem worshippers were murdered. Recognition of the Cave as a holy site for both Jews and Moslems led the government and the army, in coordination with the Moslem representatives, to determine arrangements that would allow those who wished to realize the right of prayer at the Cave to do so, whether Moslems or Jews. In this context, security arrangements were made to split the times and places for prayer between believers of the two religions, with the intention of ensuring that the basic rights of prayer of the two sides would be upheld (Shamgar Commission Report, at pp. 107 *et seq.*). After the massacre at the Machpela Cave, the Commission of Inquiry recommended that the arrangements for prayers at the Cave for members of the two religions should be maintained, with particular care to separate Jews and Moslems physically for security reasons, and with a reinforcement of security measures that were intended to protect the worshippers of the two religions against attacks of one group against the other.

The main conclusions of the Shamgar Commission concerned the prayer and security arrangements required in the precincts of the Cave itself. This case involves similar issues in the sense that it concerns aspects of the security of the Jewish worshippers on their way to the Cave, as a part of the realization of their right to freedom of worship at a holy site. But the premise is that freedom of religion and worship is not an absolute freedom but only a relative one. A balance must be found between it and other rights and values that are worthy of protection, including the value of private property (*per* President Barak in *Temple Mount Faithful v. Jerusalem District Police Commissioner* [28], at p. 455; A. Barak, *Legal Interpretation*, vol. 3, at p. 225). Against this background, the question before us is whether the need to ensure the safety of the worshippers justifies taking measures that include the requisition of land and the demolition of houses that are privately owned.

Property rights

17. The right of private property in the land and buildings that are the subject of the requisition order is a protected constitutional right. It is recognized in international law, including in the Hague Convention and Geneva Convention. It has achieved a constitutional status in Israel in s. 3 of the Basic Law: Human Dignity and Liberty (HCJ 2390/96 *Karasik v. State of Israel* [30] at pp. 712, 716; CA 5546/97 *Kiryat Ata Local Planning and Building Committee v. Holtzman* [31], at p. 641). The individual's property right does not cease to exist even in wartime (*Gussin v. IDF Commander* [1], at para. 4). The right of property has additional weight when it concerns a person's home (LCA 214/88 *Tawil v. Deutch* [32], at p. 754). In this case, we are not dealing with homes that are inhabited, since the buildings that are scheduled for demolition were abandoned years ago. We are dealing with buildings with an archaeological value whose historical value should be protected (HCJ 270/87 *Kando v. Minister of Defence* [33], at p. 742). The area commander has a duty, under the rules of international law, including the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954, to protect the cultural treasures in an occupied territory, including assets of archaeological value. He must act in this matter in accordance with the basic principles of administrative law.

A person's right to property is not an absolute right. It is a relative right. It may be violated where other desirable social purposes need to be promoted, and these include the advancement of different constitutional basic rights of others (*Ajuri v. IDF Commander in West Bank* [2], at p. 365 {97}). What is the scope of the violation that is permitted to the property right as a constitutional right in such a conflict of rights?

Two-stage balance: first stage — freedom of religion and worship versus the value of protecting human life; second stage — the freedom of worship versus the value of protecting private property

18. A confrontation between conflicting constitutional rights is usually a direct and frontal confrontation that requires balancing and weighing in one stage. But sometimes the conflict is more complex, and it may involve not only a conflict between constitutional human rights but also a conflict between them and between another general social value — such as the value of preserving public safety and security, which, in the circumstances of the case, enters into the required balancing process. In such a case, a need may arise for a two-stage balancing between the rights and values in order to decide the question whether the administrative act satisfies the constitutional criteria. The case before us is an example of the latter possibility. It first

raises the question as to what is the proper method of balancing the right of the worshippers to realize the freedom of prayer at a holy site against the value of protecting human life which the area commander is responsible to protect. If, within the framework of this balance, it transpires that in the circumstances of a given case there is no possible proper balance between the freedom of worship and the value of protecting life, then the latter value prevails and the right of worship gives way on account of the importance of the value of life. However, if it transpires that it is possible in the circumstances of a certain case to find a balance between the aforesaid constitutional right and the value of protecting human life by adopting increased security measures, then a second question arises as to whether the violation of another constitutional right such as the right of private property, which is necessitated within the framework of those measures, satisfies the rules of constitutional balancing in its conflict with the right of prayer at a holy site.

The first stage of the balancing: the right of worship versus the value of protecting human life

19. Realization of a constitutional right may involve a danger to public safety and security. This risk also includes a risk to the safety and security of someone who wishes to realize the constitutional right. There exists an obvious public interest in maintaining order and security in society. This is an essential condition for protecting life and human existence. The protection of human life is a condition for realizing individual rights and therefore this protection is of greater importance than the constitutional right, where there exists a real probability, in the sense of a 'near certainty,' that realizing the right will lead to serious harm to public safety (*per* President Barak in *Temple Mount Faithful v. Jerusalem District Police Commissioner* [28], at p. 454). The public interest in protecting human life affects the scope of the constitutional right and its relative importance vis-à-vis other values. Where the realization of the constitutional right will lead to a near certainty of serious harm to public safety, the constitutional right will give way to public safety (*Dayan v. Wilk* [24], at p. 472 {341-342}). This has been held for many years with regard to the right of Jews to pray on the Temple Mount in Jerusalem, when it was found that realization of the right *de facto* would almost certainly lead to an eruption of large-scale disturbances, which might become uncontrollable, both in Israel and abroad.

But the existence of a risk to public order and security that can be anticipated from the realization of the constitutional right does not justify, in

every case, the absolute denial of its realization. We should aim, in so far as possible, to achieve a proper balance between the needs of protecting public safety and the value inherent in the realization of the constitutional right, by creating an infrastructure of measures that will reduce the likelihood of the harm. The need and ability to make such a balance derive, on the one hand, from the strength of the constitutional right of the individual, and, on the other hand, from the range of measures available to the competent authority to satisfy the needs of public order and security, which are required as a precondition for realizing the constitutional right.

The freedom of religion is a constitutional basic right of the individual, with a preferred status even in relation to other constitutional human rights. The freedom of worship constitutes an expression of freedom of religion, and it is an offshoot of freedom of expression. 'A person expresses himself within the sphere of religious belief by means of religious worship' (*per* Justice Zamir in *Temple Mount Faithful v. Government of Israel* [29], at pp. 522-523). The constitutional protection given to freedom of worship is therefore similar, in principle, to the protection given to freedom of speech, and the constitutional balancing formula that befits the one is also applicable to the other (*Temple Mount Faithful v. Jerusalem District Police Commissioner* [28], at p. 456). We are concerned with a constitutional right of great strength whose weight is great when it is balanced against conflicting social values.

Where the realization of the right of worship creates a near certainty of the occurrence of serious and grave damage to public safety and there is no solution to such a collision by means of the use of reasonable measures that will make the danger more remote, then the value of public safety will prevail and the constitutional right will yield to it (Barak, *Legal Interpretation*, vol. 3, pp. 225-226). But where there are reasonable measures that can reduce the danger of the harm, the authorities can and should resort to these, especially where they are confronted with a constitutional right of special weight. Thus, the greater the constitutional right on the scale of rights, the greater is the need to exhaust all available reasonable measures by means of which it is possible to reduce the danger to public safety.

The worshippers who wish to go to the Machpela Cave by foot on Sabbaths and festivals wish to realize a constitutional right of freedom of worship in a holy place. This right is of special importance and weight on the scale of constitutional rights. But the public interest to ensure the security and safety of the worshippers, when passing along the worshippers' route, against the danger of attacks that directly threatens them conflicts with the realization

of the right of worship. It is the responsibility of the area commander to protect the route and those using it against danger to human life. In order to satisfy the security interest as aforesaid, the area commander considered two alternatives: to prohibit the use of the route by worshippers on foot from Kiryat Arba to the Cave on Sabbaths and festivals, or to allow this use and to take various measures that will increase the security of the area. In view of the constitutional importance of the right of prayer in a holy place, the commander saw fit to allow the use of the route and to adopt increased security measures. This balance, *prima facie*, satisfies the test of reasonableness. Whether the measure of harming private property in order to achieve the aforesaid purpose satisfies the constitutional test is another question.

Second stage of the balancing: the right of religion and worship versus the right of private property

20. There may be situations in which a relative harm to one constitutional right is possible in order to realize another constitutional right, in conditions that will ensure relative protection of human life. This is conditional upon the relative balancing of these constitutional rights against one another, as dictated by the circumstances of the case. This balance sometimes requires a conceptual definition of the constitutional rights in accordance with a scale of importance and strength in order to examine whether one right has preference and superiority to the other, or whether they are of equal importance and standing. Sometimes this conceptual examination will become redundant whether it is found that a balance that was made *de facto* also satisfies the constitutional criteria required for the purpose of a balance between constitutional rights that are of equal standing and rank to one another.

In the special circumstances of this case, there is no need to adopt a decisive position with regard to the conceptual ranking of the right of worship and the right of property in order to decide the question of how to balance between them in a case of a conflict. In view of the facts of the concrete case, the balance between them satisfies the test of constitutionality (HCJ 153/83 *Levy v. Southern District Commissioner of Police* [34], at p. 400 {115-116}). Even if we assume, for the purposes of this case, that we are concerned with constitutional rights of equal standing and importance, even so, in the horizontal balance between them, sometimes a certain reduction of one will be possible to allow the relative realization of the other. This reduction satisfies the test of constitutionality if it befits accepted social values, is intended for a proper purpose and is not excessive in its scope, in

the spirit of the limitations clause in s. 8 of the Basic Law: Human Dignity and Liberty. These principles today form a link between the Basic Law and all the rules of public law (*Horev v. Minister of Transport* [16], at pp. 41-43 {193-195}). They reflect a general balancing formula that assumes that where constitutional rights of an equal standing are concerned, complete protection should not be given to one right at the expense of a complete violation of the other right, but we should seek to uphold them jointly by allowing a reciprocal reduction of each of them.

From the general to the specific

21. The area commander has the responsibility for the security of the military force in the area under his command, as well as for maintaining order and ensuring the security and welfare of the inhabitants living there. Of paramount importance in the responsibility for the population of the area is the duty to ensure the safety and security of the inhabitants' lives. The responsibility of the commander includes not only the duty to ensure that the inhabitants' lives are secure, but also the responsibility to protect the human rights of all the inhabitants of the area, whether Arabs or Jews. One of the constitutional human rights that deserves protection is the right of freedom of religion and worship. Within the scope of this right, the Jewish inhabitants wish to give expression to their faith by praying at the Machpela Cave, which is a Jewish holy place. The realization of this right on Sabbaths and festivals requires walking from Kiryat Arba to the Machpela Cave. The risk of terror attacks and the topographic conditions require, as a condition for making this journey on foot, the existence of minimum security conditions to protect the worshippers against attacks. These conditions require the adoption of special measures to achieve this. Realization of such measures involves harm to the right of private property of the Arab inhabitants of the area, whose land is situated along the route. The property right of these inhabitants also has a recognized constitutional standing.

In making the requisition order, the area commander sought to make a proportionate balance between the conflicting constitutional rights, in order to allow the realization of the right of prayer at a holy place in conditions of relative security for those persons passing along the route.

All the possibilities for a pedestrian route of the worshippers were considered, and it was found that, with the exception of the worshippers' route, every other alternative was far more costly in terms of the security risks to the worshippers and the harm and damage anticipated to the inhabitants of the area. When the worshippers' route was found to be the

preferable route, the area commander reduced to a minimum the harm to private property along the route. In the northern part, he reduced the width of the route to two metres from each side. In the southern part of the route he reduced the widening of the route to a total width of four metres. This widening will allow only the unidirectional passage of rescue vehicles, as opposed to the possibility of bidirectional traffic that was previously considered. This reduction diminishes the harm to property, on the one hand, and allows only a minimum of security measures for the worshippers, on the other. All the buildings that are the subject of the requisition order are abandoned and uninhabited. One house that was found to be inhabited was excluded from the requisition order and the route of the passage was changed accordingly. The reduction of the area of widening the southern route currently requires a 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 the eviction of persons from their homes. The aforesaid demolition is supposed to be supervised by professionals in the fields of conservation of buildings and archaeology, in order to protect the cultural-historical values of the area, in so far as possible. The owners of the property have a right to payment for the use thereof and compensation for the requisition and the demolition. The requisition order is limited in time. When the security position changes and calm prevails in the area, the presumption is that the order will not be extended and property that has been requisitioned and can be returned will be returned to its owner.

The balance between the conflicting constitutional rights is not easy or self-evident in the circumstances of this case. It involves aspects of rights of human expression by means of realizing religious belief and worship, which conflict with rights and values concerning a connection to land and property; in addition to all of these, there is a general value of responsibility for protecting human life. The point of equilibrium between all of these factors is hard to find. Nonetheless, in the final analysis it would appear that the requisition order in its narrow format satisfies the test of constitutionality, by finding a relative balance between the constitutional rights. It allows the right of worship to be realized while providing relative protection to the security of the worshippers, which is made possible by harm to the conflicting right of private property in a limited degree, which is accompanied by financial compensation. It does not conflict with accepted social values, it is done for a proper purpose and it is not excessive. If the area commander were to refrain from causing the relative harm to property rights, this would mean failing to

adopt essential security measures for the protection of the persons walking along the route. If this were the case, it would make it necessary to deny the right of the worshippers to go to the Cave on Sabbaths and festivals absolutely, because of the lack of adequate security measures to protect their safety. Such a denial would constitute an absolute and improper violation of the freedom of worship to pray at a holy site and a serious violation of the freedom of movement and access required in order to realize freedom of religion. Alternatively, it would lead to allowing the passage of the worshippers along the route without the special security measures that are required in the circumstances of the case, thus increasing the immediate risk to the safety and lives of men, women and children using the route, sometimes in their thousands. These alternatives create considerable difficulty in themselves. Against this background, the upholding of the right of worship in conditions of relative protection for the security of the worshippers, by means of relative harm — which has been reduced to a minimum — to the property rights of the owners of the rights along the route, satisfies, in the special circumstances of this case, the conditions for the constitutional balance in a way that is not unreasonable.

Consequently I find no ground for intervention in the discretion of the area commander in making the requisition order in its narrow format, in accordance with which the order is going to be amended.

Outcome

22. On the basis of the aforesaid, I propose to my colleagues that we deny the petitions and recognize the validity of the requisition order in its narrow form, as set out in the written notice of the State dated 7 August 2003, and in the statements of counsel for the respondents during the hearing in the court on 23 November 2003, with regard to the scope of the widening of the route in its northern part. We have made a note of the respondent's statement that an amending order will be made to the original requisition order in the spirit of the aforesaid notices of the State.

President A. Barak

I agree.

Justice M. Cheshin

I agree.

Cumulative Index

Petitions denied.
11 Adar 5764.
4 March 2004.