

**Yesh Din - Volunteers for Human Rights (Registered Association 58-0442622)**

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The Petitioner

-- Versus --

- 1. The IDF -- the military court unit in the Judea and Samaria area**
- 2. The Military Advocate General**
- 3. The commander of IDF forces in the West Bank**

All represented by the office of the State Attorney, the Ministry of Justice, 29 Salah-a-Din St., Jerusalem

**Petition for Order Nisi**

This is a petition for an order nisi, whereby the Honorable Court is moved to order the Respondents to give reason, if they should so desire:

1. Why they will not let the Petitioner review the protocols of the non-confidential hearings held at the military courts in the West Bank and copy them;
2. Why they will not provide the Petitioner or anyone on its behalf with a copy of the daily list of hearings held in the military courts in the West Bank.

**A. Introduction**

1. This Petition concerns the Respondents' refusal to allow the review and copying of the protocols of the hearings in the military courts in the West Bank (of open-door hearings without publicity restrictions), as well of the Respondents' refusal to provide the Petitioner with the daily list of hearings at the military courts (the protocols and the daily list of trials will hereinafter be collectively called: "the documents").
2. As will be clarified hereinafter, the documents are needed by the Petitioner for a study it is conducting at present, whose purpose is to examine the upholding of the right to fair judicial process in the military court system.
3. Therefore, this Petition addresses an issue concerning the Respondents' duties deriving from three fundamental values of our legal system: the principle of public debate; the Petitioner's right to freedom of expression; the public's (including the Petitioner's) right to freedom of information.

4. Moreover: while the Respondents regard the principle of public debate as a **technical** principle that entitles the public or its representatives to be merely present in the courtroom, the Petition wishes to require the Respondents to regard that principle as having **material** contents, requiring the Respondents to allow **effective** monitoring of the hearings.

## **B. The factual background**

### **I. The Parties**

5. **The Petitioner, Yesh Din - Organization of Volunteers for Human Rights**, is a registered Israeli association, founded in March 2005 (hereinafter: "the Petitioner" or "the organization"). The organization and its volunteers operate in the West Bank in a number of projects concerned with defending human rights and monitoring law enforcement procedures by the Israeli government agencies. The first project selected by the organization's activists was monitoring law enforcement upon Israelis in the West Bank, and, as part of it, the organization published a report in October 2006 ("A Semblance of Law: Law Enforcement upon Israeli Civilians in the West Bank").

6. Since October 2006 the Petitioner has been conducting another project -- "realizing the right to fair judicial process in the military courts." As its title says, the project is examining whether the right to fair judicial process of suspects and defendants tried in the military court system in the West Bank is being upheld. The core of the project is an empirical study conducted by the organization's volunteers, by monitoring hearings at the courts in the Ofer Camp and at the Salem Checkpoint (the Judea Military Court and the Samaria Military Court). As will be detailed below, the study is based on examining the proceedings at the hearings, and therefore these observations and the volunteers' ability to understand what is happening at the hearings are of critical importance for the project's success and the accuracy of its conclusions.

7. **The First Respondent, the military court unit in the Judea and Samaria area**, is the body in charge of the military courts, which were established on the basis of military orders in accordance with the laws of belligerent occupation. The First Respondent is the body in charge of conducting the trials, coordinating the hearings, collecting the legal material and arranging it in archives, as well as all the procedural legal aspects necessary and required by any legal system.

8. **The Second Respondent, the Military Advocate General**, is the body in charge of the military judiciary system, both in Israel and in the territories it is holding under belligerent occupation.

9. **The Third Respondent, the commander of IDF forces in the West Bank**, holds all of the administrative and legislative powers in the area held by the State of Israel under belligerent occupation, in accordance with the rules of international humanitarian law and the laws of belligerent occupation. As part of his role as the supreme commander in the Area, the Third Respondent is responsible for enforcing the law in the whole area which is under belligerent occupation and enforcing international humanitarian law and human rights law in particular, in as much as it concerns the Palestinian population tried before the military courts.

## **II. The Petitioner's activity and the need for the documents**

10. As mentioned above, the Petitioner has begun a project to examine the legal proceedings taking place in the military courts. As part of the study, volunteers from the organization attend hearings at the military courts of the Ofer Camp and Salem Checkpoint a number of times a week.

11. During their very first visits, it became evident to the organization's volunteers that without having the list of trials being held that day and without reviewing the protocols of those hearings, they could not, in many cases, follow the course of the hearing or understand material details concerning the hearing itself. Some of the problems arose because of technical problems, such as the fact that reminder hearings and calendar calls are held quickly, and both defendants and attorneys change at a pace which is difficult to follow, or the fact that the physical conditions in the courthouse sometimes make it difficult for the audience to hear what is being said. Another difficulty in understanding the proceedings from observation alone derives from the fact that many details concerning the hearing appear in the protocol but are not necessarily spoken in the courtroom (for instance: the file number, the names of the sides, the names of the attorneys, whether the defendant is an adult or a minor and of course reasoned rulings, sentences, and verdicts).

12. The organization's volunteers discovered that their independent documentation is lacking in important details, without which it will be difficult to assess the upholding and safeguarding of various procedural rights, which is the subject of the study.

13. So, for instance, without being able to look at the protocol, in many cases the Petitioner's members cannot know, among other things, when the defendant or the suspect was detained, when the next hearing is scheduled, whether the protocol agrees with what is being said in the courtroom and who is present at the hearing. Those details, brought as an example, can indicate many issues such as the pace of the progression of the trial, whether the hearing is public and the quality of the interpretation. All of those are, of course, important components in the defendant's and suspect's rights to fair judicial process, which are being studied in the Petitioner's study.

14. In addition, the protocols would allow the organization's volunteers to keep track of relevant data which can supposedly be obtained by being present and listening to the hearing (such as: whether the defendant is represented, comments by prosecutors and judges during the trial, whether the defendant is a minor, details of plea bargains, rulings and verdicts, etc.), but which actually, for various reasons, cannot always be obtained in that way. So, for example, in certain courtrooms it is hard to hear what is being said and in other cases the hearings proceed at too rapid a pace to follow without access to the protocol (especially at calendar calls and reminder hearings).

15. The daily list of hearings is also a critical tool for the Petitioner. Following the various hearings, identifying the defendants and the lawyers who represent them and understanding the proceedings in the courtroom, only become fully possible when there is access to that list, which contains names, kind of hearing, names of judges and file numbers.

16. Therefore, without the documents that are the subject of this Petition, the Petitioner's study will be harmed as will the public's right for its representatives to present it with accurate data about the activity of its government systems.

17. It is hard to overstate the importance of the Petitioner's study. To this day, very few studies have been done about the activity of the military court system in the Occupied Territories. The few reports that have been published were not based on empirical research methodology of the kind the Petitioner is undertaking, and at any rate most of them were published many years ago. As far as the Petitioner knows, in the last 15 years only three reports on the subject have been published by human rights organizations:

"Detained Without Trial: Administrative Detention in the Occupied Territories since the Beginning of the Intifada" (**B'Tselem -- The Israeli Information Center for Human Rights in the Occupied Territories**, October 1992).

"Prisoners of Peace: Administrative Detention During the Oslo Process," (**B'Tselem - The Israeli Information Center for Human Rights in the Occupied Territories**, May 1997).

"Extension of Remand in Custody in Israeli Military Courts during 2006," (**MachsomWatch**, March 2007).

18. As opposed to the aforementioned reports, the goal of the Petitioner's study is to publish statistical data based on **hundreds** of observations; in order for that research to be accurate and present correct and complete facts that reflect reality as much as that is possible, the Petitioner and the volunteers who work in its framework need copies of the protocols of the court hearings as well as the daily list of hearings.

19. Indeed, the number of pages and documents in question is not staggering, because the organization's volunteers only want the lists of court hearings on the days they attend court, and the protocols of the hearings at which they are present. **Moreover, the Petitioner undertakes to bear the cost of copying the required material.**

**20. Furthermore and to remove any doubt at this stage of the Petition, the Petitioner has not requested a list of confidential hearings or protocols of confidential hearings, which are privileged (whether because they are held in chambers or because of the existence of a gag order or for any reason based on any legal privilege), but only copies of open documents that fall under the principle of public debate.**

21. In any case, at the very beginning of the project it became evident that the issue of the protocols and the list of daily hearings is significant. In some cases the organization's volunteers were given protocols of the hearing they attended, but that was sporadic and depended on the good will of the court clerk, the court reporter or the interpreter who chanced to be there. In most cases requests for a copy of the aforementioned documents were refused, and this posed a difficulty to the researchers. Therefore the Petitioner decided to approach the Respondents to resolve the matter.

### **III. Exhaustion of Administrative Remedies: Previous Requests by the Petitioner**

22. On October 15, 2006 the undersigned, on behalf of the Petitioner, wrote to Second Lt. Wafi Hanifas, the Public Affairs Officer of the Judea Military Court, requesting copies of the protocols of the court hearings as well as a copy of the daily list of hearings.

**23. The aforementioned letter made it clear that the organization would bear all the costs of copying and/or would provide the necessary copying paper.**

A copy of that letter is attached and marked as Exhibit A.

24. On November 5, 2006 a letter from Second Lt. Hanifas was received, rejecting the request. In his response Second Lt. Hanifas explained that (emphasis in the original):

"According to the work procedures in the courts in the Area and in Israel, protocols of the hearings are given only to the sides related to the hearing, and not to the audience observing the hearings."

25. Second Lt. Hanifas added in his letter:

"As for the hearing reports [the daily list of hearings; M.S.], it is an internal administrative document that belongs to the court, and therefore it too will not be provided. However, following your request, it has been decided to publish that report next to the courtroom so that anyone who attends court can review it."

A copy of Second Lt. Hanifas's letter is attached and marked as Exhibit B.

26. On December 20, 2006 the undersigned sent a letter on behalf of the organization to the head of the High Court section at the State Attorney's Office, Osnat Mandel, describing the chain of events in detail, and the organization's need for copies of the aforementioned documents. In that letter the undersigned argued that the principle of public debate requires accepting the organization's request.

A copy of the letter from December 20, 2006 to Advocate Mandel is attached and marked as Exhibit C.

27. About six days later, on December 26, 2006, the Petitioner's request was forwarded in full by Advocate Mandel to the office of the chief military prosecutor (The Second Respondent) in order to obtain an answer to the questions posed in writing in the aforementioned preliminary HCJ petition.

A copy of Advocate Mandel's letter is attached and marked as Exhibit D.

28. When no response of substance was received, the undersigned sent on behalf of the Petitioner, on February 28, 2007, about two months after the matter was referred

to the Second Respondent, another letter to Advocate Mandel and asked for his request to be answered. A copy of that reminder was also sent to the office of the Second Respondent.

A copy of the reminder letter from February 28 2007 is attached and marked as Exhibit E.

29. At the time of this writing, no response has been received from the Second Respondent or from the office of Advocate Mandel on the matter, even though more than two and a half months have gone by since the reminder and some five months since the first letter to Advocate Mandel.

30. Under the circumstances the Petitioner had no recourse but to turn to the Honorable Court so that it order the respondents to provide the Petitioner with the aforementioned documents it requires.

### **C. The legal argumentation**

#### **a. General**

31. The Petitioner's position is that the Respondents' blanket refusal to allow the review or copying of the **non-confidential** protocols of the military court hearings, and of the daily list of hearings, constitutes a grave violation of the principle of public debate, which is the most sensitive issue in any legal system. In addition, the Petitioner will argue that the Respondents' refusal to allow the review and copying also compromises the Petitioner's freedom of expression and the general public's freedom of information.

32. The Petitioner will argue that the Respondents violated the principle of public debate, which is fixed not only in a series of law dispositions in Israeli law but also and mainly in the international law that applies to the military court system, including in the area of humanitarian law and international human rights law.

33. The Respondents' policy, therefore, prevents transparency and leads to the protocols and the information therein not being able to reach (and actually not reaching) the public's eye, which is supposed to control and evaluate the nature and quality of hearings in the courts. The direct result is a fatal blow to the Petitioner's freedom of expression and placing a real obstacle in front of the project it is conducting, which becomes greatly limited.

**34. The Petitioner will argue that, like journalists, it is acting as a kind of emissary of the general public. Obviously there is no practical way every member of the public can be present at every hearing in the military courts, and therefore the public representatives who do attend those hearings and present their findings to the general public have a special status.**

#### **b. The principle of public debate**

#### **I. The dispositions of international law**

35. Our legal analysis in this section will be based on the following legal fields: the legal field that binds the military administration in the West Bank is, of course, the laws of belligerent occupation, which are part of international military and law. Wherever humanitarian law is silent or requires interpretation, we shall apply the dispositions of international human rights law.

36. We have adopted this path according to the ruling by the International Court of Justice in Hague (ICJ), that the relationship between humanitarian law and international human rights law is a relationship of a special and specific law. On this matter see:

*Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, 1996 (I)

I.C.J. 66;

*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion, 2004, para.102-114.

37. Even according to this narrow reading, human rights law applies to any situation humanitarian law does not address clearly and unequivocally.

38. International courts have expressed their position that humanitarian laws must not be seen as an alternative system to human rights law but as an exception to the full and universal incidence of human rights laws whose goal is to protect all people in any situation.

39. Moreover, in the International Court of Justice's ruling on the aforementioned separation wall it was established that human rights law applies parallel to humanitarian laws, and the exceptions to its application are within it, as can be seen in Article 4 of ICCPR. As stated in Section 106 of the opinion:

*"More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind found in art. 4 of the ICCPR..."*

40. Indeed, the laws of belligerent occupation recognize the power of the occupying power to establish military courts in the occupied territory (Article 66 of the Fourth Geneva Convention from 1949). As for the standards those courts must apply, the Geneva Convention says this (our emphasis):

*"Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person ... shall nevertheless be treated with humanity, and in case of*

*trial, shall not be deprived of the rights of **fair and regular trial** prescribed by the present Convention.”*

**Art. 5(1), 5(3)**

41. As to the centrality of the principle of fair trial in humanitarian law, the scholar Pictet says the following:

*“The safeguards provided in the Articles dealing with penal legislation ... obviously represent conditions which must be fulfilled if a trial is to be regular; but there are other rules relating to penal procedure which are not expressly laid down in the Convention, but must nevertheless be respected as they follow logically from its provisions. ... The idea of a regular trial is so important that it also finds expression in Article 3 ... and in Article 147, where the fact of willfully depriving a protected person of ‘the rights of fair and regular trial prescribed in the present Convention’ is included among the gravest breaches listed in that Article which call for the severest penalties.”*

( J. Pictet, Commentary on IV Geneva Convention, p. 354)

42. "Due process" is a legal institution with accepted contents. The principles and rights that derive from it are detailed in international human rights law, which we will now address.

43. It cannot be disputed that international human rights law includes public hearing as a central element of the right to "due process."

44. So, for instance, Article 14(1) of the International Covenant on Civil and Political Rights, 1966, (ICCPR) states that (our emphasis):

*"All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law..."*

45. In General Comment 13 of the UN Human Rights Committee (the party authorized to interpret the dispositions and application of the Covenant), it is stated that this Article should apply to all existing courts and tribunals (the emphasis was added, M.S., S.Z.):

Para. #4: “**The provisions of Article 14 apply to all courts and tribunals** within the scope of that Article whether ordinary or specialized.”

(Human Rights Committee, General Comment 13, Article 14 (Twenty-first session 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 14 (1994).)

46. The Human Rights Committee, that operates on the basis of the covenant’s optional protocol, stated that the principle of public hearing should apply in the broadest manner, and guarantee public access to the required information, all in order to fulfill the principles of Article 14 (our emphasis):

*“6.2 The Committee observes that courts must make information on time and venue of the oral hearings available to the **public and provide for adequate facilities for the attendance of interested members of the public**, within reasonable limits, taking into account, e.g., the potential public interest in the case, the duration of the oral hearing and the time the formal request for publicity has been made. Failure of the court to make large courtrooms available does not constitute a violation of the right to a public hearing, if in fact no interested member of the public is barred from attending an oral hearing.”*

**G. A. Van Meurs v. The Netherlands**, Communication No. 215/1986, U.N. Doc. CCPR/C/39/D/215/1986 (1990).

47. In light of the above, it is evident that the public interest inherent in staging the criminal process in front of the entire public is twofold: it is the interest of both of the defendant and of the entire public, which is supposed to control the legal process conducted upon the defendants and assess its nature.

48. Clearly, in order to fulfill those interests, **technical and physical** access to the courtroom are insufficient and it is necessary to create conditions that allow **effective** publicity. Therefore, the duty to allow public access to documents without which the objectives of the principle cannot be achieved.

## II. The dispositions of the law in Israel as to the principle of public debate

49. The principle of public debate has existed in Israeli law since the establishment of the state, and has not infrequently been enshrined in the State of Israel's principal legislation. So, for instance, Article 3 of Basic Law: Adjudication establishes that:

*"The court will try openly, unless it is stated otherwise in the law or if the court ordered otherwise in accordance with the law."*

50. Similar dispositions exist in other law dispositions, such as Section 68 of the Court Act, (combined version), 5744-1984; Section 324(a) of the Military Justice Law, 5715-1955; and Section 41(a) of The Civil Service Law (Discipline), 5723-1963 .

51. The said important principle also governs the military law that applies to the occupied territories and the activity of the military courts, and there, too, it received statutory enshrinement in the form of Article 11 of **Order Number 378 (Order regarding Security Provisions)** according to which:

*"A military court shall conduct the trials it holds in open doors."*

52. Indeed, the military court has the power to decide that a hearing will take place in closed chambers -- "if it believes it is appropriate to do so for reasons of the security of IDF forces, public security, defense of the morality or well-being of a minor or if it believes a public hearing might deter a witness from testifying freely or from testifying at all," as it says in Article 11 (a) of that order. In addition, that order also forbids publicity regarding hearings held in chambers, and empowers the court to forbid a publication that threatens the security of the Area (Articles 11(c), 11(f), 11(g)).

53. As was already made clear in the previous letters addressed both to the representatives of the Respondents and to advocate Osnat Mandel, **the Petitioner's request does not concern protocols of closed hearings but protocols of hearings held in open doors, and therefore, it does not concern confidential materials.**

54. The centrality of the principle of public debate in a variety of legal dispositions, including its mention in Basic Law: Adjudication (Article 3), imbues that principle with a special status. Rulings have added that the principle of public debate has the status of a super-principle in Israeli law:

*"In the prevailing constitutional doctrine in the Israeli legal system the principle of public debate has a super status. Public debate is part of the obligation of disclosure, which is at the basis of the democratic system. Disclosure means guaranteeing a free flow of information on subjects of public interest that affect the life of the individual and the public. The free flow of information, views and opinions is a vital condition for a proper democratic regime. It is the only way to guarantee, on the one hand, the individual's ability to influence government actions through data and information needed to do so, as well as the only way to provide the public with*

*means of criticism, with which it can judge the propriety of the government bodies' actions."*

(HCJ 258/07 -- **MK Zahava Galon v. Government Commission of Inquiry into Events of Campaign in Lebanon 2006**, Section 1 of ruling by Justice Procaccia; (the ruling was given on February 6, 2007 and is as yet unpublished) (hereinafter: **the Galon petition**).

On this matter the words of Deputy Chief Justice (retired) Mishael Heshin in PCA 5877/99 – **Anonymous v. State of Israel**, PD 49(2), 97, (2004) (hereinafter: **PCA Anonymous**), in Section 3 of his ruling, are also pertinent:

*"The super-principle, the principle that spreads its wings over the entire issue of publicity, is the principle of public judicial debate. In days past the elders held court at the city gate, and just like the gates of yore are the courts of today, whose doors are wide open to anyone who wants to enter them. A trial, any trial -- excluding exceptions -- is conducted publicly, and the publication of what was done and heard in the courtroom is merely derived from that publicity. Subject to considerations of capacity, every person is entitled to be present during a hearing in the courtroom, and publishing what took place in the courtroom is like expanding the courtroom further to those who were not physically present at the hearing. The publicity of legal proceedings -- which in itself means publication -- upholds a lofty need in an open system of government and law. Publicity means, in theory and in practice, the transparency of the court proceedings, and transparency guarantees ongoing oversight of the conduct in the court. Transparency and control -- those are the code words." (Emphases added, M.S., S.Z.)*

55. There are many rationales that are fulfilled by realizing the principle of public debate: the first rationale is grounded in the presumption that making legal hearings and the documents created therein public will lead to a better legal result and contribute to improving the quality of the resulting legal decision.

56. It is easy to see, then, that public debate is considered one of the fundamental principles of doing justice. The publicity and exposure of the materials facing the body making the legal decision help the public supervise the contents of the decision, its quality and reasoning, and convey the message that the authorities as a whole, including the military courts, are themselves subject to the rule of law. Ruling on this subject has already determined that:

*"The public's supervising eye is a means which can, in itself, negate the possibility of judging out of bias and prejudice."*

(CA 11793/05 **Israeli News Company Ltd. v. State of Israel**, Supreme Court PD 2002(2), 62 (2006); Section 13 of ruling by Justice Arbel, and see references cited there).

57. The second rationale states that publishing hearings in a legal procedure contributes to strengthening public trust in the public authorities in general, and in the

body trying the matter in particular. Thus Chief Justice Beinish also ruled in the aforementioned Galon affair:

*"Through public debate, justice is not only done but is also seen, and so the impression is prevented that justice is done in the dark and for hidden reasons" (ibid., Section 6 of Justice Beinish's verdict).*

58. The principle of publicity in fact constitutes a sine qua non for trust given by the public to the judicial branch. And so the Honorable Court ruled also in the aforementioned matter of the News Company:

*"Through publicity we avoid the feeling that justice is done in secret and while exercising alien considerations [...], and justice is seen and not only done" (ibid., Section 14 of Justice Arbel's verdict).*

59. But the publicity of debate serves a broader value, which is not unique only to the legal system and to doing justice, and that is freedom of expression.

60. It is hard to argue with the argument that without access to information there cannot be deep and effective expression. Therefore the right to freedom of expression is inseparably connected to the right to freedom of information. In our case, without access to the information related to the court hearings, the Petitioner (and the media and other interested bodies) will have a limited ability to make an educated and founded statement about the subject of its research -- adherence to the rights of due process in the military courts. Thereby the petitioner's right to freedom of expression will be violated.

61. The principle of publicity aims, then, to fulfill the goal of the public's right to know, which derives from the freedom of the press and the freedom of expression, the cornerstones of any democratic society. Justice Arbel has already acknowledged this in her ruling about The News Company:

*"This rationale has two aspects: one is the public's right to receive information about the way the public authorities operate, including the judicial branch (PCA 3614/97 Avi Yitzhak v. The Israeli News Company, PD 53(1) 26, 45-46 [hereinafter: the Avi Yitzhak affair]). In this way public oversight of the authorities is made possible, an oversight which is one of the cornerstones of the democratic system. "There is no dispute that the publicity of the legal process, in its broader sense that includes both conducting the legal hearing in such a way that it is open to the general public and in the sense of publishing the identities of the litigating parties, is the hallmark of the legal system in a democratic society, a legal system that invites the whole public to be exposed to its activities, to learn them, to criticize them and to evaluate them" (VCR 2484/05 Peri v. State of Israel (unpublished, given on July 18, 2005)). This rationale is reflected in the Freedom of Information Act 5758-1998, which gives every citizen and resident the right to receive information from the public authorities, in accordance with the provisions of the law. Indeed, the law does not apply to the contents of legal proceedings in court, but that derives from the fact that public debate in the courts is regulated by other laws (the Avi Yitzhak affair, p. 46).*

*The second aspect is the contribution of publicly broadcasting things in order to form the public agenda, and help the individual members of society form their views and opinions. The words of Chief Justice Shamgar are pertinent to this matter:*

*"The democratic process depends on the possibility of holding open discussion of the problems on the state's agenda and freely exchanging views about them... and the said exploration and discussion in the media play a prominent role. They allow significant publicity of information about all areas of life, which makes it public property, and they are a central tool in explaining theories and views and in the open public debate about them... The media are a tool that helps shape the citizen's mind and allows him free consideration and choice, while knowing about what is evolving and with the ability to assess the nature and quality of every event, every proposal and every criticism" (VR 298/86 Citrin v. Israeli Bar's Disciplinary Court, PD 41(2) 337, 356, 358). On this aspect the public interest in publication is of great importance. Justice Goldberg acknowledged that in the Avi Yitzhak affair:*

*"... This right is further validated in issues of public importance. The assumption is that on such matters the public's right to receive information that can help individuals calculate their steps and form their views and opinions grows appreciably" (the Avi Yitzhak affair, p. 47).*

(CA 11793/05 The Israeli News Company Ltd. v. State of Israel, Section 13 of Justice Arbel's ruling).

62. The freedom to publicize derives directly from the principle of publicity. The Petitioner wishes to conduct a comprehensive monitoring of hearings in the military courts, and it is interested in its research being complete, whole, and in as much accordance as possible with reality. It learned that only if it is given access to the public and non-confidential protocols of the hearings held at those courts can it fulfill that task. Deputy Chief Justice Heshin has addressed the need for transparency of the hearings held in the courts in the aforementioned PCA Anonymous:

*"An act of adjudication done publicly guarantees maximum transparency, and transparency guarantees legal control and quality control. Only thus can the public know that legal proceedings are being conducted properly and appropriately, and thus justice can not only be done but also seen in the light of the sun. For those very same reasons the freedom of expression, the public's right to know and the freedom of the press are of paramount importance in this context, i.e.: the ability to bring to the knowledge of the public events that occurred in court. The press serves, for this matter, as "the long arm of the public" (VR 298/86 Citrin v. Bar's Disciplinary Court, PD 41(2) 337, 358, from Justice Shamgar), and it is a sort of amplifier and magnifying glass for proceedings that occurred in court. Let us add that the main purpose of the principle of public debate is the public good and maintaining the values of democracy, but it may also serve the interests of the litigators or any of them (such as in our case)."*

(Ibid., Section 3 of Deputy Chief Justice Heshin's ruling).

63. Therefore, the principle of public debate has two sides: on the one hand, holding the legal hearing in open doors, giving access to anyone who wishes to be present, or: **to know what happened there**; and on the other hand providing the right and the possibility to publish, examine and criticize the contents of the legal process and its decision. The right to publish the procedures and monitor their contents and the way they are conducted are all direct outcomes of the principle of public debate. As Deputy Chief Justice Heshin has already noted in the aforementioned Anonymous ruling:

**"One may go even further and say that today, unlike in days past, the principle of public debate is less in the right to be present in the courtroom and more in the right to publish the proceedings.** *On this matter it can be said that the general public sends members of the media as its representatives to the courtroom, and they bring the contents of the proceedings to their clients through publicity. In any case, publishing the legal proceedings held an open doors can be deduced from the principle of public debate."*

(Ibid., Section 17 of ruling by Deputy Chief Justice (retired) Mishael Heshin. Emphases added, M.S., S.Z.).

64. As we noted, we view not only journalists as representatives of the public in the court room, but also researchers, academics, representatives of civil society and human right organizations, such as the Petitioner.

65. The principle of publicity and the right of freedom of expression are basic principles, constitutional rights, on which the Israeli law system is based. These rights are not only writes in the "negative" sense but are also, and mainly, writes in the "positive" sense -- the authority must allow access to those protocols and the documents it possesses. As the Honorable Court stated in the aforementioned H CJ Galon case:

*"We shall add that today, the main importance of the principle of public debate resides in the second aspect, which is the possibility to publish the fact of the hearings and their contents, and thereby to bring them to the knowledge of the general public."*

(H CJ Galon, Section 6 of Chief Justice Beinisch's ruling).

Chief Justice (retired) Shamgar ruled likewise in H CJ 1/81 **Shiran v. Israel Broadcast Authority**, PD 84 35(3) 365, on p. 378:

*"The democratic system of government draws and is even dependent upon there being a free flow of information from and to the public, regarding the main subjects that affect the lives of the public and the individual."*

Justice Procaccia added in this matter in the aforementioned Galon H CJ petition:

*"Exposure and disclosure of information of interest to the public are the conditions for the existence of public examination and oversight, while concealing and covering such information blurs and dims excesses of the public norm, and prevent the possibility of revealing them and learning lessons from that which needs to be corrected. **The principle of public debate draws its vitality from the public's right to know the actions of the government and its agencies; opening legal and judiciary proceedings to the public eye is also a guarantee of the fairness of the examination process and the quality, the level and the seriousness of the decision given at its end.**"*

(**Ibid.**, Section 1 of Justice Procaccia's ruling. Emphases added, M.S., S.Z.)

And this was well defined by the court in its ruling on HCJ 399/85, MK Rabbi Meir Kahane v. the Israel Broadcast Authority Executive Committee, PD 41(3), 255 (1987), pp. 268-269:

*"Freedom of expression is "the freedom (of the citizen) to say what is on his mind and hear what others have to say" (Chief Justice Landau in AH 9/77 Israel Electric Company Ltd. v. Ha'aretz Newspaper, PD 32 (337 and 3). In essence, freedom of expression is liberty in its Hohfeldian sense (see G. Williams, "The Concept of Legal Liberty, COLVM. L. REV 56 COLUM. L. REV. 1129 (1956)). In order to realize that liberty, the law gives its owners additional rights that derive from liberty (see CA 95/51 Podemsky v. Attorney General, PD 6 355, 341; HCJ 112/77 Fogel v. Israel Broadcast Authority, PD 31(662, 657, 3). **Of those we can mention the right to receive information and the right to react to information. Therefore, "freedom of expression" in its broad sense is a bundle of rights, at the center of which is the liberty of the speaker and the listener, and along with that liberty are other rights whose purpose is to realize and protect the said liberty.**" (Emphases added, M.S., S.Z.)*

### **c. The principle of freedom of information and providing access to the protocols**

66. The Petitioner is going to argue that its right to review and even to copy the documents which are the subject of this Petition is also derive from the public's right to access the official documents which are in the possession of the authorities. At issue is a right that derives from the principles of transparency that prevail in the Israeli legal system.

67. Public debate, in its broad sense, extends to the way the public is given access to the documents, the hearings and the rulings that are issued by the courts, all in order to achieve the goals mentioned above. As part of achieving those goals, and especially the goal of the transparency of administrative action, The Freedom of Information Act 5758-1998 was passed, giving the citizens and residents of Israel the right to receive information from the authorities, according to the provisions of the law.

68. The Israeli legal system, including the military court system, was excluded from the instance of the law, precisely because what is said, what is typed, what is documented and what is written in court is subject to sweeping publicity, as stated in

the series of laws cited above, in the previous section of this petition, unless the law orders otherwise. The court acknowledged this in its aforementioned ruling in the matter of the News Company, stating that:

*“Although the law [the reference is to the Freedom of Information Act, M.S., S.Z.] does not apply to the contents of legal proceedings in court, that derives from the fact that the publicity of hearings in court is regulated by other laws.”*

(Ibid., Section 13 of Justice Arbel’s ruling).

69. The military courts, established under international humanitarian law, constitute part of the government powers in the occupied territory. As a public authority, the Respondents must maintain utmost transparency. The protocols the Respondents possess, which are composed as part of the public hearings in the military courts, constitute an official document, and therefore the authority is required to reveal them, as long as there is no legal impediment to doing so.

70. The right to receive information from authorities is considered one of the cornerstones of modern society. It reflects the legal view that the authority, as a public trustee, is required to see to the public and not to itself in fulfilling its roles. The transparency of the authorities constitutes another means through which the goals of the principles of open debate and legal justice can be achieved, all as described above. The honorable court acknowledged this in its ruling ADA (administrative) 9135/03 The Higher Education Council v. Ha’aretz Newspaper, Supreme Court PD 2006 (1), 697, (2006), stating:

*“Indeed, the transparency of the activities of the government authorities allows the citizens to monitor those activities and the considerations that were at their basis and to criticize them as far as that is necessary, and it makes a vital contribution to “public hygiene” and to the improvement of the quality of the authorities’ activity, knowing that its activities and its decision-making processes are exposed and transparent to the public eye.*

[...]

*The individual’s access to information, as opposed to confidentiality of information and keeping it secret, brings the individual closer to the authority and increases his trust in government decisions.”*

(Ibid., Section 8 of Justice Hayut’s ruling)

71. Public officers and administrative authorities owe the public trust. They do not have the right to keep official information in their own possession, except for in the cases when the law allows it. The duty of trust imposes on the authorities the duty of disclosure, and as Justice Brandeis’s famous adage said, “sunlight is the best disinfectant.”

72. The freedom of information and access to the information in the possession of the authorities, allow citizens in different organizations and the social society, as well as

the media and other public representatives, to monitor the information in the possession of the authority, the considerations that were at the basis of the authorities' actions, including decisions in military courts; the contribution in relation to the authority resides in the very knowledge that its actions and decisions are revealed and transparent to the public eye. The inseparable connection between the public's right to information and public trust was already acknowledged by retired Deputy Chief Justice Heshin in H CJ 3751/03, Ilan v. The City of Tel Aviv-Yaffo, PD 59(3) 817 (2004), pp. 837-838:

*“The source of the principle of transparency is the fundamental concept of the public administration as a public trustee: anyone who possesses it does so as a trustee of the public, while he has nothing of his own. Indeed, in the magnificent language of Justice Chaim Cohen, the authority “came into its very being only to serve the public, and has nothing that is its own: everything it has is entrusted to it as a trustee, and for itself it has no rights or duties in addition to those, or separate and different from those, which derive from that trusteeship or were given to it or imposed upon it on the basis of legislative provisions:” H CJ 142/70 Shapira v. the Bar’s Central Committee, PD 25 (1) 325, 331. Whoever possesses powers by law must therefore act out of faith and trust and must keep in mind at all times, day and night, the public good and only the public good. And once we know that the public official is a trustee as a public representative, he must fulfill the duties of a representative including the duty to give an account of his actions, namely, to disclose to his clients – to the entire public – what he did and what he did not do, why he did this and not that, and when he did not do – why he did not do. He must disclose all of his actions and inactions and the reasoning behind them. Thus, and only thus, can the public know whether the public servant acted in faith; thus, and only thus will the public believe in the administration and its workers. The administration is therefore committed to transparency of its actions and decisions. Transparency will guarantee supervision and control, and only in that way will it be possible to examine and check whether the administration acted as it ought to have acted.”*

And see also H CJ 1601/90 **Shalit v. Peres**, PD 44 (3) 353:

*“Indeed, the duty of disclosure, which derives from the freedom of expression, is not connected only to the essence of the Democratic regime, but also – like the very freedom of expression itself – from the right of the individual and society for the truth to be revealed, and for it to be given the possibility of self realization. The right to know is not only a public right. It is also an individual right.” (Ibid., p.366).*

#### **d. Interim summary**

73. And so, we have presented our position heretofore that the rule regarding public debate has super-legal constitutional significance in the Israeli legal system; that the rules regarding public debate are aimed at realizing the interests of the individual person standing at the gate of the courthouse as a defendant, the interests of the public which wishes to control and examine the authorities' decision-making process, and

the objectives of the authority itself, which, thanks to knowing it is being controlled, will make better decisions of a higher quality.

74. Alongside the provisions of Israeli law, there are similar provisions in international human rights law that fill with contents the principle of due process fixed in the humanitarian law that applies to an occupied territory. Those provisions recognize the centrality of the principle of public debate that extends in a broad and essential manner, in order to realize the objectives we enumerated above.

75. Alongside the principle of public debate stands the principle of freedom of expression. This principle, attended by a right, cannot be realized without a free flow of information and without public access to that information, which is in the possession of the authorities as public trustees. The right to freedom of expression is not only negative in its essence but is a positive right, which imposes on the authority the duty to allow that access to the information that is in its possession.

76. In order to realize those objectives and the realization of the constitutional rights, the legislator saw fit to order the freedom of information, through appropriate legislation, which was complemented and sometimes followed the extensive ruling of the Honorable Court on the subject.

#### **D. From the public to the individual**

77. As mentioned, the Petitioner asked to be allowed to receive the protocols of the public hearings attended by volunteers on its behalf, who are engaged in documenting the proceedings at the military courts. The Petitioner also asked to be provided with a list of the hearings held each day its volunteers are present at the courts, all in order to complete its documentation and oversight project as detailed above.

78. However, except for the laconic refusal letter sent by a representative of the First Respondent, the undersigned was not given reason or informed why it would not be possible to view those protocols.

79. It should be stressed that a large part of the project being conducted by the Petitioner is examining the legal proceedings held in the courts, including examining the right to fair judicial process. Receiving the protocols and examining the correspondence of what is said in the protocols with what is said in the actual hearing as documented by the organization's volunteers constitutes a preeminently important document for the success of the project.

80. The military courts are not included in the categories stated by the Freedom of Information Act, the reason being that the principle of specific publicity applies to them, as explained above. The principle of publicity is meant to ensure the various objectives presented above. The Respondents' refusal to grant the Petitioner the right to receive the protocols constitutes a gross violation of the principle of publicity, the principle of transparency and the principle of freedom of information.

81. It is the Petitioner's understanding that the material realization of public debate is contingent not only on the procedural question of the ability to be present in the courtroom but also the public's ability (or representatives on its behalf – whether they

are journalists, academics or human rights organizations) to monitor the course of the hearings effectively.

82. The matter resembles the right of a defendant or suspect to be a full partner in the legal proceeding taking place against him. Can we say that right has been fulfilled if he does not speak the language and the court has not provided him with an interpreter? By no means can we say that a defendant who does not speak the language of the hearings is realizing his right to be a partner in the proceedings by his very presence. His presence has no meaning if it is not attended by the ability to understand the course of the hearing, and that can be achieved only through an interpreter.

83. The same is true for public debate. The values and interests that principal wishes to promote are only partly fulfilled by physical presence in the courtroom. Sometimes access to the protocol of the hearing or other documents is needed in order for public debate to be truly achieved.

84. The principle of public debate is not only giving the public the possibility to be present at the hearing but also giving the public the ability to understand the meaning of the proceeding and its results. Hiding part of the process, therefore, nullifies the rationale of holding the hearing in open doors.

85. The Petitioner's activity, conducting a study of proceedings in the military courts, turns the organization and its members – as civil society activists – into a kind of “public servants.” The results of the study will, probably, be disseminated to the public and thus public debate will achieve its broader goal – bringing the courtroom proceedings to the public and creating the conditions for informed criticism. It is hard to avoid the impression made upon the Petitioner that the Respondents' refusal to give the Petitioner what it wants stems from their strong desire to hide something, the very things which the Petitioner wishes to reveal.

86. Concealing the material requested by the Petitioner constitutes a gross violation of all the constitutional and legal principles upon which this petition is based. It is beyond the understanding of the Petitioner how every day dozens of documents, protocols, and other information possessed by the authorities is disclosed – whether by court order or at the authorities' free good will – but the protocols and legal proceedings that occur in the courts are not available to any party that is external to the process. Are the protocols of tender committees more important to the public than decisions that bear on human life? Do not protocols regarding legal rulings and denying the freedom of protected civilians in an area subject to the military occupation, fall under the banner of “the public's right to know?”

87. It needs to be added to that while the “civilian” legal system has been blessed with the best technological wonders, which allow the Petitioner to receive anything it wants through Internet sites and so on, the military courts have not been endowed with all that, and therefore the request from the Respondents is the only way for the Petitioner to obtain what it wants.

88. In addition and without detracting from any of the above, the Petitioner will argue that by the Respondents' refusal to avail it of the requested information, the

organization and its volunteers' freedom of expression is directly undermined. The goal of the organization's volunteers was to collect their findings regarding proceedings in the military courts, and at the end of the project to disseminate their findings to various parties. The scope and depth of the project require access to information, almost all of which is stored by the Respondents. The Respondents' failure to provide the Petitioner with the requested information constitutes a fatal violation of the Petitioner's freedom of expression, and contradicts the rules established in rulings regarding the duty to provide information to the public, as part of the realization of freedom of expression.

## **E. Conclusion**

89. Therefore, the Honorable Court is moved to issue an order nisi as requested at the outset of this Petition and after receiving the Respondents' Answer, to render the same absolute.

90. The Honorable Court is further moved to charge the Respondents with the Petitioner's expenses and legal fees, plus V.A.T. as required by law.

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Michael Sfar, Adv.

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Shlomi Zachary, Adv.

Representatives of the petitioner

*Translation from the Hebrew original: Yesh Din- Volunteers for Human Rights*