# Neighbours as human shields? The Israel Defense Forces' "Early Warning Procedure" and international humanitarian law

by Roland Otto*

The "Early Warning Procedure"[1], colloquially referred to as "Neighbour Procedure", is a means employed by the Israel Defense Forces (IDF) to arrest wanted persons in the West Bank and to avoid civilian and military casualties. If the Israeli armed forces have knowledge of a wanted person's presence in a house, according to the "Early Warning Procedure" the forces surround the house but do not enter it themselves. They then obtain the assistance of local Palestinians, i.e. a neighbour who is persuaded to enter the house. That person warns the occupants of the house, asks them to leave it and requests the wanted person to surrender to the Israeli forces. If the wanted person does not obey, the forces enter the house to arrest him. The general idea of the "Early Warning Procedure" is to find a volunteer, who is persuaded by words only, is not threatened, and has every possibility to refuse. The person in question may not be ordered to perform military tasks and may not assist in situations where he is liable to be injured.[2] According to the IDF, the "Early Warning Procedure" avoids civilian casualties, i.e. of innocent house occupants, as well as injuries to soldiers who could be targeted while approaching the house. Furthermore, it gives the Israeli armed forces the possibility to operate in a manner attracting less attention: a loud warning by megaphone is not necessary to evacuate the house. Thus, attacks from the neighbourhood can be avoided.

Quite apart from the fact that it might not always be possible to fulfil the preconditions set out above, as pressure might be put on civilians[3] and the danger of injury cannot be absolutely excluded,[4] the legality of this method is questionable in several respects. The legal background that has to be taken into account is determined by the Israeli occupation of the West Bank.

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## The normative framework: international humanitarian law and human rights law

The International Court of Justice has recently clarified that Israel is still belligerently occupying the West Bank:

> "The territories situated between the Green Line (…) and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories (…) have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power."[5]

In contrast to this, the State of Israel claims that the West Bank has a status *sui generis*, i.e. outside the law, as being neither part of Israeli territory, nor formally occupied territory.[6] According to the Israeli "Missing Revisioner Theory", in 1967 the West Bank was not the "territory of a High Contracting Party" within the meaning of Article 2, para. 2, of the Fourth

**1** Other terms used are "Prior Warning Procedure" or "Advance Warning Procedure", see Military Order (Israel), "Advance Warning Procedure", 26 November 2002, translation by B'Tselem <http://www.btselem.org/english/legal_documents/advanced_warning_procedure.doc> (last visited 10 November 2004).

**2** Military Order (Israel), "Advance Warning Procedure", 26 November 2002, *op. cit.* (note 1).

**3** See e.g. testimony of Ahmad Abd al-Qader Ahmad, in "Soldiers use Ahmad Asaf as a human shield in Tulkarem refugee camp", B'Tselem, 12 January 2004, <http://www.btselem.org/English/Testimonies/040112_Ahmad_Assaf_Human_Shield.asp> (last visited 10 November 2004).

**4** E.g. the case of Nidal Abu Mukhsan, who was killed by the person he was supposed to convince to surrender. See "The IDF continues to force Palestinians to serve as 'human shields' for soldiers in contempt of High Court of Justice injunction", B'Tselem, <http://www.btselem.org/english/testimonies/021226_human_shields_update.asp> (last visited 10 November 2004).

**5** ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, para. 78, available at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm> (last visited 10 November 2004); see also Supreme Court of Israel, *Beit Sourik Village Council* v. *The Government of Israel et al.*, HCJ 2056/04, Judgment of 30 June 2004, para. 23, available at <http://62.90.71.124/Files_ENG/04/560/020/a28/04020560.a28.pdf> (last visited 10 November 2004); *Ajuri* v. *IDF Commander*, HCJ 7015/02, Judgment of 3 September 2002 ("Assigned Residence"), in *Israel Law Reports*, 2002, pp. 2 and 12 ff.

**6** David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, State University of New York Press, New York, 2002, pp. 3234; Richard A. Falk; Burns H. Weston, "The relevance of international law to Israeli and Palestinian rights in the West Bank and Gaza", in Emma Playfair (ed.), *International Law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip*, Clarendon Press, Oxford, 1992, p. 131.

Geneva Convention,[7] as it had been occupied by Jordan since the 1948 War. According to the State of Israel it was thus not occupied by Israel in 1967. Consequently, Israel denies the direct applicability of the Fourth Geneva Convention regarding that territory.[8] However, "the whole of the international community — except Israel"[9] accepts that the Fourth Geneva Convention is applicable *de jure*.[10] The State of Israel agrees that the "humanitarian provisions" laid down in the Convention are at least *de facto* applicable.[11]

In addition, Israel generally applies the 1907 Hague Regulations[12] and the Israeli Supreme Court has recognized them as being customary international law and thus part of Israeli law.[13] Israel is furthermore bound by the International Covenant on Civil and Political Rights (ICCPR),[14]

**7** Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, entry into force on 21 October 1950, Final Record of the Diplomatic Conference of Geneva of 1949, Federal Political Department, Berne, Vol. 1, pp. 297-330; reprinted in *UNTS*, Vol. 75, 1950, pp. 287-417; Israel signed the Fourth Geneva Convention on 8 December 1949 and ratified it on 6 July 1951. The only reservation Israel made refers to the use of the Red Shield of David as the emblem and distinctive sign of its medical services, see "Reservations and declarations concerning the four Geneva Conventions of 12 August 1949", reprinted in Dietrich Schindler; Jirí Toman (eds), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, 2nd ed., Sijthoff & Noordhoff, Alphen aan den Rijn, 1981, p. 506.

**8** Yehuda Zvi Blum, "The missing revisioner: Reflections on the status of Judea and Samaria", in *Israel Law Review*, Vol. 3, 1968, pp.279-301; Meir Shamgar, "The observance of international law in the administered territories", in: *Israel Yearbook on Human Rights*, Vol. 1, 1971, pp. 265 ff.

**9** Ardi Imseis, "On the Fourth Geneva Convention and the occupied Palestinian territory", in *Harvard International Law Journal*, Vol. 44, No. 1, 2003, p. 97.

**10** See e.g. Security Council Resolution 1435 (24 September 2002), UN Doc. S/RES/1435 (2002), on the situation in the Middle East, including the Palestinian question; ICJ, *op. cit.* (note 5), paras. 89-101; "Declaration on the Convention's applicability to the occupied Palestinian territories", High Contracting Parties to the Fourth Geneva Convention, Geneva, 5 December 2001, reprinted in *Journal of Palestine Studies*, Vol. 31, No. 3, 2002, pp. 148-150.

**11** See Supreme Court of Israel, *op. cit.* (note 5), pp. 12 ff.

**12** Regulations respecting the Laws and Customs of War on Land annexed to the Hague Convention (IV) respecting the Laws and Customs of War on Land, 18 October 1907, entry into force on 26 January 1910, in J.B. Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed., New York 1918, pp. 100-127 (English translation by US Department of State, with minor corrections by J. B. Scott); reprinted in *American Journal of International Law*, Vol. 2, Suppl., 1908, pp. 97-117 (hereinafter 1907 Hague Regulations).

**13** Supreme Court of Israel, *Ayyoub* v. *Minister of Defence (Beth-El* case*)*, H.C. 606/78, H.C. 610/78, in *Piskei Din [Decisions of the Israeli Supreme Court]*, Vol. 33, No. 2, p. 133; English summary in *Israel Yearbook on Human Rights*, Vol. 9, 1979, pp. 337 ff.; see also Thomas S. Kuttner, "Israel and the West Bank: Aspects of the law of belligerent occupation", in *Israel Yearbook on Human Rights*, Vol. 7, 1977, p. 171; Eyal Benvenisti, *The International Law of Occupation*, Princeton University Press, Princeton, N.J., 1993, pp. 109 and 112.

**14** International Covenant on Civil and Political Rights (ICCPR), 19 December 1966, entry into force on 23 March 1976, in *UNTS*, Vol. 999, 1976, pp. 171-346; entry into force for Israel on 3 January 1992. The only reservation Israel made concerns matters of personal status which are to be governed in Israel by religious law (Art. 23 of the Covenant), available at http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm (last visited 10 November 2004).

which is also applicable to Israeli authority exercised in the occupied territories.[15]

The following analysis will focus on the 1907 Hague Regulations and the Fourth Geneva Convention. Reference will also be made to related human rights questions.

### Israel's responsibility for order and security in the occupied territories

According to Article 43 of the 1907 Hague Regulations, an occupying power assumes responsibility for the occupied territory and its inhabitants and is responsible for "*l'ordre et la vie publics*".[16] This provision is further developed in Articles 29 and 47 ff. of the Fourth Geneva Convention. Hence the occupying power has not only the right, but even the responsibility to take security measures. If a civilian is reasonably suspected of an offence for which arrest would be an appropriate measure, an arrest is allowed under international humanitarian law. This may involve the use of force if necessary, but such security measures are always subject to the rule of proportionality.[17] As a precondition for the following considerations, we will accept that the arrest of a wanted person in an occupied territory is legal and that the means employed, i.e. the force used against that person, comply with the requirements of proportionality. The present examination thus concerns the rights of the person who might voluntarily warn the occupants of the house in question as part of an otherwise legal action.

**15** ICJ, *op. cit.* (note 5), paras. 110 f.; see also Jochen Abr. Frowein, "The relationship between human rights regimes and regimes of belligerent occupation", in *Israel Yearbook on Human Rights*, Vol. 28, 1998, pp. 6 and 11; Manfred Nowak, *U.N. Covenant on Civil and Political Rights — CCPR Commentary*, Engel, Kehl am Rhein, 1993, Art. 2, para. 28.

**16** The common English translation differs from the authentic French version at this point and reads "public order and safety"; compare e.g. Adam Roberts; Richard Guelff (eds.), *Documents on the Laws of War*, 3rd ed., Oxford University Press, Oxford, 2000, p. 81. This seems to be based on the semi-official English translation by the US Department of State as given in James Brown Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed., Oxford University Press, New York, 1918, p. 123. A more adequate translation is contained in *American Journal of International Law*, Vol. 2, Suppl., 1908, pp. 112 f., which refers to "public order and life". The correct translation is most likely the one proposed by Edmund H. Schwenk, "Legislative power of the military occupant under Article 43, Hague Regulations", in *Yale Law Journal*, Vol. 54, 1945, pp. 393 (footnote 1) and 398: "As the French term 'la vie publique' encompasses 'social functions [and] ordinary transactions which constitute daily life' the term 'public order and civil life' seems to come closest to the meaning of 'l'ordre et la vie publics', whereas the term 'l'ordre' means 'security or general safety'". See also Benvenisti, *op. cit.* (note 13), p. 7; Kretzmer, *op. cit.* (note 6), p. 58.

**17** Hans-Peter Gasser, "Protection of the civilian population", in Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford, 1999, pp. 214, 242 and 246; see also Kretzmer, *op. cit.* (note 6), pp. 131 and 155.

At first sight, the problem thus seems to be a factual one: how can it be determined whether a person is truly voluntarily helping or is subject to any kind of pressure? Cases in which the person in question felt "the barrel of a rifle touching [his] back"[18] are clearly illegal. But if certainty as to the voluntary character of the person's actions could be achieved, why should that person not help to avoid casualties? Nevertheless, legal questions arise even before the factual question of the true voluntary character, for even though a person helps voluntarily, that person's rights could still be infringed in a way rendering the action illegal. This would first be the case if an absolute prohibition of the "Early Warning Procedure" existed under international humanitarian or human rights law, and secondly if that person's rights were infringed in a disproportionate manner.

### An absolute prohibition of the "Early Warning Procedure"

Civilians residing in the occupied territories are protected persons within the meaning of Article 4, para. 1, of the Fourth Geneva Convention.[19] They are, under Article 27, para. 1, of the Convention and customary international law, entitled to respect for their persons and must be protected against all acts of violence or threats thereof.[20] According to Article 47 of the Fourth Geneva Convention, protected persons in occupied territory "shall not be deprived (…) of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory". These benefits cannot even be changed "by any agreement concluded between the authorities of the occupied territories and the Occupying Power". The rights guaranteed by the Convention are thus not subject to the disposition of either the Occupying or the Occupied Power.

**18** Statement by Emil Darwazeh, quoted in Aryeh Dayan, "Refuse to be a human shield? No such thing — mocking High Court rules, the IDF still put Palestinians in the way of danger", on Haaretz.com, 7 July 2003 available at <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=315128&contrassID=1> (last visited 10 November 2004).

**19** "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."; see Yuval Shany, "Israeli counter-terrorism measures: Are they 'kosher' under international law?", in Michael N. Schmitt, Gian Luca Beruto (eds.), *Terrorism and International Law: Challenges and Responses*, International Institute of Humanitarian Law, 2003, p. 96 <http://www.michaelschmitt.org/images/4996terr.pdf> (last visited 10 November 2004).

**20** Gasser, *op. cit.* (note 17), p. 212.

Moreover, they are not even open to modification by the protected persons themselves, as Article 47 is supplemented by a second layer of protection: Article 8 of the Fourth Geneva Convention stipulates that protected persons may not renounce the rights secured to them. Article 8 was introduced to make clear that "States party to the Convention (…) could not release themselves from their obligations towards protected persons, even if the latter showed expressly and of their own free will that that was what they desired."[21] It replaced an earlier draft possibly leaving room for the interpretation that protected persons could renounce the benefits of the Convention, provided that their choice was made completely freely and without any pressure. The present wording was chosen to avoid the difficulty of proving the existence of duress or pressure on persons renouncing their rights.[22] Thus, even a renunciation of rights by a protected person on his or her own initiative is null and void. This principle, laid down in Article 8 of the Fourth Geneva Convention, applies to the entirety of international humanitarian law.[23]

The aforesaid provisions establish the background that has to be borne in mind when examining the legality of the "Early Warning Procedure". There is no rule under international humanitarian law explicitly prohibiting that procedure. However, it might fall under the prohibition on compelling protected persons to serve in the Occupying Power's armed forces or take part in military operations and the prohibition of the use of human shields.

### Compulsion of protected persons to serve in the occupying power's armed forces is prohibited

Under Article 51, para. 1, of the Fourth Geneva Convention, protected persons may not be compelled to serve in the Occupying Power's armed or auxiliary forces, nor may the Occupying Power use pressure or propaganda to achieve voluntary enlistment. This prohibition is a universally recognized basic principle of the laws of war.[24] It is absolute and permits no derogation,[25] and is included in the catalogue of war crimes of the Rome

**21** Jean S. Pictet, Oscar M. Uhler, Henri Coursier (eds), *The Geneva Conventions of 12 August 1949: Commentary, Vol. 4: Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958, p. 74.

**22** *Ibid.*, pp. 74 ff.

**23** Gasser, *op. cit.* (note 17), p. 252.

**24** Pictet, *op. cit.* (note 21), p. 292; Gasser, *op. cit.* (note 17), p. 263.

**25** Pictet, *ibid.*, p. 293; Gasser, *ibid.*, p. 263.

Statute of the International Criminal Court (ICC).[26] While Article 23 (h), para. 2, of the 1907 Hague Regulations only forbade forced participation of nationals of the hostile party in operations of war directed against their own country, the Fourth Geneva Convention extended the scope of the prohibition: it refers to all recruitment and enlistment in the armed forces of the Occupying Power, whatever the theatre of operations and whoever the opposing forces might be, including resistance movements operating within the occupied territory.[27]

At first sight it might seem unlikely that the help of the "Early Warner" on an *ad hoc* basis falls under this prohibition. The wording "serve in its armed forces" and "servir dans ses forces armées" apparently relates to something more durable than bringing a message to the residents of a house. However, the object of this prohibition is to protect the inhabitants of an occupied territory from actions offensive to their patriotic feelings and from attempts to undermine their allegiance to their own country.[28] Protected persons should not be subjected to an unbearable loyalty conflict.[29] For example, the use of a protected person in an operation against the forces with whom that person identifies or sympathizes amounts to a serious attack on human dignity and causes serious mental suffering or injury.[30] Furthermore, a person supporting the Occupying Power's forces, even on a single occasion, will very likely be stigmatized as a "collaborator". Such a person might, at least in the perception of the other civilians, have changed sides. Thus, even an isolated supporting action runs counter to the purpose of Article 51, para. 1, of the Fourth Geneva Convention.

Another important factor that has to be taken into account is the rule preventing protected persons from renouncing the rights secured to them. Read in connection with Article 8 of that same Convention, the said Article 51, para. 1, amounts to an absolute prohibition of the "Early Warning Procedure": it bans not only forced service in the Occupying Power's armed forces, but also propaganda for voluntary service. It thus covers pub-

**26** Article 8.2 (a) (v) of the Rome Statute of the International Criminal Court (ICC Statute), 17 July 1998, entry into force on 1 July 2002, UN Doc. A/CONF.183/9; reprinted in *UNTS*, Vol. 2187, 2002, pp. 90-158; *ILM*, Vol. 37, No. 5, 1998, pp. 1002-1069.

**27** Pictet, *op. cit.* (note 21), p. 293; Gasser, *op. cit.* (note 17), p. 263.

**28** Pictet, *ibid.*, p. 293.

**29** Michael Bothe, "War crimes", in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2002, p. 394.

**30** ICTY, *Prosecutor* v. *Tihomir Blaškić*, Case No. IT-95-14-A (Appeals Chamber, Judgment of 29 July 2004), para. 597.

licity aimed at the population of an occupied territory, i.e. by radio or television. Such means used to influence protected persons seem rather harmless compared to the situation a neighbour faces when asked to serve as an "Early Warner". That request is not addressed to the general public, but is made directly to one specific person. It is not transmitted by an anonymous medium such as radio or television, but is most likely made to him by several heavily armed members of the Occupying Power's armed forces. Nor is it an invitation he can think over for some time, but a request he must decide on that very moment. These factors add up to a considerable amount of pressure imposed on the person in question. The previous practice of the Israeli armed forces has shown that the possibility of a negative answer might not even be taken into account.[31]

### Prohibition on compelling protected persons to take part in military operations

Protected persons can under certain conditions be compelled to work. However, under Article 51, para. 2, of the Fourth Geneva Convention, work that would oblige them to take part in military operations is excluded. This rule, already formulated in Article 52 of the 1907 Hague Regulations, is also contained in the ICC Statute's list of war crimes.[32] Protected persons may not be ordered to contribute to military operations.[33] This covers operations against their own country or another State, as well as actions against resistance and partisans in the occupied territory.[34]

The said prohibition is intended to ensure that civilians who are compelled to work by the occupying authorities always retain their status as civilians.[35] This is not the case as regards the "Early Warning Procedure", for the protected person becomes part of a military action by the occupying forces. Even though the reason for the arrest of the wanted person may be of a penal nature or based on security considerations, the forces performing that action are the Occupying Power's armed forces. This association with them can endanger the protected person, who may meet with armed opposition[36] or become the victim of a booby trap. Such risks are typically taken by combat-

**31** Dayan, *op. cit.* (note 18).
**32** Article 8, para. 2, lit. b (xv) ICC Statute.
**33** ICTY, *op. cit.* (note 30).
**34** Gasser, *op. cit.* (note 17), p. 264.
**35** *Ibid.*
**36** E.g. the case of Nidal Abu Mukhsan, *op. cit.* (note 4).

ants, not civilians. The "Early Warning Procedure" uses civilians to avoid those risks and thus shifts the front line of hostilities into the midst of the civilian population.

Nonetheless, the wording of Article 51, para. 2, might suggest that protected persons may not be compelled to take part in military operations, but that room is left for voluntary participation.[37] Again, this prohibition has to be read in close connection with the said Convention's Article 8. While it is expressly prohibited to force a civilian to take part in a military operation, Article 8 is meant to preclude forced participation in the guise of voluntary participation. It follows that the prohibition in Article 51, para. 2, must amount to a general prohibition on civilians taking part in military operations.

This more extensive interpretation finds support in the phrasing of Article 51: the general rule is that "[t]he Occupying Power may not compel protected persons to work" unless certain conditions are fulfilled. Thus, compelling protected persons to work is permissible only as an exception. Article 51, para. 2, spells out this exception, i.e. the kind of work the persons in question may be compelled to do. The exception does not include military operations, a fact that is further clarified. Under Article 8 of the Fourth Geneva Convention, protected persons cannot renounce these limitations, i.e. a person compelled to work cannot voluntarily agree to do work other than that specified in Article 51, para. 2 thereof. Hence a person compelled to work cannot agree voluntarily to take part in military actions. It would consequently be somewhat surprising if this did not hold true for a person who agreed to work voluntarily at the start, and later took part in a military operation.

### Prohibition on the use of human shields

Under Article 28 of the Fourth Geneva Convention it is absolutely forbidden to use civilians as shields; they may not be used to render certain points or areas immune from military operations. Yet one aim of the "Early Warning Procedure" is to avoid injuries to soldiers who could be targeted while approaching the house, e.g. by booby traps, or while surrounding the house and drawing attention to themselves by using a megaphone to warn the residents in it.

**37** Hilaire McCoubrey, *International Humanitarian Law: Modern Developments in the Limitation of Warfare*, 2nd ed., Ashgate, Aldershot, 1998, p. 200.

It is questionable whether such attacks on the occupying forces are covered by the term "military operations", which seems to refer first and foremost to acts of warfare committed by the enemy's military forces. But it also covers acts of war by groups such as volunteer corps and resistance movements, which are placed in the same category as the regular armed forces under Article 4, paragraphs 2, 3 and 6, of the Third Geneva Convention.[38] The aforesaid prohibition also applies to occupied territory.[39] However, civilians who spontaneously attack occupying forces neither fulfil the requirements of the said article's paragraph 2 in terms of command responsibility for subordinates and distinctive signs, nor are they members of armed forces within the meaning of its paragraph 3, nor do they constitute a *levée en masse* in accordance with its paragraph 6. Thus, at first sight, the "Early Warning Procedure" would not amount to the use of civilians as shields, since it serves as protection against persons not covered by Article 4 of the Third Geneva Convention.

However, the scope of this prohibition is broader: civilians may not be used in order to gain a military advantage or secure a military operation.[40] While it remains questionable whether security measures by the occupying forces represent a "military advantage", they surely have to be regarded as "military operations", for they are performed by the Occupying Power's armed forces and not by any kind of security force provided by the occupied population. It is not clear whether they are law enforcement measures or further the military aims of the Occupying Power. In the case of the "Early Warning Procedure" a civilian is exposed to danger in order to help the military forces achieve their aims and reduce the risks taken by them. Therefore the person helping voluntarily is indeed serving as a shield, perhaps not in the classic sense, but he does nevertheless diminish the risk of an attack on the military forces in that he is a civilian and is less likely to be attacked in that kind of situation.

The fact that according to the "Early Warning Procedure" the civilian helps voluntarily loses its relevance, first if Article 8 of the Fourth Geneva Convention is taken into account and, secondly, if the situation is viewed from the standpoint of a potential attacker. In the latter's perception, it is

**38** Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, entry into force on 21 October 1950, Final Record of the Diplomatic Conference of Geneva of 1949, Federal Political Department, Berne, Vol. 1, pp. 243-276; reprinted in *UNTS*, Vol. 75, 1950, pp. 135-285.

**39** Pictet, *op. cit.* (note 21), p. 209.

**40** Gasser, *op. cit.* (note 17), pp. 218 and 265.

not possible to distinguish a volunteer from a human shield under duress. This results in exactly the kind of conflict the prohibition of human shields is meant to avoid: the need to decide between attacking one's equals or refraining from an attack.

To sum up, the prohibition on compelling protected persons to serve in the Occupying Power's armed forces might at first sight not amount to an absolute prohibition of the "Early Warning Procedure". However, if the ban on propaganda to obtain voluntary service and Article 8 of the Fourth Geneva Convention are taken into account, it becomes clear that the "Early Warning Procedure" violates that prohibition. This becomes even more evident when paragraphs 1 and 2 of Article 51 are read in context: it is prohibited not only to force protected persons to participate in military operations, but also to use publicity in order to obtain voluntary service. The tenor of this is that a protected person may not be used in a military context. If the ban on the use of propaganda is taken seriously, he cannot even be asked to participate. Moreover, under Article 8 of the Fourth Geneva Convention the limitations imposed by the above prohibition cannot be renounced by protected persons, as that would render possible the abusive use of "forced volunteers".

While this might still be subject to further discussion in terms of "real volunteers", the fact that the use of civilians as human shields is prohibited means that the "Early Warning Procedure" infringes upon international humanitarian law. Even a perfectly voluntary "human shield" falls under this prohibition, as it is not possible for third persons to distinguish volunteers from non-volunteers. Thus, the "Early Warning Procedure" violates Article 51 of the Fourth Geneva Convention as well as the said prohibition.

### The human rights perspective

The situation differs if considered from a human rights perspective: the right at stake is the right to life, as laid down in Article 6 of the ICCPR.[41] This right is not guaranteed in an absolute manner. "Lawful acts of war" are not prohibited by Article 6 "if they do not violate internationally recognized laws and customs of war."[42] The illegality of the "Early Warning

**41** Article 6, para. 1, of the ICCPR reads "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

**42** Report of the Secretary-General on "Respect for Human Rights in Armed Conflicts", UN Doc. A/8052 (18 September 1970), p. 104; see also Jochen Abr. Frowein, "Article 15", in Jochen Abr. Frowein; Wolfgang Peukert (eds.), *Europäische Menschenrechtskonvention — EMRK-Kommentar*, 2nd ed., N. P. Engel, Kehl am Rhein, 1996, para. 12.

Procedure" is, as shown above, a direct result of the special situation of occupation. The authority of a State to limit the rights of the persons within its jurisdiction is broader than that of an Occupying Power with regard to protected persons, for in human rights law there is no prohibition of voluntary renunciation of protection comparable to Article 8 of the Fourth Geneva Convention. It is true that States are obliged to take positive measures to ensure the right to life.[43] This does not, however, comprise a duty to protect individuals from any risk they take voluntarily.[44] Thus, the persons themselves have to assess the risks they take. The present issue is an example of international humanitarian law providing for a higher standard of protection than human rights law. In this context, the international humanitarian law rules are the *leges speciales* and prevail over the human rights norms.[45]

### A different approach: proportionality considerations

The foregoing analysis has shown that various international humanitarian law rights and human rights are affected by the "Early Warning Procedure". This list is supplemented by Article 27, para. 1(2), of the Fourth Geneva Convention and customary international law, which states that protected persons "shall be protected especially against all acts of violence or threats thereof".[46] All acts that might cause unjustifiable harm to a civilian must be avoided.[47] The prohibition of physical or moral coercion, in particular to obtain information, that is laid down in Article 31 of the Fourth Geneva Convention and Article 44 of the 1907 Hague Regulations, and the prohibition on forcing enemy nationals to act as a guide for invading enemy forces[48] follow the same pattern: the use of protected persons against their will in any manner to achieve military advantages is either prohibited or subject to limitations.

**43** Halûk A. Kabaalioğlu, "The obligation to 'respect' and to 'ensure' the right to life", in Bertrand. G. Ramcharan (ed.), *The Right to Life in International Law*, Martinus Nijhoff Publishers, Dordrecht, 1985, pp. 164 f.

**44** See Nowak, *op. cit.* (note 15), Art. 6, paras. 3 ff. and 17; Eckart Klein, "The duty to protect and to ensure human rights under the International Covenant on Civil and Political Rights", in: Eckart Klein (ed.), *The Duty to Protect and Ensure Human Rights*, Berlin Verlag, Berlin, 2000, pp. 306-310.

**45** See ICJ, *op. cit.* (note 5), para. 106; Frowein, *op. cit.* (note 15), pp. 9 and 11; Nowak, *op. cit.* (note 15), Art. 4, para. 27; Hans-Joachim Heintze, "The European Court of Human Rights and the implementation of human rights standards during armed conflict", in *German Yearbook of International Law*, Vol. 45, 2002, p. 64.

**46** Gasser, *op. cit.* (note 17), p. 212.

**47** *Ibid.*

**48** Gerhard von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation*, University of Minnesota Press, Minneapolis, 1957, p. 83.

Even without an absolute prohibition, the "Early Warning Procedure" could be illegal, as the infringement of any rights of the civilian in question is subject to proportionality: in *jus in bello* proportionality is used to control permitted harm to others.[49] This principle applies not only to military operations, where it requires that the losses and damages caused must not be excessive in relation to the direct military advantage anticipated,[50] but also to the exercise of authority and security measures by the military commander in an area under belligerent occupation.[51] "Indeed, every Israeli soldier carries in his pack both the rules of international law and also the basic principles of Israeli administrative law that are relevant to the issue."[52] This includes the principle that the means used to realize the legitimate objective have to be of a proper proportion to their costs.[53]

### Legitimate objectives to be achieved by the "Early Warning Procedure"

The "Early Warning Procedure" is designed to achieve several objectives. The main objective of the whole operation is to arrest the wanted person. There are several others, which might vary in priority, namely to cause as few civilian casualties as possible, to suffer as few casualties in the armed forces as possible, and to act quietly and thus avoid attacks by third parties.[54]

### The "Early Warning Procedure" as an appropriate means to achieve these objectives

This procedure is probably an appropriate means of arresting the wanted person, either because he gives himself up to the armed forces or because they enter the house after the warning. It is unlikely that the warning will enable the wanted person to flee, as the house is surrounded.

**49** Michael Bothe; Karl Josef Partsch; Waldemar A. Solf (eds.), *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Nijhoff, The Hague, 1982, p. 299.

**50** Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, Clarendon, Oxford, 1994, p. 230; Judith Gail Gardam, "Proportionality and force in international law", in *American Journal of International Law*, Vol. 87, 1993, pp. 391 and 409.

**51** Supreme Court of Israel, *Beit Sourik Village Council* v. *The Government of Israel et al.*, *op. cit.* (note 5), para. 39; Supreme Court of Israel, *Ajuri et al.* v. *IDF Commander*, *op. cit.* (note 5), pp. 21 f.; Kretzmer, *op. cit.* (note 6), pp. 131 and 155; Gasser, *op. cit.* (note 17), pp. 214, 242 and 246.

**52** Supreme Court of Israel, *Ajuri* v. *IDF Commander*, *op. cit.* (note 5), p. 13.

**53** *Ibid*., pp. 21ff.

**54** Military Order (Israel), "Advance Warning Procedure", *op. cit.* (note 1).

At first sight the "Early Warning Procedure" procedure is likely to cause only few civilian casualties, as long as the civilian occupants of the house in question trust the forces and leave the house voluntarily. On the other hand, if those occupants or the wanted person put up any resistance, there might be an additional civilian victim, as the "Early Warner" is drawn into the fighting.[55] Also, he might trigger a booby trap and thus be the first civilian victim even before delivering his message. However, a person from the neighbourhood might know about the booby traps and therefore be able to avoid them. But even a successful "Early Warner" may well be stigmatized as a "collaborator" and subjected afterwards to reprisals by members of his community. The relevant troop commander has to take all these factors into account in order to ensure that the person in question is not injured.[56] A reliable prognosis seems hardly possible.

The "Early Warning Procedure" is certainly appropriate to avoid further casualties among the Israeli armed forces. As already pointed out above, they do not have to approach the house themselves and thus do not run the risk of being attacked from it or triggering a booby trap. They can also proceed very quietly, as no megaphone warning is given. Thus, the said procedure is a suitable means to achieve the legitimate objectives.

### Less injurious means

There might, however, be other less injurious means to achieve the same aims. The first is that the forces could enter the surrounded house without any warning. This strategy is probably appropriate to arrest the wanted person. The risk of him managing to flee because he is confused with the civilian occupants of the house is no greater than in the case of the "Early Warning Procedure", as the house is nevertheless surrounded by armed forces. But this method is very unlikely to keep civilian casualties to a minimum. At the time the forces enter the house and fighting might start, all civilian occupants are still in it. They might be confused with the wanted person and thus injured or killed during the attempt to arrest him. They might also be injured or killed by means such as gunfire or explosives used by the wanted person to defend himself. The risk of civilian casualties is therefore much higher than with the "Early Warning Procedure", even if the absence of the "Early Warner" means that he at least will not be an addi-

**55** See the case of Nidal Abu Mukhsan, *op. cit.* (note 4).

**56** Military Order (Israel), "Advance Warning Procedure", *op. cit.* (note 1).

tional victim. So entry without warning is no less harmful to civilians than the "Early Warning Procedure". The same might apply in terms of the casualties suffered by the Israeli forces: it is at least possible that more soldiers are injured or killed, e.g. by booby traps or if the startled civilian occupants try to defend themselves. Moreover, the number of persons taking part in such an operation is higher. So even though this alternative method does not provoke more attacks by third parties, it is less suitable to achieve the desired aims than the "Early Warning Procedure".

Secondly, the forces could enter the surrounded house after a warning is given by megaphone. This tactic is just as appropriate to arrest the wanted person as the other methods. As long as the civilian occupants trust the Israeli forces' warning and leave the house, the risk of civilian casualties should be the same, with one exception — since no civilian "Early Warner" is required, at least one person less is exposed to possible injury. Admittedly, the residents are arguably less likely to leave the house, but on the other hand no civilian runs the risk of triggering a booby trap. It is questionable whether this method is likely to result in fewer casualties among the armed forces, for the manner in which they have to approach the house and the risk of fighting or being struck by a booby trap while trying to arrest the wanted person there are the same as in the case of an "Early Warner". On the other hand, by giving a megaphone warning the armed forces draw attention to their operation and thus invite attacks from third parties in the neighbourhood. This method is at least in that regard less appropriate than the "Early Warning Procedure".

### Proportionality "in the narrow sense"

As shown above, the second alternative method, i.e. to surround the house, warn by megaphone and enter the house afterwards, is only less appropriate insofar as it increases the risk of the Israeli forces being attacked from the surrounding area. No other alternative offers absolutely the same possibilities to achieve the aims. The question therefore arises whether the risk for the civilian involved in the "Early Warning Procedure" is duly proportionate to the advantages of that method.

In weighing up the danger for a civilian totally unconnected to the events against a reduced risk for the security forces, whose very task it is to take such risks, the scales should always tilt in favour of the civilian's rights. What the Israeli armed forces seem to be doing is to shift those risks away from themselves by using civilians, which not only endangers the civilian

concerned but might also lead to subsequent local reprisals against him. The front line of the conflict is thus transferred into the midst of the civilian population. This cannot be deemed proportionate if the values of international humanitarian law, the essence of which is to keep civilians separate from military measures by the Occupying Power, are taken into consideration. This conclusion is supported by the findings of the Israeli Supreme Court in its Separation Fence Decision;[57] if a possible alternative method, even though its benefit will be somewhat smaller than that of the former one, causes significantly less damage, the original act is disproportionate.[58] As stated, the possible alternative of giving a warning by megaphone increases the risk for the armed forces and is thus of less benefit in that regard. It is not of any less benefit, however, in terms of its main objective: it is suitable to achieve the arrest of the wanted person. The lesser benefit applies only to the possible "costs" for the Israeli armed forces in doing so. On the other hand, this method is significantly less harmful to the person whose rights are at stake: the "Early Warner" is not endangered, since he is not needed. The "Early Warning Procedure" is therefore not proportionate, for it is possible for the forces to achieve their aims with a slightly increased risk for themselves, but without any danger for the civilian who has nothing to do with the events.

## Conclusion

In the author's opinion, the "Early Warning Procedure" infringes both Article 51 of the Fourth Geneva Convention and the prohibition on the use of human shields and is thus a means absolutely prohibited by international humanitarian law.

Even if this conclusion is not accepted, the "Early Warning Procedure" violates the principle of proportionality. While it may be an appropriate means to achieve the legitimate aims discussed above, the two factors to be weighed up against each other are the safety of a person with no connection whatsoever to the events and the safety of the armed forces. As it is possible for the latter to achieve their aims at a higher risk for themselves but without any harm at all to the civilian in question, the outcome must be the following: the "Early Warning Procedure", even if it is not subject to an absolute prohibition, is not a proportionate means under international humanitarian law.

**57** Supreme Court of Israel, *Beit Sourik Village Council* v. *The Government of Israel et al.*, *op. cit.* (note 5).

**58** *Ibid*., para. 41; see also United Kingdom, *The Manual of the Law of Armed Conflict*, UK Ministry of Defence, Oxford 2004, para. 2.7.1.

## Résumé

***À la fois voisins et boucliers humains ?***

***La «procédure d'alerte précoce» des forces armées israéliennes et le droit international humanitaire***

*Roland Otto*

*La « procédure d'alerte précoce » permet aux forces armées israéliennes d'obtenir l'assistance d'un civil volontaire, à savoir un voisin, pour arrêter une personne recherchée dans les territoires occupés. L'auteur rappelle que les personnes protégées ne peuvent pas renoncer aux droits que leur confère la IVe Convention de Genève. Il soutient ensuite que cette pratique viole l'interdiction qui est faite d'obliger des personnes protégées à servir dans les forces armées de l'occupant et à participer aux opérations militaires, ainsi que celle d'utiliser des boucliers humains. Dans ce contexte, le droit international humanitaire est une* lex specialis *du droit des droits de l'homme. En outre, la procédure viole le principe de la proportionnalité, car les forces armées peuvent atteindre leurs objectifs en prenant elles-mêmes des risques accrus, sans faire courir un danger au civil en question.*