

HCJ 3799/02

1. Adalah – The Legal Center for Arab Minority Rights in Israel
2. The Association for Civil Rights in Israel
3. Kanon – The Palestinian Organization for the Protection of Human and Environmental Rights
4. Physicians for Human Rights
5. B'tselem – The Israeli Information Center for Human Rights in the Occupied Territories
6. The Public Committee Against Torture in Israel
7. Center for the Defense of the Individual

v.

1. GOC Central Command, IDF
2. Chief of the General Staff, IDF
3. The Minister of Defense
4. The Prime Minister of Israel

The Supreme Court Sitting as the High Court of Justice

[June 23, 2005]

Before President A. Barak, Vice President M. Cheshin & Justice D. Beinisch

Petition for an *Order Nisi* and an *Interlocutory Order*

For Petitioners: Marwan Dalal

For Respondents: Shai Nitzan

JUDGMENT

President A. Barak:

According to the "Early Warning" procedure, Israeli soldiers wishing to arrest a Palestinian suspected of terrorist activity may be aided by a local Palestinian resident, who gives the suspect prior warning of possible injury to the suspect or to those with him during the arrest. Is this procedure legal? That is the question before us.

A. The Petition and the Course of its Hearing

Petitioners, seven human rights organizations, submitted this petition after the commencement of combat activities in the territories, in the framework of operation "Defensive Wall". They contend that the IDF is using the civilian population in a way that violates fundamental norms of international and constitutional law. They have based their arguments on reports in the Israeli press and upon reports of international human rights organizations (*e.g.* Human Rights Watch, B'tselem, and Amnesty International). These reports contain descriptions of many cases in which the IDF made use of local residents for military needs. Described, *inter alia*, are cases in which the IDF forced Palestinian residents to walk through and scan buildings suspected to be booby-trapped, and in which it ordered them to enter certain areas before the combat forces, in order to find wanted persons there; also described are

cases in which the army used residents as a "human shield" which accompanied the combat forces, to serve as a shield against attack on those forces. Thus, residents were stationed on porches of houses where soldiers were present, in order to prevent gunfire upon the houses. Further described were cases in which local residents were asked about the presence of wanted persons and weapons, under threat of bodily injury or death, should the questions go unanswered. According to the reports, relatives were taken in certain cases as hostages, in order to ensure the arrest of wanted persons.

2. It was against this background that petitioners submitted this petition (on May 5 2002). They contended that respondents were violating Israeli constitutional law and the fundamental norms of public international law, when the civilian population was used during operations in the Judea and Samaria area. They asked that this Court issue an interlocutory injunction, ordering respondents to refrain from using people as a "human shield" or as hostages during their military operations. Respondents responded that:

"In light of various complaints which have reached respondents, including, *inter alia*, the information detailed in the petition, and taking no position on the question whether the content of the complaints is true or not, and to eliminate any doubt, the IDF has decided to immediately issue an unequivocal order to the forces operating in the field, that all forces operating in the field are strictly forbidden to use civilians, *qua* civilians, as a 'live shield' against live fire or attacks by the Palestinian side, or as 'hostages'. It is further clarified in the order that this rule applies in houses, in streets, and in any area or place where IDF forces are operating.

It is to be noted, that some of the complaints detailed in the petition do not relate to use of people as 'human shields', rather to the assistance which the IDF receives from Palestinian residents, for the purpose of entry into houses of other Palestinian residents during operational activity. In light of the complaints detailed in the petition, the IDF decided to clarify that such acts are also forbidden, in those cases in which the commander in the field believes that the civilian is liable to be exposed to danger of bodily harm."

3. Respondents later announced (on May 20 2002) that the Chief of the General Staff had instructed the IDF to prepare orders relating to the subject. As a result, the instructions providing that it is strictly forbidden to use Palestinian civilians as a live shield (to position civilians alongside army forces in order to protect the soldiers from injury) were issued. The instructions further provided that it is strictly forbidden to hold Palestinian civilians as "hostages" (to seize and hold civilians as a means to pressure others). Last, the instructions provided that it is strictly forbidden to use civilians in situations where they might be exposed to danger to life or limb. However, respondents did not rule out the possibility of being assisted by the local population. They emphasized that such assistance is solicited in situations where it will allow avoidance of a military act liable to cause greater harm to local residents, to

soldiers, and to property. At the first hearing in the petition (on May 21 2002), before Justices T. Strasberg-Cohen, D. Beinisch, and E. Rivlin, it was decided that respondents shall submit a supplementary response, in which they shall update the Court regarding preparation of an order to formalize and clarify the issue of soliciting Palestinian residents' assistance.

4. Petitioners submitted a statement (on August 18 2002), attempting to illustrate the illegality of using civilians, through the case of the death of Palestinian civilian Abu Muhsan from the village of Tubas. Abu Muhsan was killed (on August 14 2002) while participating in "the neighbor procedure", as IDF forces tried to arrest a dangerous wanted person. Petitioners contended that he was asked to assist soldiers during the arrest of a wanted person in a most dangerous situation, and that his death illustrates the illegality of use of civilians who are asked to assist the security forces. Against this background, petitioners claimed that one cannot rely at all upon security agencies' discretion in employing the procedures they enacted. In light of petitioners' statement, this Court issued (Strasberg-Cohen J. on August 18 2002) a temporary interlocutory injunction, ordering respondents to refrain from using Palestinian civilians as a "human shield" or as "hostages", "including their use for any military acts such as 'the neighbor procedure', absolutely, irrespective of the discretion of any military personnel." This temporary interlocutory injunction was extended a number of times, with respondents' agreement.

B. The "Early Warning" Procedure

5. In respondents' supplementary statement (of December 5 2002), they stated that IDF soldiers will continue to be absolutely forbidden from using civilians as a "live shield" against gunfire or attacks by the Palestinian side, or as "hostages". Regarding assistance by Palestinian residents in order to prevent loss of life, it was decided that an order would be issued, clarifying in which exact situations it is forbidden, in which permitted, and under what restrictions. Respondents stated that at the end of a debate in which various IDF officials participated, instructions and orders were issued (on November 26 2002), along with an operational directive by the name of "Early Warning". This directive lays out the procedures for soliciting the assistance of local residents, in order to arrest wanted persons. The directive opens with the following general description:

"General

'Early Warning' is an operational procedure, employed in operations to arrest wanted persons, allowing solicitation of a local Palestinian resident's assistance in order to minimize the danger of wounding innocent civilians and the wanted persons themselves (allowing their arrest without bloodshed). Assistance by a local resident is intended to grant an early warning to the residents of the house, in order to allow the innocent to leave the building and the wanted persons to turn themselves in, before it becomes necessary to use force, which is liable to endanger human life".

When operations are preplanned, the procedure must be approved, in the framework in which the operations are approved. In cases of activity which was not preplanned, the approval of the brigade commander, his deputy, or of the brigade operations directorate officer is needed, in order to use it. When the procedure is used, an effort is to be made to find a person such as a relative or neighbor, who is acquainted with the wanted person or with the residents of the house, or has influence over them. The procedure is not to be used to solicit the assistance of women, children, the elderly, or the disabled (clause 1 of the procedure).

6. The "Early Warning" directive also included the details of the procedure for approaching a resident in order to receive his consent to provide assistance. Due to its importance, we shall quote it in its entirety:

"2. Approaching the Local Palestinian Resident in order to Receive Assistance

Contact with the local resident is to be made by the commander of the force directly, or via a translator. Contact is to be made in a language understood by the local resident, while strictly preserving human dignity. When contact is made with the resident, it is to be clarified to him that he is being asked to assist soldiers in order to prevent injury to innocent persons or their property.

Emphases:

- A. The civilian population has no obligation to assist the IDF in warning civilians of attack.
- B. Contact, and persuasion, shall be exclusively verbal.
- C. It is strictly forbidden to use force or violence toward a local resident or others, in order to secure said assistance.
- D. It is strictly forbidden to threaten a resident, or other people, that physical violence, arrest, or other means will be used against them.
- E. It is strictly forbidden to hold people 'hostage' in order to secure the assistance of a local resident.
- F. If a local resident refuses – **under no circumstances is provision of assistance to be forced**" [emphases in original].

7. The operational directive included instructions regarding the use of the procedure, when the local resident has agreed to assist army forces. Here also the instructions will be fully quoted, in light of their importance:

"3. Assistance of a Local Resident

Solicitation of a local resident's assistance is intended to allow innocent persons to leave the building and/or allow the wanted persons to turn themselves in before there is a need to use force, which is liable to endanger human life. For that purpose, one may ask a local resident to approach the house, to give notice to those in the house that the army is present and to warn them that if they do not leave the house, the army is liable to use force in order to arrest the wanted persons.

Emphases:

A. It is strictly forbidden to use the local resident in military missions (*e.g.* locating explosive charges, intelligence gathering).

B. It is strictly forbidden to solicit the assistance of a local resident, when the commander of the force believes that the latter will be in danger – even with his consent.

C. It is strictly forbidden to use a local resident as a 'live shield' against attack. Thus, during the advance of the force, accompanied by the local resident, the latter is not to be positioned at the head of the force.

D. It is strictly forbidden to equip the local resident with military equipment (uniform, weapon, battle vest, *etc.*).

E. 'Early Warning' is not to be employed when there is another effective way to achieve the objective, whose results are less severe.

F. It is to be preferred that the local resident not be asked to enter the building, rather be asked to relay the warning from the outside (through a knock on the door and a conversation with the persons in the building from the outside). He shall be asked to enter the building only in those cases in which there is no other way to relay the warning, and only if the commander of the force believes that the local resident will not be exposed to danger as a result of his entry into the building" [emphases in the original].

In addition, the operational directive provides that the assistance of a local resident will be terminated as soon as the persons in the house have exited it (clause 4(1) of the directive). It further provides that the assistance of a local resident shall be used only at a specific time and place, and that one may not "adjoin a local resident to a military force" (clause 4, emphasis B). It also determines the duty to terminate the assistance prior to attacking the building or undertaking other forceful acts (clause 4, emphasis C). It was decided that military units can make use of the procedure only after having received detailed guidance about the directive.

8. As a result of the issuing of the "Early Warning" procedure, the Court held an additional hearing in the petition (on January 21 2003), before Strasberg-Cohen J., England J., and Procaccia J. That hearing was not a hearing in the original petition. That petition is no longer relevant. The hearing was a hearing regarding the new procedure – "The Early Warning Procedure". During the hearing, petitioners' claim that the new procedure is illegal was discussed. The parties were asked to supplement their arguments, while relating to the new procedure from the standpoint of international law, and to the question of the legitimacy of the differentiation between use of people as "live shields" or as "hostages" on the one hand, and the acts described as permitted in the procedures on the other. It was decided that the temporary injunction would continue to be in force until judgment in the petition is handed down; that, with amended wording, such that the wording of the original injunction would be replaced by wording by which "respondents shall refrain from using people as human shields and/or as hostages during their military activity in the West Bank". The use of the new procedure, in and of itself, was not prohibited in the interlocutory injunction.

9. Petitioners later asked (on April 27 2003) to submit additional testimony regarding respondents' use of civilians as human shields and/or as hostages. Attached to the motion was the testimony of a number of Palestinian residents, who, according to their claims, were forced to serve as "human shields" for IDF forces during their operations of the forces in the West Bank in the months of January-March 2003. Against the background of this testimony, petitioners claimed that respondents continue to use Palestinian civilians as a "human shield" and/or as hostages, in violation of international law which applies to them, and in violation of the temporary interlocutory order. Petitioners also submitted (on May 22 2003) the testimony of a volunteer in the Machsom Watch organization who was, she claimed, witness to IDF soldiers' use of a Palestinian bus driver at one of the checkpoints in the West Bank. Per petitioners' request, an urgent hearing in the petition was held (on July 8 2003), before Barak P., Or V.P., and Mazza J.

10. On August 16 2004, petitioners submitted a motion pursuant to the Contempt of Court Ordinance. The motion included the testimony of eight more people regarding the use of Palestinian civilians as "human shields" and/or as hostages during the months January-July 2004. *Inter alia*, it was contended in the motion that during respondents' military activity, they forced Palestinian civilians to stand in front of them during live fire exchanges with the side with which the civilian identifies; to enter houses and buildings before the military force; to search for objects suspected to be dangerous objects; and to check the bodies of combatants belonging to the civilians' side.

11. The fourth hearing in the petition was held (on September 5 2004) before Barak P., Mazza V.P., and Cheshin J. (who replaced Or V.P., who had retired). During the hearing, the new procedure and the way it is implemented by IDF forces was discussed. In oral argument, respondents presented the accumulative experience from the previous two years, in employing the procedure in hundreds of cases. That experience, it was claimed, shows that the procedure is not forced upon the residents, and that its use has not led to bodily or mental injury to the participants in it. Respondents clarified that they do not take the claims regarding violation of the procedure lightly, and that those are being examined and investigated. At the end of

the hearing, it was decided that the continued hearing of the petition would be adjourned, in order to allow respondents to submit a report on their treatment of the cases presented in petitioners' documents, regarding charges of violation of the "Early Warning" procedure. Such report was submitted in a third supplementary statement by respondents (of February 28, 2005). Respondents discussed the rationale upon which the procedure is based, the way it is implemented today by the IDF, and the way that the specific cases presented by petitioners, claimed to be IDF forces' violations of the procedure, had been dealt with. Respondents stated that in all the cases brought up in the framework of the petition which raised suspicion of violation of the procedure, the military police (*metzach*) had begun an investigation, or an investigating officer had been appointed.

12. Prior to the hearing of the petition, petitioners submitted (on June 23 2005) a motion to submit additional testimony, in which they wished to update the Court regarding the respondents' continued use of civilians protected under the Fourth Geneva Convention of 1949 as "human shields" and/or as hostages. Attached to the motion was testimony of Palestinian civilians regarding three events which occurred in the months March and May 2005. The final hearing in the petition took place (on June 23 2005) before Barak P, Cheshin V.P. and Beinisch J. (who replaced Mazza V.P., who had retired). During the hearing, respondents stated that petitioners' claims regarding these three new cases were being examined. In one case, military police investigation had commenced; in another case, a committee of investigation had not found a violation of the procedure; and in a third case, respondents were waiting for the decision of the Military Advocate General. Respondents emphasized that the fact that a number of cases of violation of the procedure had been discovered over a period of years does not mean that the procedure itself is to be rejected. During the hearing we heard, *inter alia*, a survey by the operations officer of the central command, regarding the operational importance of the "Early Warning" procedure, in preventing injury to Palestinian civilians.

C. The Arguments of the Parties

13. Petitioners claim that the procedure known as "Early Warning" is illegal, as it is at odds with the principles of international humanitarian law regarding the military activity of an occupying force in occupied territory. It is, in fact, the use of a protected civilian as a "human shield". The procedure puts the protected civilian in real and tangible danger. It puts him at the pinnacle of military activity, the objective of which is arresting a person whom respondents themselves define as most dangerous. Petitioners are of the opinion that the dimension of consent in the procedure, or lack of refusal on the part of the protected civilian, cannot absolve it of its illegality. The protected civilian's consent is not true consent, and in any case is irrelevant. The protected civilian cannot waive the rights granted him by international law, including the right not to be involved in the military activity of an occupying force. It was further contended that the procedure creates a certain and tangible injury to the dignity of the protected civilian, since it is used against the side with which he naturally identifies. It is likely even to cause him critical mental injury. In this context, petitioners refer to the judgment of the International Court of Justice regarding the crimes committed in the former Yugoslavia, according to which use of prisoners for digging a trench for the military force is a cruel and inhuman use, and violates the prisoners' right to dignity. Petitioners contend that various articles of the

Fourth Geneva Convention of 1949 prohibit the "Early Warning" procedure, including articles 3, 8, 27, 28, 47 & 51 of that convention. The use of the procedure is also prohibited, claim petitioners, by article 51(7) of the first protocol of the Geneva Convention of 1977. Last, the decisions of the International Court of Justice regarding the crimes committed in the former Yugoslavia also require that the procedure be determined illegal.

14. Petitioners argue that one can learn from the procedure instructions themselves that the procedure endangers the civilian population, whereas respondents have a duty to refrain from causing harm to it. The directive relates to situations which deteriorate into exchanges of gunfire, and to situations in which the individual is positioned in front of a military force (while knocking on the building door) in a manner which endangers him. Petitioners point out that the procedure grants substantial discretion to military personnel, regarding the possibility of soliciting the local population's assistance. The military discretion, claim petitioners, is regularly employed in violation of the interlocutory injunction. Respondents continue to make use of Palestinian civilians, including as "human shields", during their operational activity and in order to achieve the objectives of that military activity, and even abuse the local population. From this it can be learned that the military discretion on this issue cannot be relied upon. The procedure broadcasts an inhuman message to soldiers, according to which instrumental use can be made of Palestinian civilians in order to succeed in the military activity, whose objective is the making of an arrest.

15. Petitioners submitted the expert opinion of Professor E. Benvenisti, according to which the "Early Warning" procedure does not fulfill the requirements of international humanitarian law. Professor Benvenisti is of the opinion that the procedure is likely to endanger the lives of the Palestinian residents. The danger is liable to stem from a response by those entrenching themselves in the building, or from a response by soldiers to the response of the former. One must examine whether that danger is justified by legitimate reasons, and whether it is proportional. In this context, Professor Benvenisti notes:

"The procedure describes a legitimate motivation for use of 'early warning' measures, since protection of those who are not combatants is, as mentioned, the duty of the army in combat. What has yet to be examined is whether or not that means is proportional, that is to say, whether the same objective cannot be achieved without the use of the Palestinian residents. It seems that on this point that the procedure raises difficulty, since the use of a simple audio amplification system would, *prima facie*, be an efficient enough means . . .

It is unclear whether the danger involved in using residents to relay warnings is equivalent to the saving of the lives of those who are believed to be in the building into which the army wishes to enter, and whom the army wishes to warn. The uncertainty regarding the expected level of danger makes the exposure to the danger disproportionate" (clause 9 of the expert opinion).

Professor Benvenisti determines that the supposition that the procedure is intended to prevent injury to the military forces remains an open question. He further explains that the requirement of receiving the local resident's consent to provide assistance does not change anything, in light of the large power imbalance between IDF soldiers and the residents, which turns the consent into consent which is coerced, or understood to be coerced. In addition, the procedure does not include clear instructions to soldiers, how to decide between the alternative of using residents and other means of relaying warning. Against this background, petitioners claim that the procedure is not legal, and is not proportional.

16. Respondents plea that the arguments regarding the illegality and disproportionateness of the "Early Warning" procedure are to be rejected. According to respondents, these arguments are unfounded and do not fit reality and international law. Respondents point out the reality, in which IDF combats terrorists hiding among the civilian population. Respondents recognize the restrictions upon them in the framework of such combat. IDF soldiers are categorically forbidden to use civilians, *qua* civilians, as a "live shield" or as "hostages", for the purpose of protection against gunfire or attacks by the Palestinian side. The army forces must perform a balancing between the need to arrest wanted persons and the need to protect the civilian population. In the framework of this balancing, the IDF prefers to arrest terrorists instead of killing them, as permitted by the laws of war, while granting an effective early warning. Against this background, the "Early Warning" procedure was formulated. The procedure is intended primarily to prevent injury to innocent local residents. In a great many cases there is no effective alternative to relaying a warning via a local resident. According to respondents, past experience shows that soliciting the assistance of local residents in order to grant an effective early warning allows the making of arrests while substantially reducing the need to resort to means of force, which damage property and create danger to innocent civilians, and while reducing the possibility that gunfire exchanges, from which innocents are liable to be injured, will develop. The use of the procedure leads to a reduction of the danger to civilians on site. Its use is likely also to prevent injury to the wanted person himself and to IDF soldiers, objectives which are also legitimate, in and of themselves. The attainment of these advantages, in a way that does not involve danger to the residents, is worthy, legal, and proportional.

17. Respondents contend that the use of the "Early Warning" procedure in appropriate cases sits well with the fundamental principles of international law. Those principles require that during the planning of a military activity, every attempt be made to reduce the collateral damage caused as a result of the military activity to those who are not combatants, to the extent possible, under the circumstances. In addition, pursuant to the rules of international law, an armed force which is about to undertake an activity liable to injure civilians must, to the extent possible, grant prior notice regarding the planned activity, in order to reduce the danger of injury to civilians. International law does not prohibit receiving the assistance of a consenting local civilian, in order to warn other residents of an impending attack, if he is not exposed to danger as a result. *Au contraire*: it is desirable, argue respondents, to grant an early warning before the attack, which is liable to injure the civilian population or damage civilian buildings which have been abused by wanted Palestinians. Moreover, international law even permits forcing the relaying of a warning if necessary military considerations so require; however, the procedure does not go so

far, as it requires the consent of the resident. Respondents' position is, therefore, that in planning arrests, the military commander is permitted – and even required – to examine whether, under the circumstances, it is possible to reduce collateral damage to innocent persons and property, by soliciting the assistance of a local civilian, in circumstances which do not endanger him.

18. Respondents further note that the approval for issuance of the "Early Warning" procedure was given by the Attorney General, after he was persuaded that such assistance by local consenting residents can save many lives, and primarily those of the local residents. If the wanted person does not turn himself in, military personnel must indeed use force, which can harm the wanted person, those living in the house, property, and IDF soldiers. All these, claim respondents, can be prevented when the procedure is used in the fitting circumstances. The Attorney General was persuaded that the granting of warning by local residents will have a better effect than warning granted by the army forces. Respondents contend that in the formulation of the procedure, the lessons from the case in which Abu Muhsan was killed were studied. That case was an exception, and one cannot conclude from it that the directive is generally dangerous. They further contend that the directive is proportional, and that in certain cases alternate means such as an audio amplification system cannot be used, as it can endanger the soldiers.

19. Regarding cases in which the procedure was violated, respondents emphasize that the IDF views as severe any suspicion of violation of the procedure, and thoroughly examines the cases in which such suspicion arises. Regarding all the cases mentioned in the petition in which suspicion of violation of the procedure arose, a military police investigation was initiated or an examining officer was appointed. It was further stated that additional investigations of the military police were commenced regarding a number of complaints which were brought before the Military Advocate General personnel, outside the framework of the petition. Some of the investigations are still pending. In one case an IDF officer was indicted regarding an event in April 2004. The officer was convicted, given a prison sentence to be served by way of military labor, lowered in rank, and expelled from his position. On the other hand respondents noted that in hundreds of other cases in which the procedure was used, no complaints whatsoever were made regarding its use. The single cases cannot lead to a conclusion that the procedure is illegal or unreasonable. All they show is that the procedure was violated in isolated cases.

The Normative Framework

20. An army in an area under belligerent occupation is permitted to arrest local residents wanted by it, who endanger its security (*see* H CJ 102/82 *Tsemel v. The Minister of Defense*, 37 (3) PD 365, 369; H CJ 3239/02 *Marab v. The Commander of IDF Forces in the Judea and Samaria Area*, 57 (2) PD 349, 365). In this framework – and to the extent that it does not frustrate the military action intended to arrest the wanted person, the army is permitted – and at times even required – to give the wanted person an early warning. Thus it is possible to ensure the making of the arrest without injury to the civilian population (*see* regulation 26 of Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (hereinafter – *The Hague Regulations*); article 57(2) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of

International Armed Conflicts (Protocol I), 8 June 1977 (hereinafter – *The First Protocol*); see also Fleck *The Handbook of Humanitarian Law in Armed Conflicts* (1995) 171, 223 (hereinafter – *Fleck*); rule 20 of 1 *Customary International Humanitarian Law: Rules* (2005) 62 (hereinafter – *International Humanitarian Law*)).

21. Just as it is clear that an army is authorized to arrest a wanted person who endangers security, so is it clear that the army is not permitted to use local residents as a "human shield" (see article 28 of IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949 (hereinafter – *the Fourth Geneva Convention*); article 51(7) of *The First Protocol*; see also *Fleck*, at p. 218)). Pictet correctly noted that the use of people as a "human shield" is a "cruel and barbaric" act (see J. Pictet *Commentary IV Geneva Convention* (1958) 208; rule 97 of *International Humanitarian Law*).

22. Is the army permitted to make a local resident relay an "early warning" to a wanted person in a place besieged by the army, against his will? All agree that such a thing is prohibited (compare regulation 23(4) of *The Hague Regulations*; article 51 of *The Fourth Geneva Convention*; Pictet, at p. 292; *Fleck*, at p. 252). Indeed, the "Early Warning" procedure explicitly states that the assistance of a local Palestinian resident can be solicited in order to relay an early warning only when that resident has consented to provide such assistance. It is also agreed by all that early warning is not to be relayed by a local resident, if doing so will endanger him.

23. However, what is the law regarding the solicitation of a local resident's assistance, for the purpose of relaying an "early warning" according to the procedure for doing so, when that resident gives his consent, and damage will not be done to him by relaying the warning? Let it be said immediately: no explicit provision applying to that issue, which would contain a solution to our problem, is to be found (see R. Otto "Neighbors as Human Shields? The Israel Defense Forces 'Early Warning Procedure' and International Humanitarian Law" 86 *Int'l Rev. Red Cross* 771, 776 (2004)). The solution to our question requires a balancing between conflicting considerations. On the one hand, is the value of human life. Use of the "Early Warning" procedure is intended to prevent the need to arrest a wanted person through use of force. In this regard, the procedure is intended to prevent damage to the local residents who are in the same place as the wanted person. Indeed, safeguarding of the lives of the civilian population is a central value in the humanitarian law applicable to belligerent occupation (see article 27 of *The Fourth Geneva Convention*; H CJ 4764/04 *Physicians for Human Rights v. The Commander of IDF Forces in Gaza*, 58(5) PD 385, 39X; *Fleck*, at p. 212). The legality of the "Early Warning" procedure might draw its validity from the general duty of the occupying army to ensure the dignity and security of the civilian population. It also sits well with the occupying army's power to protect the lives and security of its soldiers. On the other hand stands the occupying army's duty to safeguard the life and dignity of the local civilian sent to relay the warning. That is certainly the case when he does not consent to take upon himself the task he has been given, and when its performance is likely to cause him damage. But that is also the case when he gives his consent, and when performance of the role will cause him no damage. That is so not only since he is not permitted to waive his rights pursuant to the humanitarian law (see article 8 of *The Fourth Geneva Convention*; Pictet, at pp. 72, 74), but also since, *de facto*, it is difficult to judge when his consent is given freely, and when it is the result of overt or subtle pressure.

24. In balancing between these conflicting considerations, which shall prevail? In my opinion, the considerations in favor of forbidding the army from using a local resident prevail. At the foundation of my view lie a number of principled reasons. First, a basic principle, which passes as a common thread running through all of the law of belligerent occupation, is the prohibition of use of protected residents as a part of the war effort of the occupying army. The civilian population is not to be used for the military needs of the occupying army (*see Fleck*, at p. 218). They are not to be "volunteered" for cooperation with the army (*see regulation 23(b) of The Hague Regulations and article 51 of The Fourth Geneva Convention; see also Pictet*, at p. 292). From this general principle is derived the specific prohibition of use of local residents as a "human shield". Also derived from this principle is the prohibition of use of coercion (physical or moral) of protected persons in order to obtain intelligence (article 31 of *The Fourth Geneva Convention; Pictet*, at p. 219). It seems to me that prohibiting use of local residents for relaying warnings from the army to those whom the army wishes to arrest should also be derived from this general principle. Second, an additional principle of the humanitarian law is that all is to be done to separate between the civilian population and military activity (*see Fleck*, at p. 169). The central application of this rule is the duty to distance innocent local residents from the zone of hostilities (*see rule 24 of International Humanitarian Law*). This rule calls for an approach, according to which a local resident is not to be brought, even with his consent, into a zone in which combat activity is taking place. Third, in light of the inequality between the occupying force and the local resident, it is not to be expected that the local resident will reject the request that he relay a warning to the person whom the army wishes to arrest. A procedure is not to be based upon consent, when in many cases the consent will not be real (*see Fleck*, at p. 252). The situation in which such consent would be requested should be avoided. Last, one cannot know in advance whether the relaying of a warning involves danger to the local resident who relays it. The ability to properly estimate the existence of danger is difficult in combat conditions, and a procedure should not be based on the need to assume a lack of danger, when such an assumption is at times unfounded. On this issue, one must consider not only the physical danger of damage from gunfire originating in the wanted person's location, or from various booby-traps, but also the wider danger which a local resident who "collaborates" with the occupying army can expect.

25. These considerations lead me to the conclusion that the "Early Warning" procedure is at odds with international law. It comes too close to the normative "nucleus" of the forbidden, and is found in the relatively grey area (the penumbra) of the improper.

The result is that we turn the *order nisi* into an *order absolute*, in the following way: we declare that the "Early Warning" procedure contradicts international law.

Vice President M. Cheshin:

The subject is a difficult one. Most difficult. So difficult is it, that a judge might ask himself why he chose the calling of the judiciary, and not of another profession, to be busy with. Woe is me, for I answer to my creator; woe is me, with my conflicting inclinations (*see Babylonian Talmud, Brachot, 61, 1*). No matter which solution I choose, the time will come that I will regret my choice. Indeed, there

is no clear legal rule to show us the way, and I shall decide according to my own way of legal reasoning. The present issue is quite similar to the "ticking bomb" issue (HCJ 5100/94 *The Public Committee Against Torture in Israel v. The Government of Israel*, 53 (4) PD 817), where interests and values of the first degree stood opposite each other, and deciding which interests and values would prevail, and which interests would retreat, was hard – unbearably hard.

2. Professor Eyal Benvenisti wrote, in the conclusion of his expert opinion which lies before us:

"The 'early warning' procedure is at odds with the rules of international humanitarian law dealing with the protection of civilians and others removed from participation in combat, from unnecessary dangers of war. These are cogent rules which obligate the agencies of the State of Israel and cannot be stipulated out.

The question whether the danger is unnecessary or not is to be examined according to the standards of the worthy objective, and of the proportionality of the means to realize it. The 'Early Warning' procedure is intended to advance a worthy objective. However, the means to realize it – use of Palestinian residents to relay warnings – is not proportional, as it is not clear whether it is effective, why other alternatives which do not involve use of local civilians (like a loudspeaker or other means of amplification) are not feasible or preferable, or whether the danger to the resident relaying the warning is substantially less than the danger to the civilians being held together with those entrenching themselves inside the building; and there are no clear instructions to soldiers how to choose between the alternative of use of residents and other means of warning."

Professor Benvenisti raises various difficult questions, but to all of these difficult questions - the state has responded with answers. The summary of the answers is: and what shall be the law when all the difficult questions have been answered to our satisfaction? That is to say, when, under the circumstances, soliciting a local resident's aid is the most effective means, or the only means, remaining before violently storming the house, and when the use of a loudspeaker and of other means of amplification were unproductive? Regarding the question whether the danger to the warning resident is substantially less than the danger to which the residents in the building are exposed, the state replies that, according to the procedure, it is forbidden to be aided by a resident if the commander of the force believes that he is liable to be exposed to danger due to his consent to the army's request, and thus, even though the resident has granted his consent; and regarding the lack of clear instructions how to decide between alternatives, it seems that the procedure is sufficiently detailed, and can, in any case, be improved and perfected.

3. The basic assumption is that the army is about to storm the building by force, and that the army, in its manner and in the manner of any army, may, and even almost certainly will, injure those in the house, including even the family members living in

the house. Can we decisively say that being aided, in good faith, by a neighbor, is disproportionate in **all** cases? In **any** circumstances whatsoever?

Here he is, that dangerous terrorist whose hands have become covered with blood, and whose plans are only evil. The terrorist is hiding out in the house, and the order is to apprehend him "alive or dead". That order is uncontroversial, and the question is merely what shall be done, and what shall not be done, to carry out the order. Suddenly the father of the family living in the house appears on the scene. The father had previously gone to the store to buy food for his family, and he now returns to his house, which is surrounded by army personnel. And in the house are his wife and his eight children. The startled and fearful father hears whatever he hears from the army personnel, and he immediately agrees to the army's offer – it might even be his own request – that he call his family to leave the house, all according to the written procedure. Yet here we forbid the army from allowing the father to so protect his family. Indeed, it is not so in every case. However, such a case - or a similar case – can occur.

4. Moreover, our assumption is that we have reached the last resort: that the army has made use of all other means at its disposal - excepting violent storming of the house – and that the terrorist has not surrendered. We thus stand before the following choice: being aided by the father, who will warn his family, or storming the house, involving mortal danger to the residents of the house and to the soldiers. Non-recognition of the procedure in such circumstances is by no means simple.

5. And if despite all these things that I have written, I shall concur in the opinion of the President – it is because I have considered the formula adopted in *The Public Committee Against Torture in Israel* case (see **id.**, starting at p. 840). The formula is one of *ex ante* and *ex post*, and for our purposes is applicable to an even greater degree. And it is even possible that life will teach us otherwise, and that our conclusion will come to be changed.

6. To conclude: subject to what I have written above, I concur in the opinion of President Barak.

7. Meanwhile, I have read the opinion of my colleague Justice Beinisch, and I would wholeheartedly sign my name by each and every one of her comments. There are two reasons which strengthen our conclusion. **The first reason** can be called "the written rule versus reality". However clear and clean the written rule may be, we must not forget that it is carried out, *de facto*, in the field, outside, under pressure, in tense circumstances, in conditions of mortal danger – to residents and soldiers. With any slight deviation from the directive, misunderstanding, or incorrect reading of the conditions in the field, we have strayed off the proper road onto the forbidden shoulders – we have slid from the permitted over to the forbidden. The temptation is great, and the justification will be easily found. Indeed, as the intensity of the danger rises, so rises the intensity of the temptation – in field conditions – to deviate from the procedure.

The second reason is found in routine, which awaits us around the bend. Routine, according to its very nature, deteriorates the sensitivity and caution needed to perform the procedure, and the concern that the special and rare will become regular and

routine – even bureaucratic – is great. This is the same difficulty we came upon in *The Public Committee Against Torture in Israel* case, and in the "ticking bomb" issue. Yet it is the *ex ante* and *ex post* formula, limited as it may be, which is likely to assist us, even if only partially.

Justice D. Beinisch:

I concur in the judgment of President Barak, and will add a bit of my own only to emphasize the main unacceptable aspects, in my opinion, of the "Early Warning" procedure presently discussed.

1. The issue placed before us in this petition is one of the most difficult issues to come before us in the reality in which we have found ourselves in recent years. The difficulty is found in the fact the petition deals with the way to safeguard human life during military activity, in an area held under belligerent occupation, and is interwoven with the discretion of the military commander in fulfilling his duties. It should be recalled that the primary assumption of our discussion is that we are dealing with the safeguarding of human life at the time of legitimate military activity whose objective is the arrest of a wanted person who endangers the security of the region and the security of the civilians and the soldiers. An additional assumption is that the military commander of the area held under belligerent occupation, and the commanders acting on his behalf and in his name, are the ones charged with the safety and security of all the residents in the area, including the security of the very protected resident who is asked to assist IDF forces according to the procedure, and belongs to the civilian population. In the background of the case before us is found, therefore, the assumption that the task and the weighty responsibility of safeguarding the lives and bodily integrity of the local population, and of IDF soldiers operating in the occupied territory in order to ensure security in it, is cast upon the military commander. Another uncontested primary assumption is that the military commander and those who obey him must honor the rules of international law and the constitutional principles of our legal system. Our judicial review of the legality of procedures meant to safeguard human life are anchored in these primary assumptions.

2. At first this petition was submitted arguing that during its military activity in the area, the IDF employs a practice prohibited by the fundamental norms of international and constitutional law, by making use of the civilian population as a "live shield" for the forces in combat. In their response to the original petition, respondents already clarified unequivocally that they recognize that the forces operating in the field are categorically forbidden from using Palestinian residents as a "live shield" or as "hostages", and that involving local residents in any activity exposing them to danger to life or limb is prohibited. As a result of that unequivocal declaration, respondents claimed that they wish to enact clear and legitimate instructions, which would ensure that the military forces operating in the field will act legally, regarding the prevention of mortal danger during operational activity. In the existing circumstances, respondents were permitted to present us with the new detailed procedure which they wish to enact in the army in order to prevent use of a forbidden practice, and to lay out rules to ensure that IDF soldiers will not act illegally. By the end of the proceedings, however, the original petition had undergone metamorphosis, and came to be directed against the "Early Warning" procedure,

which the army was using as part of a declared agenda of avoiding the forbidden practice of using local residents as a "live shield" or as "hostages".

3. According to respondents' argument, the purpose of the procedure is to formalize and detail the possibility of soliciting the assistance of local residents in order to minimize the danger of injury to innocent civilians, and even to the wanted persons themselves, during operational activity; the procedure is also intended to ensure that the residents of the house in which the wanted terrorist is hiding out will not be injured during the operational-military arrest, all exclusively in the framework of the permissible, and according to the principles of public international law, which charge the army holding the territory with the duty to protect the local residents and to prevent mortal danger to them.

4. The question which we must decide is whether the enacted procedure is in fact legal; in other words, whether the procedure can ensure the achievement of the worthy purpose of safeguarding the lives of the residents, through fitting and worthy means. As explained in the judgment of my colleague the President, in which the Vice President, Justice M. Cheshin, concurred, the answer to that question is negative. The said procedure cannot stand, due to the fact that it permits the use of a disproportionate means, and therefore cannot prevent the unacceptable practice which respondents themselves wish to prevent. The main reason for that, in my opinion, is that *de facto*, the procedure does not stop the forbidden practice of using local residents in order to aid army forces, and is even liable to endanger the lives of those residents who are asked to provide such assistance. The gap between the prohibition, which the respondents recognize, and the permission, which can be enacted according to the discretion of the military commander, is narrow and close, and is no different, in essence, from the sweeping prohibition determined in the norms of international law. Moreover, even if the procedure were legal, the danger of sliding into the practice forbidden by a categorical prohibition is inherent in the means permitted by the procedure.

5. Respondents emphasized before us that the procedure revolves around two central axes. The first is that the mission of assisting in "early warning" is not to be cast upon a resident, unless he has given his consent; the other is that the mission of "early warning" is not to be cast upon a local resident if it is likely to expose him to danger to life or limb. It seems to me that both these axes are inapplicable, and therefore cannot serve as anchor for the entire procedure.

Regarding the element of the local resident's consent to assist the forces in combat, which is a necessary condition for receiving such assistance, it can be determined that there is no permissible way to obtain such consent. Beyond the prohibition, anchored in principles of international law, of involving the protected population in the war effort of the army holding the territory, it is difficult to see how, in the circumstances present in the area, the required consent can be obtained. The validity of consent is conditional upon it being given of free will. When a local resident is asked by a military commander, accompanied by armed army forces, to assist in an act performed against the population to which he belongs, even if the request is made for a desirable objective, the resident has no real option of refusing the request, and therefore his consent – is not consent.

Regarding the danger to the resident asked to assist army forces, there is no way to ensure that his life is not being endangered by involving him in the activity – activity with which he has no connection, and into which he is thrown against his best interest. Naturally, in the operational activity, the military commander has wide discretion to make decisions in the field, and he must do so under pressure. The burden is on him, to estimate the level of danger to which the local resident is exposed, and at the same time to estimate the danger to those in the house against which the activity is directed. And of course, the weighty burden of minimizing the danger to the lives of his soldiers rests on his shoulders. In these circumstances, the danger to the life of the resident is a real danger which does not stand in proper proportion to the purpose of the procedure – minimizing loss of the lives of the innocent residents – while severely violating the free will of the resident asked to assist army forces, and no less, violating his dignity as a human being.

6. Thus, the necessary conclusion is that the violation of the principles protected in international law is reflected, as discussed, in the instructions of the procedure, which, on its face, is not proportional. In addition to that, it is impossible to escape the impression that the reality described by petitioners, which was not categorically denied by respondents, shows that the procedure, with all the qualifications in it - even if it was legal, and I am not of the opinion that it is – is not capable of being implemented, *de facto*. As it turns out, there are deviations from the procedure in the field; nor does the use made of local residents for "early warning" remain within the restrictions set out in the procedure. Although respondents' counsel did not confirm before us the severe events which were described by petitioners, he did confirm that investigations are underway regarding suspected severe cases which were raised by petitioners, and also confirmed that additional complaints, which were not raised at all in the petition, are being investigated. The daily reality in the field is difficult. The conditions set out in the procedure, aside from being faulty in and of themselves, allow a slide down the slippery slope, which causes stark violations of the rules of international law, and of the constitutional principles of our legal system. The army must do all in its power to prevent the possibility that a detailed and official procedure will create gaps which will lead to a deterioration of the operations in the field to unequivocal situations of illegality. The procedure contains such a gap, and thus must be annulled.

Therefore, I concur in the judgment of President Barak, and in his reasoning.

Decided according to the judgment of President A. Barak.

Given today, 3 Tishrei 5766 (October 6 2005).