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**To:**  
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**Re: Response to "Yesh Din's" draft report: "Trials in the Backyard"**

Our reply to "Yesh Din's" draft report: "Trials in the Backyard – Realization of the Rights to Just Process in Military Courts in the Occupied Territories", which was submitted to us for response, is divided into two parts: the response of the military courts system and the response of the IDF Attorney General's office response.

**The Response of the Military Courts System**

**Preface**

1. The military courts system in Judea and Samaria welcome's "Yesh Din's" initiative to direct its attention, albeit critical, to proceedings in the military courts.
2. Ever since its establishment, the military courts system has opted for **maximum transparency**, as befitting a judiciary system. Hearings in the system are conducted openly, cases in deliberation are provided for review, and reports on its operations are issued regularly. This was also the case regarding "Yesh Din's" approach which received our full cooperation, as can be established by the abundance of data and facts presented in this report, which were to all intents and purposes disclosed by the system through the IDF Spokesperson unit.
3. As the introduction to the report states, the military courts system in Judea and Samaria has a great influence on the lives, the public order and the security in the region.
4. The judges of the military courts are required to determine destinies and to make difficult decisions on a daily basis. This is the essence of the judiciary authority the world over, and in this regard the military courts are no different than their parallels elsewhere. However, judgment in Judea and Samaria is characterized by increased activity involved in **creating appropriate balances between security considerations and human rights**, this, of course,

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besides the traditional balances which are required of any judge in deciding between varying interests, between individuals and groups, between rehabilitation and retribution, and so forth.

5. However, it should be remembered that judgment does not take place in a vacuum. The military courts, which were established under the IDF's combat approach in the area, are subject to a number of normative levels, at the head of which is the legislation determined by the military commander, but also encompassing the rules of Israeli administrative law, as well as the principles of wartime, international and humanitarian law. Under this framework, the legislator in the area, has created a robust normative infrastructure for the military courts' activity, which as a rule meets the international norms detailed in the report, and even exceeds them. In addition, in cases where the legislator has not stated his opinion, the courts have filled in the blanks while setting forth arrangements intended to create a fitting integration of the public interest in punishing criminals, and safeguarding the rights of the accused under the criminal process.
6. To illustrate, without going in depth at this stage, we will note that the substantial law and the legal proceedings common in the military courts, are similar and almost identical to those in civilian courts in Israel. Israeli evidence laws have been adopted word for word. As regards to detention laws, regardless of the various arrangements set forth by the legislator, the court has adopted the principles of the basic laws and the detention laws, which action has changed has brought about changes in legislation that greatly improve the condition of suspects and accused persons (thus, for example, the grounds for arrest were adopted, the obligation to list the suspicions and to submit evidence was enacted, the arrest period was limited until the end of proceedings, and so forth). **All these were not mentioned in the report**, which instead chose to focus on failures, most of which are fictitious. Therefore, further on, we will review in short the legal and ruling arrangements common in the military courts in the region, which ensure just process, according to the order set forth in the report, while amending errors that feature in the report.
7. Furthermore, in complete opposite to the picture that the persons writing the report wish to paint, **a systematic, complete and objective review of the activities of the military courts, will lead one to the conclusion that given the constraints existing in the region, the military courts system provides full opportunity for just trial.**
8. In this matter, we will immediately state that **the data and the research methods on which the report bases its conclusions suffer from a number of fundamental flaws**, which negate the majority of the findings detailed in the report. Second, it is not possible to ignore **obvious errors** in understanding the legal basis for the courts' activities, and even the **obvious lack of understanding** as regards legal proceedings under criminal law and in administrative arrests. We will therefore present a number of prominent examples of these faults, which debunk the "scientific" air which the report tries to assume.
9. Since the year 2000, **the military courts system has led great many changes**, some institutional and some legal, which have greatly promoted the rights of the accused and those persons brought before the courts for judgment. The contribution of the courts to improving human rights in Judea and Samaria is so significant, that it is possible to determine that the judiciary branch is the only one effectively balancing the extensive legislative and executive authorities granted to the regional military commander. Thus, the military courts have determined that it is in their authority to criticize the legality of orders issued by the military

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commander according to the principles of international law and the basic laws common in the State of Israel. We will also review these changes, albeit in short, in an additional chapter in our response.

10. Furthermore, the report suffers from a **lack of comparative assessment**. A matter-of-fact review of a legal system dealing almost entirely with cases involving acts of terrorism and violence cannot be carried out without referring to activities taking place in similar systems, whether in the Israeli legal system, or in systems enacted in other developed countries. We will attempt to fill this gap in short in the final chapter to this response.
11. Thus, although some of the claims in the report do indeed reflect challenges facing the military courts system, the faults made in writing the report leave one with a **strong feeling-that its authors first drew their desired conclusions, and only then adapted the data and their presentation to this end**.
12. We hope that despite the short time given to us to draw our response, the reader will find in our words a serious and in-depth consideration of the claims made in the report.

#### **Chapter A: Faults in the Data and in the Research Methodology:**

13. As mentioned, the report suffers from substantial flaws in the data on which it relies, as well as in the research methodology chosen. We will now review the main flaws.

#### **Observations**

14. As stated by the authors of the report "*The project's data base includes observation forms pertaining to over 800 separate hearings*". In light of the fact that in the year 2006 alone and in the first instance, approximately 26,000 legal hearings were conducted on indictments, and more than 16,000 hearings in arrest instances, one cannot but reach the conclusion that it is not possible to rely on the said observations, in drawing any significant conclusions.
15. The tiny data base, which was selected randomly, and which cannot statistically serve as a representative sample, was used to draw conclusions in a long list of matters, and this seriously undermines the integrity of those conclusions.
16. Furthermore, a more scrupulous review of observation citations in the report will show that a large part of the report's conclusions are based on a much smaller number of observations, and therefore on a tiny amount of information. When the report's authors wish to investigate the average period of time that passes from detention hearings and to reading of the indictment, they rely on 31 forms, out of thousands of hearings that took place in 2006 regarding detention. This is also true as regards the rest of the data on the average period of time between hearings. The size of the sample (156 cases) is less than one percent of all arrest hearings (16,451 hearings), is not representative and does not state dates, and so it is difficult to know its distribution amongst the judges. Moreover, it is necessary to distinguish between cases in which there is agreement for detention, in which hearings only take a few minutes, as is common in any court, and cases in which there is objection to the arrest, in which the hearing is much longer.

17. Had the review been conducted on a comprehensive and true data base, the following picture would have emerged: 21 minutes is the average time for an arrest hearing including arrests and releases in agreement, while the average arrest hearing in which the parties litigate including writing the court's decision is 46 minutes.
18. The authors of the report make some severe claims regarding settlements, and event state data regarding the court's acceptance of such settlements. They base their conclusions on 99 cases, when in 2006 alone, more than 5,500 cases ended in settlements. A review of the quality and the scope of translations in the court were conducted through 648 observation forms, as mentioned, at that time, over 37,000 hearings were conducted. Additional examples for this can be found as regards the conclusions on issues pertaining to the treatment of minors.

**Lacking any proper data base, the report's conclusions are all fundamentally flawed.**

### **Lack of Legal Knowledge**

19. The report paints a clear picture in which the observers in the courts lack any basic legal knowledge. This prevents them from fully understanding the process and reliably reporting the court's activities. Prominent examples for this shall be presented under Chapter B below, where examination of the protocols referred to in the report has found serious errors in understanding the process, to the point of determining that witnesses were interviewed without the accused being present, in direct contradiction to events.

**"Selective" Israeli law and the "harsh" law as regards the responsibility of accomplices to murder**

In p. 16 to the report, its authors state that:

*In the region, it is possible to try any person as the perpetrator of a crime, even if he only assisted in it, whereas in Israel, there is a clear differentiation between the perpetrator and the accomplice.*

A simple legal review cannot but reach the conclusion that this is a misunderstanding of the law in the region and in Israel. The Supreme Court in Israel has for many years been deliberating the differentiation between an accomplice and a joint perpetrator. A series of tests have been determined which were repealed or limited in various rulings, and to this day, there are still various schools of thought in the matter. In the region, despite the legal arrangement in this matter, the military court of appeals has established a penal differentiation between an accomplice and a partner to a crime. The court has also adopted in full the tests for determining criminal responsibility as accomplice or as joint perpetrator (Judea and Samaria Region Appeals 2599/04 **Military Court Prosecution v. Dudin** [Pador 734(33)05]).

### **Partial Gathering of Data**

20. As mentioned, the military courts system has made every effort to provide all the data requested by "Yesh Din", under the limitations of the courts' current computer system. The military courts' activity reports for the years 2004, 2005 and 2006 were provided in full. The organization requested additional data on several occasions, and also requested clarifications for the data submitted. All there were provided to the best of our abilities.

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21. It is therefore unfortunate to see that in a number of issues, the organization did not request data for issues raised in the report. Furthermore, the organization, for reasons known only to itself, chose not to divulge in full the data given to it, or to present such data in the manner convenient for its desired conclusion (one example, of many, pertains to the presentation of the number of appeals filed, and not presenting the number of appeals sustained, which would have shown that a significant percentage of defense appeals are sustained). It is evident that this biased presentation of data was repeatedly done with the intent of presenting the system in a negative manner, or, unfortunately, through negligent analysis of the data. Thus, the report's authors continually state the fact that bills of indictment for intentional manslaughter constitute only one percent of the court's activities. Had the authors taken the time to review the corresponding statistics in the Israeli system, they would have come to the conclusion that one percent is a very significant part of the activity. It was also possible to expect that the authors not ignore the fact that about 33 percent of the bills of indictment heard in court deal with hostile terrorist activity, meaning that one third of the military courts' activity deals with crimes of terrorism, most of them very severe. If we add to this the percentage of violation of settlement cases and leaving the region without permit, it clearly becomes evident that the bulk of the court's activity does indeed involve security matters (61.5% of cases). But in addition, and this is the heart of the matter, a statistical analysis that combines homicide cases with transportation cases as equal elements is not significant nor is it valid. Any legal practitioner with an understanding of the legal investment necessary to conduct a murder trial and that necessary for transportation violations or illegal residents will immediately understand that this is blatant deception. A "case" is an administrative reference unit with no statistical significance, and should be compared to a suitable reference group. Had cases been examined according to the judiciary time invested in them, it would have been found that despite the fact that manslaughter and attempted manslaughter comprise only 5 percent of the total number of indictments; more than 40% of the system's judiciary time is invested in them. **One cannot but come to the conclusion that also in the matter of data, the manner of its presentation is the central issue.**

#### **Administrative Arrests – An Invalid Statistical Method *Ad Absurdum***

The authors of the report state: "*From the data, it would seem that recent years have seen a trend of imprisoning Palestinians (thus in the original!) under administrative arrest as an alternative to filing bills of indictment and conducting trial*"

The statistical methods used to assess the administrative arrest process in the report are flawed and suffer from a lack of legal and mathematic understanding. The report's authors wish to base their conclusions by counting cases. This is a misunderstanding of the administrative arrest process. The law limits an administrative arrest for a maximal period of 6 months, which can be extended by separate order. And indeed, there are many initial orders and orders for extension which are shortened or repealed by means of judiciary review (for example **63% of the orders in 2004 were shortened or repealed**). But to the author of the report, a common example of an administrative order that was repealed or shortened and which brought about an extension order that was also shortened, and in which the person was incarcerated for a total of 10 months, is counted as "two cases", where a case involving attempted murder involving the conviction and an 10-year prison sentence for two people, is also counted as "two cases". Under the relevant variable of judiciary imprisonment time relative to administrative imprisonment time, this is a 24-fold difference.

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Another absurd result of this system is that the tighter the judiciary control and the more it shortens the imprisonment period for additional control for the effect that the passage of time has on the threat posed by the detainee, so the number of cases is larger and the administrative imprisonment would seem to take a "larger" share of incarcerations in the region.

Another absurdity shows that if administrative arrest orders were subject to judiciary review once every two years and not once every six months, the number of cases filed would decrease by a factor of 4 relative to the same imprisonment time ! In other words, a person would be under administrative arrest for two years without possibility of judiciary control, but the conclusion as regards the policy for administrative imprisonment trends would change (by a factor of 4) to the good of the authority !

**These absurdities show the weakness and invalidity of the statistical examination and deduction method.**

22. Furthermore, for the first time in the history of the military courts, "Yesh Din" was granted a general review permit, which allows it to review court cases similar to the practice common in courts of law in Israel. Despite the review permit being given and supplementing missing data through observations, which allowed the organization to examine protocols and rulings in depth, the organization has chosen to issue its report without having made any significant use of the permit granted to it (the organization's representatives came twice to copy a small number of cases).
23. To this we will add that had the authors of the report asked for the court unit's comments to many issues similar to requests made in other matters, a series of unfortunate errors (which do not add to the credibility of the report) could have been avoided. A simple example to this matter can be found in the chapter dealing with the advertising of the military court of appeals' rulings in full, starting from 2005, on three key legal websites on the internet. These websites also publish a selection of rulings from the first instance courts. Throughout the years, select military court rulings are published from the first instance and from the appeals instance. As of 2000, these files are published regularly, once a year. The formulation of these files is carried out by functionaries in the military court system alone. The files are sent to all the legal libraries in academic institutions, to courts, and also to the Bar's libraries.
24. If this does not suffice, all military court of appeals rulings are distributed, by known procedure, according to the order worked out together with representatives from the Military Courts Attorneys' Committee, to four different attorneys from all districts, who have volunteered to distribute the rulings to their friends. Furthermore, as stated in the report, the unit is working on establishing an independent website, in which it will publish all court rulings.

#### **Preference for Feelings Over Data**

25. In many parts of the report, reference is made to conversations and interviews conducted with defense attorneys. There is no doubt that their words carry substantial weight, especially if they appear regularly in court (which could not be ascertained due to the confidentiality of their names). However, their statements and estimations and the feelings of these defense attorneys should have been checked against the rest of the data gathered or that should have been gathered. However, throughout the entire report, its authors systematically preferred the

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feelings of the defense attorneys even when there were not checked by other means, or were even contradicted by objective data.

26. But not only in the matter of defense attorneys' statements did the report's authors prefer feelings over data. Casual conversations that they held with a number of persons, some of them unauthorized from amongst the unit's soldiers and officers, led, without any other inquiry being made, to decisive conclusions in complete opposite to what had formally been stated by the system in response to the organization's questions. Thus in the introduction to the report, it is stated that the military courts unit headquarters does not conduct a review of the courts themselves, this according to "statements made by officers". However, the authors of the report have completely disregarded the system's response to their question, in which we made clear, according to proven data, that the military courts headquarters conducts yearly reviews of all the courts as regards administration, logistics, manpower and training, and so forth. All under the limitations posed by the need to ensure full judicial independence. Therefore, there is a substantial flaw in the fact that, without any inquiry and without any factual basis, the report's authors have preferred in this matter as well to choose "gossip" from unidentified persons over facts. In this matter, we will also state that despite the fact that the organization has approached the IDF Spokesperson numerous times for data and clarifications on many matters, it has expressly avoided requesting permission to speak with various persons in the system, but rather preferred to "hunt" for them through random conversation, without some of the persons knowing to whom they were speaking and for what purposes. This type of behavior is tainted with basic indecency that should be condemned.

**The preference of feelings over data undermines the basis for the report's conclusions.**

## **Chapter B: Review of the Proceedings Ensuring Just Trial and Specific Comments**

### **The Courts System – General**

27. It should be clarified that the courts system is **an independent system**. The independent discretion of a judiciary system is one of its most important principles, and therefore as such, there is no room to conduct general IDF reviews in professional matters. Review of the system is carried out through the appeals instance. In administrative matters, reviews are carried out by the military courts headquarters. The report is therefore wrong on this point.
28. Page 13 of the report reads "**From the President of the Judea Military Court to the Judea and Samaria Regional Attorney's Office**": the headline is not true. The president of the Judea court remains in office. True, the president of the Samaria court has been appointed Judea and Samaria Regional Attorney, but this is similar to the move made by the honorable Judges Eliakim Rubinstein and Edna Arbel from the position of district judges to the position of Legal Counsel to the Government and Attorney General. It shall be emphasized that the system's judges maintain their independence and do not favor even those persons who until recently were judges themselves. There are quite a number of cases pointing to this, but a simple example of the matter can be found in "Machsom Watch" reports, an organization that "Yesh Din" relies on extensively – reports that clearly indicate that the attorney's presence does not change their opinions. Thus, for example, in a report dated 13/08/07, which details a "heated and educated" discussion between the judge and the Judea and Samaria Regional Attorney regarding the prosecution's behavior (case 3731/05) and of course there are many other cases, such as a discussion held on the matter of closed door hearings under case 3052/06 to which the report itself refers.

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29. Page 15 to the report: **Extension of sentence in Israeli courts:** it was claimed that it is illegal for extension of sentences to be conducted in the imprisonment facilities in Israel. The Supreme Court has approved that hearings for sentence extensions be carried out in facilities in Israel under Supreme Court Ruling 6504/95 in the case of Mohamad Wajiya. Therefore the claim simply is not true.
30. Page 17 to the report: **The percentage of manslaughter and attempted manslaughter cases:** this is a distorted presentation of data. The percentage of cases involving intentional manslaughter or attempted intentional manslaughter is very large compared to Israel, where only a fraction of a percent of the cases involve these offenses. Also, for some reason, the report's authors chose not to include severe terrorism offenses such as shooting, conspiring to carry out bombings and placing explosive devices among the severe terrorism offences. These constitute hundreds of additional cases. The percentage of severe terrorism cases in the military courts is ten-fold greater than the percentage in the Israeli legal system. We will further recall that as has been detailed above, over 40% of the courts' judiciary time is devoted to these cases.
31. Page 19 to the report: **The claim that the judge's independence is limited is simply ludicrous and outrageous.** According to the law, they are not subject to any authority except the authority of the law. True, the judges are appointed by the regional commander, but this appointment is similar to appointment by the President of the State of Israel, and as it is not possible to say that the dependence of judges in Israel is limited because the President has signed their appointment; this is also the case for judges in the military courts. In fact, it is only a confirmatory signature by the military commander, and he has no say in the matter. **The entity that appoints judges is an independent and external committee that operates solely for the appointment of judges.**
32. In this matter, we will note that an unfortunate error has been made in the report in claiming that the experience required of judges is lacking. The report's authors believe that "legal experience" alone is not sufficient to be appointed judge, and it is necessary to demand judiciary experience. Only that a candidate for a judiciary position cannot have judiciary experience before he has been appointed! Therefore, only legal experience is required, and as in the case of the corresponding civilian system, the qualification for appointing a magistrate judge is 5 years of legal experience, so it is in the region (Courts Law, 5744,–section 4). This is also the case regarding the judges of the military court of appeals, which are required, like the judges of the district courts, to have 7 years legal experience, including a judiciary role.
33. Page 20 to the report: **The method for appointing judges: the report intentionally distorts the actual situation.** The report refers to things said by the Assistant Military Attorney General in 2002, in the period prior to the establishment of the Judges Appointment Committee. Since 2004, the committee is an independent entity, and it examines each candidate thoroughly, both in active service and in reserve service. The position of the Bar's representative in the committee is significant, as is the position of any other member of the committee.
34. Page 24 to the report: **Administrative arrest versus criminal proceedings:** a comparison of the number of administrative arrest warrants and the number of indictments is not logically valid and is incorrect. It is possible for several warrants to be issued in the same year for one person, and the judges would instruct that his case be reviewed in close intervals, so that

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several warrants would be issued in his case and a number of hearings be held. Had a bill of indictment been filed against him, this would have been considered as one proceeding. Increasing the judiciary control over administrative warrants and shortening the incarceration period of the administrative arrest warrants brings about an increase in their number. A comparison of the criminal process to the administrative one is therefore irrelevant, nothing can be learnt from it, and it stems from a lack of understanding of the matter at hand.

### **Conditions in the Military Courts:**

35. Page 27 to the report: The claims are not true. From inquiring with the persons responsible in the Israeli Prison Service, there is no limitation for the number of times that a prisoner can go to the restrooms. The size of a prison cell in the Judea court is 9 sqm and not 2.5 sqm as claimed in the report.
36. Page 28 to the report: The military courts have waiting halls that would not shame any other court of law. These are tidy, **air conditioned** buildings that offer many seats. The Judea court has even opened a cafeteria for visitors to the courthouse. To say that this is a "fenced-in pen" is **a distorted presentation of matters**. In that case, the soldiers are also located in fenced-in pens. Of course, family members can leave the compound if they wish.
37. The judges usually try to maintain quiet, although they occasionally allow the accused and his family to converse, **as a fundamental humanitarian gesture**, so long as this does not interfere with the proceedings.
38. It shall be emphasized, that court hearings are intended for legal proceedings and not for family visits. It is therefore strange, that the report on the one hand criticized the fact that there is noise during the course of the hearings, and on the other hand criticizes the judges for not allowing the accused to speak with their families (thereby adding to the noise). Things, therefore, are presented in a distorted fashion. **The report refers to hearings held in certain cases, though from checking with the case records (Judea Case 3113/06, Judea Case 3940/06) it seems that no hearings were held in these cases on the dates claimed.**

### **Just Process Rights in the Military Courts**

#### **The Rate of Acquittals in Military Courts:**

39. **The rate of full acquittals from all the cases in the military courts is much higher than the rate of acquittals in courts in Israel**, where the rate of full acquittal from all cases (for 2005) is 0.1% (according to data from the Central Bureau of Statistics, Statistical Yearbook for Israel 2007, p. 482). It should be clarified that the data referring to the rate of acquittals in Israel does not include transportation cases. The accepted rate of full acquittals in the military courts is 0.901%, or **9 times as high!** (after adjustment to the survey in Israel - not including transportation cases and including full indictment repeal).
40. Furthermore, it should be remembered that the authors of the report chose to present the number of acquittals compared to all the cases heard in court, including transportation cases and cases involving leaving the region without permit, and without cases where the prosecution has fully repealed or dropped the indictment as is the case in Israel. It should be

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emphasized, that even as presented by the report's authors, the figure of 0.29% (which, as mentioned is an underestimate), still indicates a much higher rate of acquittal compared to Israel (**3-fold!**).

41. Furthermore, the percentage of full acquittals is not a statistically valid value that can serve for drawing relevant conclusions for evaluating the existence of just process. A case number is not a statistical reference unit. The correct reference unit is the bill of indictment. In other words, out of all the bills of indictment filed, in how many has the accused been convicted. This way, we obtain a value that reflects the influence of the legal process on indictments filed against the accused. Furthermore, presenting only the number of full acquittals is incorrect. Out of the cases in which the accused denies guilt there are many cases, in which a person who has been accused with many severe indictments, is acquitted of the vast majority, and is only convicted for a minor offence. The result of such a case is registered as a conviction even though in essence this is an acquittal. Several prominent examples for this shall be illustrated below:

**1377/02 Military Court Prosecution v. Mahmoud Asaad** – The accused was convicted of a series of offences pertaining to his activity as a senior functionary in the Tanzim in Bethlehem. The most severe charges pertained to his delivery of three persons suspected of cooperation with Israel to Tanzim militiamen, who murdered them. Despite the fact that his confession was found reliable, nothing else could be found to support it. Therefore, the accused was acquitted from the majority of offences attributed to him, including the three murder charges (except for two relatively minor offences of attempted solicitation to manufacture a bomb and attempted solicitation to trade in weapons).

**4261/03 Military Court Prosecution v. Debabsa** – The accused was accused of deliberate manslaughter and in aggravated assault as well as kidnapping. The court acquitted the accused of the deliberate manslaughter and the assault charges. The accused was convicted of kidnapping in an incident unrelated to the charge of deliberate manslaughter.

**3715/04 Military Court Prosecution v. Dula** – The accused was accused of a number of offences, including deliberate manslaughter of the boy Ofir Rahum. The court partially acquitted the accused on the benefit of the doubt of involvement in the murder, as it was proven that the accused did indeed know of the intention to carry out the kidnapping, but it was not proven that he knew of the intention to murder Ofir, and he did not actually assist in the boy's murder. However, the accused was convicted of kidnapping and in assistance after the murder.

**1671/02 Military Court Prosecution v. Elamor** – The accused was accused of several offences, including deliberate manslaughter and attempted manslaughter. The court acquitted the accused on the benefit of the doubt due to insufficient evidence and due to differences in descriptions of the bombing given by the witnesses (the accused confessed to one charge – trading in combat equipment – for which he was convicted). The court criticized the superficial investigation that failed to find sufficient evidence.

**3742/02 Military Court Prosecution v. Barguti** – The son of Marwan Barguti was accused of four attempts at deliberate manslaughter and at shooting towards a person. The court acquitted the accused of all these charges on the benefit of the doubt as there was insufficient

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evidence backing the statements incriminating him. The court convicted him of a single charge which ascribed him with a relatively minor offence of membership in an illegal organization.

1618/02 Military Court Prosecution v. Abu Snina – The accused was acquitted of murdering a soldier and was convicted on other charges, to which he confessed. The court revoked of its own accord the solidarity responsibility practice for conspirators despite the fact that the law in the region had not been amended in a manner similar to the Penal Law in Israel. This ruling brought about the acquittal of several other persons charged with murder, following the same doctrine. The ruling was upheld in the appeals instance.

2341/04 Military Court Prosecution v. Abd Elraouf Yusef – The court decided by majority vote to clear the accused of eight out of ten charges, including two charges pertaining to deliberate manslaughter. The majority vote was based on the fact that it was not possible to rely on the two witnesses that tied the accused to the murder due to their lack of credibility. The appeals instance upheld the acquittal.

42. Therefore, according to the methodology proposed in the report, a case in which the accused was acquitted of murder but convicted for unlawful gathering would be considered as having been convicted. **Now we see that it is not possible to derive from this data any significant conclusions regarding assumption of innocence and so forth.**

### Assumption of Innocence

43. Assumption of innocence is meticulously upheld in the military courts. The feelings of one defense attorney cannot replace facts: the percentage of full acquittals is significant, partial acquittals are even more common, the accused is given full opportunity to voice his arguments and present his witnesses, professional, serious and in depth consideration by the judges of the parties arguments. Therefore, **the military courts meet all professional standards prevalent in developed countries**, and there is especially a maximum closeness to the legal system in Israel in all aspects and regards. In administrative proceedings as well, the courts tend to intervene significantly in the decision of the military commander, and shorten or annul warrants, in cases where the judge has not been convinced that the sanction is necessary. This activity on behalf of the court, is a source of pride to a system, that despite its being a military system, knows how to maintain and uphold its independence, its great professionalism, and its continuous aspiration for just trial.
44. Moreover, the courts have expanded the areas subject to judiciary review with the aim of allowing full realization of the accused' rights. In view of the centralization of legislative and executive authority in the hands of the military commander, which can weaken the defense mechanisms against uncontrolled use of the power given to the authority, the courts have positioned themselves as the only effective block against the government's action (see Appeals Committee 5/06 **Schwartz v. the IDF Commander in the Region**).
45. **An examination of the percentage of court cases ending in settlements, shows that this is significantly lower than the cases ending in settlement in Israel.** With all due respect to the feelings of lawyers in this matter, they cannot refute proven facts. Therefore, it is not possible to complain that settlements are made in lieu of the right to argument. Moreover, according to the method of law common in Judea and Samaria and in Israel, the court orders that

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settlements be upheld if they do not deviate radically from the common and reasonable level of punishment. Therefore, once the accused has decided to reach a settlement through his attorney, the court will usually honor the settlement. Settlements are usually a definite public interest, that in the reality of the region can greatly benefit accused persons whose attorneys believe have a high chance of being convicted. Assuming that the defense attorney has carried out his work properly, in such a case the interest to reach settlement is first and foremost the interest of the accused person who can minimize the severity of the indictment filed against him, and that of his sentence. Therefore, there is no flaw in reaching settlements.

### **Release of Suspects from Custody:**

46. **Duration of hearings** (p. 34 to the report): It is incorrect to present an average hearing time. There is no room for including in these statistics hearings in which both parties agree, both the defense attorney for the accused as well as the prosecutor, to remand custody. Such hearings are naturally shorter, and this is also true in the courts in Israel. It is necessary to check the length of the hearing when the defense attorney objects to the remand request, and argues his request. In these cases, hearings can take a significantly longer amount of time, in such a manner as to allow both parties to present their arguments to the court, as well as to allow the judge to formulate a reasoned decision. Furthermore, it should be remembered that in complex cases, and they are not few, the judge does not dictate his decision in the courtroom, but rather rights it in his office. Naturally, the time necessary for considering and writing such a decision is not measured in "hearing time".
47. It should be mentioned that the "sample" to which the report refers is not statistically valid and does not constitute a significant sample (38 detention hearings out of thousands of hearings every year).

We will emphasize that the judges consider the evidence and in hundreds of decisions every year order the release on probation of the accused.

### **Evidence Laws**

48. Presenting the words of one defense attorney, spoken from his own subjective point of view, as representing the entire situation is distorted and ignores the data. Suffice it to say that evidence laws in the military courts **are identical** by law to those in Israel (section 9 to the Order for Security Directives 5730 – 1970 states: "As regards evidence laws the military court shall act as per the rules obligating in criminal matters in courts in the State of Israel"), and the same standard is used. The rate of acquittals, which is higher than that of courts in Israel, proves this.

### **The Number of Judges**

49. True, the number of judges is small compared to the number of cases (a total of 14 judges in all instances). The system acknowledges that work load on the judges is very great. Too great, even. The IDF acknowledges the lack of judges and it was recently decided to increase the number of judges in the first instance by two additional persons. Of course, one should remember that besides the judges in career service, there are also judges on reserve duty, and they are all legal practitioners from the private and public sectors, both from the prosecution and from the defense. Either way, an in-depth review of the courts' decisions shows that the load borne by the judges does not detract from their professionalism.

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## **Publicity of the Hearing**

### **Accessibility of the Courts**

50. The matter of accessibility of the courts can be divided into two parts. First, it is necessary to recall that the provisions of the Order for Security Directives, 5730 – 1970, and the many amendments made to it, have greatly improved the accused' access to the courts. If in the past there was no system of appeals, this was established in 1990. Following its creation, the door was opened for suspects and accused persons to appeal first instance decisions, during all stages of trial, as is common in the criminal system in Israel. Accessibility was further strengthened by the court's determining mandatory attendance in all trial proceedings, and by the possibility to conduct disclosure of evidence and disclosure of classified evidence, that were initially provided by court rulings, and were later anchored by law.
51. The second aspect of this right pertains to the accessibility of the court to the public. In this matter, too, it must be said that the military courts meet the appropriate standards. In this regard, there is emphasis on providing family members with the opportunity to be present in the courtroom during the trial, as part of the realization of the publicity principle of the trial. Representatives of human rights organizations and from the Israeli and international media are also present during hearings. However, alongside the principle of public trial and accessibility to the court, there are also additional considerations that cannot be ignored, including the limited space available in the courtrooms, as well as security considerations that necessitate a level of security derived, among other things, from the number of attendants in the courtroom, and from security risks involved in the location of the courthouse. Therefore, a certain limitation has been determined by the security elements guarding the courthouses (the IDF in past and the IPS today) on the number of family members allowed to enter the courtroom, so as to allow the relatives of all detainees to be present during the hearing, while maintaining the required level of security. We believe that the procedure set forth properly balances the publicity and accessibility principles to which we are obligated, and the security needs detailed above. Furthermore, when a defense attorney requests that additional persons be allowed to enter the courtroom, this request is usually granted, subject to the aforementioned security considerations.
52. At this point, it should be emphasized that the courts unit security officer does not himself decide who shall be admitted to the hearings and who shall not. The situation described in the report is not true. Individual cases are considered, and this is usually brought to the presiding judge for decision. If there is no special problem, the tendency is to allow entrance of additional family members as mentioned.

**One can only come to the conclusion that the military courts uphold their accessibility.**

However, it should be stressed that the courts system has no objection to increasing the number of security guards in such a manner that would allow additional family members and audiences to be admitted to hearings.

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### **Publicity of Hearing**

53. The military courts are very strict in upholding the publicity of the hearing, and are not deterred from instructing that a hearing be opened to the public even against the opinion of other senior persons in the defense forces. Thus, for example, was the case in Judea Case 3324/02, where the court ordered the doors to be opened despite an order signed by the GOC Central Command who believed that the hearing should be conducted behind closed doors.
54. Also in the matter of Judea Case 3052/06, which is cited on page 42 of the report, the court so ordered, contrary to the opinion of the GSS and the prosecution. Presenting matters as though only due to the attorney's entrance influenced the proceedings is outrageous. Only after though court had decided against the opinion of the prosecution and the General Attorney at its head, did **both parties**, the Attorney General and Adv. Avigdor Feldman who represented the accused in this request, jointly request to postpone the hearing. Therefore, the court granted the postponement request. The presence of the Attorney General did not change a single thing as far as the court was concerned – the court's original decision stood, and the postponement was granted so that the decision could be appealed. This is also apparent from reviewing the hearing protocol.

**One cannot but come to the conclusion that the military courts uphold the publicity principle.**

### **The Right to Know the Charge:**

55. On page 38 to the report, reference is made to the alleged "practice" in the Samaria court not to allow time for reviewing the material during detention hearings. This practice, if it had existed in the past, and these claims have not been proven, **was rejected** due to the military court of appeals' rulings, so that it no longer occurs today.
56. It should be noted that the practice of remanding custody in order that the defense attorney may study the material is also common in courts in Israel, and this option is always given at the defense attorney's request in the military courts as well.
57. As regards the translation of bills of indictment, in the past a large portion of the indictments were translated into Arabic, but as no request was made to receive these translations, the practice was changed, and today indictments are translated as per the accused' request, or that of his representative.

### **The Right to Representation:**

#### **Appointment of Attorney**

58. The military courts do not avoid appointing a defense attorney funded by the Civil Administration. They do this not only in severe cases, but also in minor cases where there is no obligation to appoint a defense attorney. Had the organization taken the time to request data in this matter, we could have provided case numbers in which a defense attorney was appointed by the court.

**In any case, the key data that should be noted, is that in 99.9% of the cases, the accused is represented by a defense attorney.**

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### Palestinian Attorneys

59. Palestinian defense attorneys are granted full access to the military courts. Both to the Samaria court and to the Judea court. It should be emphasized that the Judea court is not located within the Ofer Prison complex and is not under IPS responsibility. The Judea court is located in an area that is part of the military compound (although the security of the court is given to IPS personnel), but entry to the court is independent and separate from the entrance to the military base. Every defense attorney has full access to the compound. The court is not responsible for attorneys' access to IPS facilities and in these matters, inquiries should be directed to the prison authorities.

### Arrest Hearings

60. During the investigation stage, the military courts act as is common in Israel, meaning: the police is given the right to file a confidential report to the judge, and it is not disclosed to the defense. There is no difference between the military courts and the courts in Israel in this matter.

### The Accused's Presence During the Hearing

61. The report's remarks in this matter indicates **a complete lack of understanding for legal proceedings** and suffer from significant inaccuracies. By law (section 35 to the Order for Security Directives), the accused is entitled to be present in hearings in his case. Exceptions to his are made in cases where the accused does not behave properly in court or when permission is granted by the court due to the accused's medical condition.
62. A hearing in which the court explicitly determines that due to the accused not being present (case 6057/06 to which the report refers) there is no choice but to postpone the hearing points to the fact that the court decided not to hold the hearing. A hearing in which the accused did not appear due to illness (for example case 5552/06 to which the report refers), in which the court sets a new date for the hearing so that the accused can be present, does not constitute a hearing ex parte as nothing takes place except for determining a date for the next hearing while consulting with the relevant parties. And what exactly do the report's authors expect the court to do? **To say that postponing a hearing due to the illness of the accused constitutes a hearing ex parte is tendentious in the worst case, and indicates a complete lack of understanding of the process and lack of professionalism on behalf of the Yesh Din observers at best.**

This is also the case when the court finds that notice of the hearing was not given to the accused and postpones the hearing to a new date.

63. It should be emphasized that, contrary to the report, proof hearings are held with the accused present. It is unfortunate and puzzling that the report claims that a witness was heard without the accused being present (the report refers to case 2645/07 and the protocol dated 1.8.07), when a review of the relevant protocol finds that both the accused and his attorney were present **and no witness appeared during that hearing.**

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### **Accessibility to Rulings and Legislation**

64. See our response in Chapter A. It should be noted that to the best of our knowledge, recently, legislation in the region which is under military responsibility has been advertised on the "Nevo" website.

It has recently been decided that amendments to legislation be published, in Hebrew and in English – in the defense attorneys' room in the courthouse.

Besides that, as mentioned, the courts system has no objection that rulings be published on the internet, the staff work for which is already underway.

### **The Right to Trial Without Delay**

65. The workload in the courts is very great, the number of judiciary hours and the number of courtrooms are limited, and this necessarily affects the interval between hearings. However, it should be emphasized that the statistical data regarding the closing of cases in 2006 indicates that a "hostile act of terrorism" case closed on average after 7.5 months, a "violation of civil order" case after 3.9 months, and a "criminal" case after 5.4 months.

**This proves, with proven and validated facts, that the right to trial without delay is meticulously upheld by the military courts.**

### **Detention**

66. It should be stressed that in the past there was no limit to prolonging detention. The limitation was enacted due to clear and unequivocal call by the military courts for the legislator to change the situation (case 1313/00 Miscellaneous Appeals 108/02 **Military Court Prosecution v. Amro**). Only following the military courts' ruling, was the law amended.

### **The Right to Plea and Present Evidence**

67. The settlements mechanism is common in Israeli courts, just as it is common in courts in the region. Regarding this mechanism, the following things were said by the Supreme Court under Criminal Appeal 1958/98 **John Doe v. the State of Israel** ruling 47 (1), 577, pages 594-595:

**"We are not dealing only with a practical need, but with an institution the existence of which is in the public interest, and which is conceptually justified as part of the adversarial system. And in this regard Judge Motza has said the following:**

**"Personally, I believe that the practice of settlements is part of the adversarial deliberation system, which not only creates the conditions for its development – which are mainly the heavy quantitative burden borne by the courts – but also provides the conceptual and methodological justifications that support it. Surely, the adversarial deliberation method dictates not only a contradiction between the opposing parties, but also a discourse between them, with the aim of minimizing the dispute and creating a balance of the advantages and disadvantages of each of the parties, and to which, in most cases, the parties are aware". (Criminal Appeals 4772/92, 4900 Merkovich and others v. the State of Israel, hereinafter: the Merkovich affair).**

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**This approach by Judge Motza to justify settlement agreements coincides with trends developing in our system today, which call for the development of means of understanding and discourse between the parties, similar to mediation proceedings and preliminary proceedings, which may also be practiced in the criminal field. This trend gives weight to the accused's willingness to bear responsibility for his actions, and for the need to acknowledge the fact that settlements do not necessarily weaken the deterrence of punishment, but may contribute to effective deterrence in that they engender the conviction of more accused persons, including accused persons who for various reasons there might have been difficulty in establishing their guilt through admissible evidence. The penal effectiveness is also expressed in the fact that the penal result might be swift and immediate. Among other things, it appears that acknowledgement of the settlements mechanism is more justified since the expansion of the representation granted to accused persons by the public defense office. Due to the aforementioned reasons, it is common today to view settlement agreements as a legitimate tool, and an instrument contributing to the enforcement of law"**

68. It is evident that settlement agreements is a common practice in the Israeli legal system. In Israel too it is common for an accused person who confesses in court to be entitled to an easement of his sentence, while persons denying guilt, prolonging their trial and who are found guilty are not entitled to such easement.

### **Translation**

69. The military courts system gives utmost importance to the translation of its hearings. To this end, soldiers with high personal abilities are recruited, who undergo admissions tests, a professional course, and constant on-the-job training, as well as advanced professional training. The unit translations officer, who serves as a professional guide, conducts a periodic review of the quality of the translations, and translators who are not up to standard are reassigned to other duties. Furthermore, several judges in the unit speak Arabic at mother tongue level, and they too supervise the level of translation and serve as professional guides for the translators.
70. In order to raise the quality of the translation, career-service translators were recruited. There is no need to mention that in cases where a defense attorney is not satisfied with the level of translation, this is brought to the court's knowledge, and later to the attention of the translations officer for review and in order to find suitable solutions.
71. It is therefore peculiar that Yesh Din observers, whose command of Arabic is not perfect, purport to express opinions regarding the accuracy of military court translations.
72. Nevertheless, we acknowledge that the quality of translation varies, as by translator, and measures are being taken in the system to rectify this. One of the measures is augmenting the number of commissioned translators. The Judea court, for example, currently employs 3 translators in career service instead of just one as before. Clearly, the more permanent service commissions instituted, the better the translations obtained.

## Minors

### Release from detention

73. The contention that upon considering detention of an accused person, no notice is paid to whether the person in question is a minor is downright fallacious. If we were asked to address this issue, we would refer to many cases where accused persons were released solely by merit of being minors. **Here too, lamentably, the organization preferred relying on a handful of observations to seeking hard data.**

### Penalty

74. Relying on an interview with a defense lawyer about penalties sentenced to minors without reviewing specific cases or performing thorough statistical analysis is **unprofessional and irrelevant**. Military court rulings consistently take into account the necessity for leniency in castigating minors and paying heed to their minority upon sentencing, both on account of very serious and lesser offenses. Rulings emphasize time and again the need to attribute considerable significance to an accused person's youth. We can thus refer to Judea and Samaria Region Appeal 2063/05; Single Judge Appeal Judea and Samaria Region 2891/06; Single Judge Appeal Judea and Samaria Region 1350/07 and many other verdicts.

## Chapter C: courts contribution to better observation of human rights in the region:

75. Military courts have taken extensive actions to promote defendants' rights in the region. In a number of rulings of recent years, the courts adopted many rules with a view to conform, as much as possible, the regional law to Israeli law. The courts have done so despite the outdated legislation and were often the instigators of legislative revisions aimed at improving and promoting defendants' rights. Among the various issues addressed, were the following:
- It has been determined that the fundamental law of human rights and liberties should guide military courts (see Gaza Region Indictment Appeal 5/05 **Aljamal v. The Military Prosecutor**);
  - Causes for detention applicable by Israeli criminal procedure law (authority of enforcement and arrests) 1995 were adopted. (see Indictment Appeal 157/00 **Military Court Prosecution v. Abu Salim**);
  - Strong emphasis was given to the right for representation throughout all proceedings, starting with the investigation, the detention and on until the conclusion of proceeding, as well as during the trial itself, and defendants are released when investigating factors prevent appropriate representation (see Indictment Appeal 1060/05 **Ahmed Hamaisa v. Military Court Prosecution**; Indictment Appeal 1850/06 **Ibrahim Halil Ibrahim v. Military Court Prosecution**; Indictment Appeal 2019/06 **Darjam Almashani v. Military Court Prosecution**; Indictment Appeal 1476/06 **Military Court Prosecution v. Karim Gulani and others**);
  - Legal provisos were imposed on the term of detention extension despite the legal possibility to set longer terms (JS Indictment Appeal 20/03 **Ahmed Shrab v. Military Court Prosecution**; JS Indictment Appeal **Fadi Jibrin v. Military Court Prosecution**; JS Indictment Appeal 1380/05 **Salah Hamuri v. Military Court Prosecution**);

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- Military court rulings have led to a legislated adoption of the constriction on incarcerations for the duration of proceedings (the Adorayim case) 1313/00 Miscellaneous Requests 108/02 **Halef Amru v. Military Court Prosecution**);
- De minimis defense have been deemed admissible (Judea court case 3159/04 **Military Court Prosecution v. Abu Galia** – the defendant was acquitted by merit of such defense);
- The doctrine of just defense has been accepted (case 3975/04 **Military Court Prosecution v. Nimer** – the defendant was acquitted by merit of such defense);
- The selective enforcement doctrine was accepted (Judea case 2446/07 **Military Court Prosecution v. Isa**);
- The ruling which allowed conviction of deliberate manslaughter even where the mental element is not intent (see Judea and Samaria Region Appeal 79/99 **Mantzur Shamsana v. Military Court Prosecution**) was revoked;
- The doctrine of conspirators' mutual accountability was disqualified, having been abolished by Israeli legislation (see Judea and Samaria Region Appeal 353/03 **Military Court Prosecution v. Abu Snina**);
- The option to petition for disclosure in martial appeal court has been provided, facilitating the petitioning by Palestinian defending attorneys in such matters, whereas previously they had to employ Israeli attorneys in order to appeal before the Supreme Court (Judea and Samaria Region Miscellaneous Request 71/03 **John Doe v. Military Court Prosecution**).

Many other redresses are surveyed in details in an essay by N. Benisho, *Criminal Law in the Region of Judea Samaria and the Gaza Strip – Portal and Trends* Military and Law 18<sup>th</sup> edition (2005) 293.

**All of the above, and more, are owing to system justices being independent, professional, and aware of the importance of fair procedures and just administration of justice.**

**A more profound and objective examination of the role of military courts would have yielded the conclusion that military courts lead improvements in observance of human rights in Judea and Samaria.**

## Chapter D: about other legal systems

76. Just like any legal system, our military courts are not mistake proof. These mistakes, however, are but exceptions from which the generality may not be deduced. Military courts uphold judicial norms and assure the conduction of due process of law by the standards generally accepted in modern countries overseas, as a system which is allegiant to natural justice should. Even in these difficult times, military courts observe the principles of procedure prevailing in Israeli civilian courts (section 10 of the order regarding security instructions 1970 and the Supreme Court verdict 179/80 **Algazawi and others v. the Military Court of Gaza**, verdict 34 (4), 411, 413). The evidence law, adopted from that applicable in the criminal courts of Israel, adhered to by military courts too, ensures that principles of trial and justice are honored (section 9 of the Order for Security Directives, 1970). Let us stress that there is no substantial difference between the “regular” criminal justice system and that of the military courts, when it comes to those legal conjunctions where human rights and national security interests are counterweighed.
77. The basic assumptions guiding those presiding over the military court system whereby human rights ought to be revered even in dire times, which have been frequently acknowledged in Supreme Court rulings, are not the only example of a legal approach that emulates judicial methods instituted in other democratic countries. Many democracies have set specific provisions to facilitate the fight against terrorism, removing the Archimedean point of balance between human rights and national security much to the detriment of human rights. Many scholars protested against this phenomenon, arguing that this is tantamount to crude trampling of basic individual liberties.
78. It would suffice to name, among the many scholars who came to this realization, the learned Prof. E. Gross, Prof. Aolain and Prof. O. Gross who published several comprehensive and up to date studies concerning this very issue in recent years. (for instance, see Emanuel Gross’s *Democracies’ Battle With Terrorism – Legal and Moral Aspects* (Nevo publishing, 2004), *Law in Times of Crisis, Emergency Powers in Theory and Practice* Oren Gross and Fionnuala Ni Aolain (Cambridge Studies in International and Comparative Law, 2006)).
79. These studies include comprehensive surveys of this topic and point out a general trend of democracies growing intolerance for terror related offenses, even where it entails a most acute infringement of basic rights. The studies speak, inter alia, of various democracies’ legal treatment of persons accused of terrorist group membership. Thus, for example, in the 70’s and 80’s special courts were established in Britain to handle terror offenses in Northern Ireland. British law at the time provided a series of special evidence law and criminal procedure rules which were enacted by those courts and meant to constrict accused persons’ rights. These constrictions included the revocation of accused persons’ right to remain silent, evidence law rules which facilitated convictions based solely on accomplices’ testimonies – diverging from standard British lege rules. Also instituted were special procedures such as the annulment of the jury system which was employed in regular criminal courts in Britain.
80. The studies also include comprehensive criticism of the United States legal adjustment following the 11/9 terror onslaught. The authors maintain that US authorities’ incarceration of detainees in Guantanamo does not comply with international or American legal norms. They blatantly condemn the US authorities with regards to a multitude of issues where, so they believe, the most basic human rights and natural justice were violated. For instance, it was

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argued that there is no independent legal supervision over terms of detention of Guantanamo detainees, that detainees are altogether deprived of fundamental rights such as the right to an attorney. The authors believe that the terrorist attack on the United States on 11/9 has violently disturbed the balance between human rights and national security, engendering an imbalance whereby constitutional procedural rights are sacrificed for the sake of fighting terrorism, which may lead to erroneous infliction of harm on innocent people. They think this issue should be subject to standard rules practiced in criminal courts so as to avert impediment of constitutional guarantees incorporated in procedures and evidence law, which were arduously forged over many years to assure fair and just procedure.

81. Under this topic, one should mention a memorandum submitted in August 2007 before the Supreme Court of the United States on behalf of the detainees by seven senior Israeli professors (Prof. Ariel Bendor, Prof. Eyal Benbinishti, Prof. Emanuel Gross, Prof. Asher Maoz, Prof. Barak Medina, Prof. Yuval Shani and Prof. (emeritus) Amos Shapira) as amici curiae (“friends of the court”). In that memo, they unambiguously criticize the legal ordination instituted in the United States, and refer to the Israeli legal system in general, **including the military court, as an example of a system that better warrants detainees’ rights and fair judicial process.**
82. Thus, the memorandum states, for instance, that the legal ordinations in Israel and in the region, unlike the US ones, assure strict supervision regarding the rights of detainees suspected of terrorist activities. The memo also extensively addresses the independence of civil and military judicial systems which try terror offenses in Israel and the region. And it further contends that, unlike in the legal state of affairs in the United States, detainees are entitled to review investigation documents pertaining to their charges and their basic right to an attorney is upheld.
83. It seems that there is no need to say more. **Taking the aforementioned comparisons in account, one ought to reexamine the arguments put forth in the Account as well as the basic assumptions assumed by the auditors, which are inconsistent with the factual and legal conjuncture.**

### Conclusion

84. As demonstrated above, the Yesh Din Account, which purports to paint an accurate picture of exercise of fair procedure rights in military courts of Judea and Samaria, **is riddled with essential flaws which disprove its factual-survey infrastructure.**
85. Not only is its the **method of survey inadequate**, the **data base is extremely narrow**. Hence, it is not surprising that the Account is rife with **material errors** which **distort reality**. An adequate investigative and legal examination, abiding by principles expounded above, would suggest that **military courts operate in compliance with accepted Israeli courts standards, while observing accused persons’ rights including the right to fair procedure.**
86. Moreover, despite the national security constraints characteristic of military court activity, it champions accused persons’ rights while acceding to sterner rules than the ones set by international law. The doings of military courts, which succeed in finding the right balance between national security interests on one hand, and human rights on the other, honor the state of Israel. And sadly, the Account fails to make this evident.

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87. We therefore expect the many deficiencies indicated in our response to be rectified in the final Account.

### **Military court Response**

88. First let it be stated that the presentation of data in the report and the construal thereto attributed is utterly biased and often, as will be expounded hereunder, the report is intrinsically self contradictory and the interpretation of legislative pronouncements is often partial.
89. As elaborated below, in certain cases the report deliberately ignores reference data, particularly such that appertains to analogous occurrences in the state of Israel or Israeli legislative pronouncements. Let it be stressed that in most proceedings pertaining to legal procedures and evidence law, the legislation, and practice more so, is identical to that applicable in the state of Israel. This is distinctly manifest in the appeal court ruling.
90. The report also completely overlooks the fact that in many cases issues pertaining to legal proceedings in the region are brought before the Supreme Court, which, by and large, rejects these appeals. Where this datum is mentioned in the report, it is "impartially" presented and sometimes integrated with harsh criticism of the Supreme Court.
91. The Military court of course second Supreme Court rulings and regards it as the ultimate and competent court to render interpretations of regional, criminal, and international law. The fact that throughout their conduction, beginning with arrests and deprivation of attorney rights and ending with appeal court's rulings, legal proceedings in the region are subject to Supreme Court constant supervision, speaks for itself.
92. Considerable portions of the report findings are based on so called interviews where the authors of the report question some persona incognita. Regarding various issues, the report pretentiously makes assertions about the legal proceeding of military court courts, based on anonymous sources. These are vaguely articulated and fail to put forth any concrete example of any case or protocol. Thus, for instance, the report purports to draw clear cut conclusions regarding the presumption of innocence, or rather the lack thereof, in military court courts, based on an account by some incognito attorney, where all the particulars concerning the background of this source, the number of military court appearances he has made, if any, the cases on which base he presumptuously asserts that the presumption of innocence is disregarded. Vis a vis thousands of court sessions, hearings, hair splitting, quite a few acquittals, and perpetual Supreme Court supervision, stand utterances of some anonymous lawyer speaking of disregard for the presumption of innocence as if it were an established fact. It is lamentable that the report's authors saw fit to rely, so blindly, on accounts by incognito personae, despite objective data which clearly refutes them.
93. Much of the report's reliance on reports of so called observers is entirely unprofessional. No one disputes, not even the report authors, that those observers lack legal education. And yet they purport to make assertions regarding judicial decisions taken in the cases they were

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examining. It is most regretful that the report purports to state statistics concerning the quality of translation in military court courts based on the discernment of those observers, who, even according to the report's authors, are not proficient in Arabic. The report even goes as far as presenting a statistical integration chart based on those observers' opinions about the adequacy of translation.

94. Especially outrageous is the fact the report's authors, in describing military court prosecution practices, chose to base their arguments on an account by some incognito attorney, who, so they claim, has been a military court prosecutor in Judea for two years – a lawyer who, for reasons known to him only, preferred to cloak his identity and be referred to only as "Z". This lawyer, Z, purports to testify that military court prosecution files charges "frivolously" just to "inflate" bills of indictment, makes other such scandalous groundless accusations which are very easily made from behind the sheltering cloak of an alias. Lamentably, the report's authors did not provide military court representatives to state their stand regarding the raised issues. Let it be stated that the military court conducts its activities under full disclosure and in cooperation with human rights organizations. The authors should have, before publishing their report, met with military court representative, and not rely on the recounts of a former prosecutor whose identity is unknown.

### **Specific Response to the Report**

#### **Page 13 – "from presiding over the Judea court to the Judea and Samaria military court department."**

95. The report's authors allege that former justices never take senior or minor positions with the prosecution, or at least not to the best of their knowledge. **This is quite peculiar seeing as one member public council and of the advising legal committee of Yesh Din, Michael Ben Yair, was himself a district justice before being appointed Attorney General.** Let us refresh the report's authors' memory with some other examples: From the military system, let us mention the chief military court attorneys, Uri Shoham and Menahem Finklestein, who both held senior positions in the military court court of appeals, before being appointed Chief Military court Attorneys. The latter positions includes being in charge of the prosecution and the legal power to commit persons to trial for various offences. They both currently preside as district judges. Among attorneys general, let us name, as mentioned, Michael Ben Yair and Yosef Harish, who both were district judges before heading the general prosecution. Supreme Court judges in this category include Edna Arbel, who manned several positions with the state attorney, then presided as district judge, attorney general and is currently a Supreme Court justice. A similar career was led by Elyakim Rubinstein, who was a legal advisor to the foreign affairs and defense ministries, a district judge, and is now a Supreme Court judge.
96. These examples are but few of many, which only stand to show that transitions to and from general attorney offices and judicial positions, are natural and that the pools of manpower both draw from greatly overlap.

#### **Page 16 – Unjust public image of the courts as handling serious charges**

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97. The content of page 16 is one of many instances of misinterpretation of statistical data. Indeed, among the thousands of cases handled by military court courts, of which thousands are traffic and illegal stay cases, the number of murder files constitutes one percent, even this year, which was relatively calm. The authors of the report are welcome to review the statistical abstract of the state of Israel and find the percentage of murder files out of all files processed by the courts of Israel, albeit excluding traffic-offenses files at that.
98. Aside from this, it is a clear absolute given that military court courts try many and very grave homicide and terrorist bombing cases. **In fact, the military courts have been trying, in the past 7 years, the hardest and most severe cases tried in Israel since the trial of Adolf Eichmann.** The files of the murder squads of Park Hotel, Maksim Restaurant, the Siluan Squad, those who put the mother and children of Kibutz Metzger up to his crime, and hundreds of other atrocious murder cases, are all processed by military court courts. The authors of the report also dismiss thousands of other cases: attempted murder, firing at civilian vehicles, and attempted terrorist bombing – some intercepted at the very last moment, some resulting merely in severe physical injury. All these cases too are subject to military court proceedings.
99. Here we should emphasize that despite the immense difference between courts ruling in Israel and those in the region in term of number and severity of offenses, the appeal court sees fit, time and time again, to embrace standards, practices, and procedures similar to those employed in Israel. As for evidence law, military courts are subject, by law, to the same evidence law applicable in Israel.

#### Page 19 – transgression of jurisdiction outside region bounds

100. The authors argue that under section 7 of the order concerning security instructions, the military court has extended its jurisdiction beyond the bounds of the region, so as to include offenses perpetrated in Israel or abroad as well. The letter of section 7 of the security instructions order does permit commitment to trial of persons who had committed, outside the region, an offense, compromising security inside the region. In this respect, the section is the same as several legislative pronouncements from various places in the world, whereby the principle of extraterritorial application is incorporated into the local judicial system, such as sections 7-9 of the penal code. It should be mentioned, however, that there have been very few incidences of this sort. In most cases where military courts try offenses destined to be ultimately committed in Israel, its jurisdiction follows from the fact that the offence was "in part" (for instance, the preparation, conspiracy or planning thereof) committed within region bounds. Regarding this matter let us refer to the verdicts criminal appeal 50+121/65, Windinfeld versus Attorney General; criminal appeal 84/88 the state of Israel versus Yaakov Ben Shalom Abergil; criminal appeal 331/88 Yaakov Ben Yosef Haluba versus the state of Israel; criminal further hearing 4603/97 Aharon Mehsulam versus the state of Israel as for the doctrine of offense "in part".

#### Page 23 – integration chart of administrative detention warrant

101. On page 23 one finds another stark example of the report's biased distortion of correct statistics. The report's authors neglect to mention what they know full well, that is that administrative detention warrants of a single person are issued several times in one year, and that the number of issued warrants is not indication to the number of persons administratively detained. Since the administrative detention warrant is only valid for six months, only one logical conclusion follows: for some detainees, there will be more than one warrant in one elapsing year. Here to the report is inconsistent, for elsewhere in the report (page 104) it is

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stated that there are currently 783 administrative detainees. **The only logical conclusion ensuing the fact that 2,934 warrants were issued for 783 detainees, goes to show the contrary – that military command and the military court do not automatically exercise their power to issue 6 months administrative detention warrants, but apply discretion as by varying circumstances. The report's authors, however, ignore this conspicuous fact.**

102. The distortion of statistics is further enhanced in the following page (page 24) where the number of bills of indictment is purportedly compared with the number of administrative detention warrants, whereby, seemingly, one may observe as trend of increasing employment of this administrative mean, while decreasing that of the criminal one. An indictment against a person is filed once. Administrative detention warrants against one person are filed several times (since even exhausting warrant term, at least two must be issued in one year.) Comparing the number of indictments with that of administrative detention warrants and trying to draw conclusions thereby, constitute stark misrepresentation. Moreover, trends in administrative court rulings, as well as data put forth in the report itself, suggest that administrative detention warrants are more and more frequently intermitted and criminal proceedings prevail.

#### **Page 25 – trying Israeli citizens**

103. Courts martial are indeed competent to try any person who has committed an offence within their jurisdiction. However, since the early 1980's its has the Attorney General's policy not to commit Israeli citizens to trial by courts martial.

#### **Page 34 – rate of release upon arrest hearings**

104. The attempt to make statistical inferences regarding the prevalence of arrests based on 118 out of thousands of arrest hearings taking place every year can hardly be taken seriously. An undisputable fact is that decisions to release, hundreds of them, are abundant in the corpus of military court rulings. What is more, the military court prosecution abides by the detention policy of the appeal court, and in many cases averts, beforehand, or instructs interrogators to release suspects of various offenses. **The indisputable fact is that - as opposed to the report's claims, whereby one may be led to think that one in 118 persons is released – about a third of all cases tried by courts martial are cases of released persons.**

#### **Page 42 – description of hearing of case 3052/06, closing doors during ISA personnel testimonies.**

105. The report's authors' description is fundamentally inaccurate. If not otherwise, than merely because the appeal regarding the decision to close the court was jointly submitted by both parties and done in accord with the defending attorney Avigdor Feldman Adv. – an accord registered in the records. It is odd that the authors failed to set forth this material fact.
106. As for the matter at hand, it is sub judice, awaiting appeal court decision, and the prosecution withholds its arguments until the matter is heard in court.

#### **Page 46 – promptness service of bills of indictment**

107. Defense lawyers are served bills of indictment on the last day of detention, simply because they are usually drafted and submitted to court on that last day. Due to the load and magnitude of cases and detainees processed and handled by the military court, the prosecution is forced

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to exhaust the duration of detentions in order to prepare the bills of indictment. The military court prosecution has no reason to withhold a bill of indictment which has been filed or drafted and to avoid serving it to defending attorneys or defendants.

#### **Page 59 – deprivation of attorney rights**

108. The order to deprive a person of legal consultation exists in the detention laws of the state of Israel as well (albeit valid for different periods of time and rendered under different authorities). There are certain situations where meeting with an attorney might impede investigation or immediately compromise security in the region. This is why the relevant legal provisions have been instituted. This is all the more necessary since the most of the lawyers who are active in the region are not subordinate to the Israel Bar or constrained by effective enforcement of ethical principles. Regretfully, too often lawyers have even been involved in outright obstruction of justice, including conveyance of messages or even mobile phones to detainees.
109. The fact stated in the report that appeals regarding this matter to the Supreme Court have been rejected one by one, does not necessarily mean that the Supreme Court is not duly fulfilling its duties. An accomplished lawyer may deduce the contrary – that this legal power is moderately and legally applied under constant supervision by the Supreme Court of Israel.

#### **Page 61-62 – perusal of investigation material**

110. The rule set forth in section 74 of the criminal procedure law concerning the right to peruse investigation documents is constantly and continuously observed by courts martial. It does sometimes happen that parties disagree as to the nature or scope of this material, but this is not different, by all means, than what transpires in Israel, and the court renders decisions in these matters.
111. The Xerox machines at the prosecution offices are available to all lawyers and are operated by a civilian franchiser. Military court prosecution is unaware of any complaints of lawyers pertaining to difficulties in obtaining photocopies. Although the report states otherwise, memorandums of ISA interrogations are included in the prosecution file and the defending attorney may photocopy it whenever he or she please.

#### **Page 64 – ruling CDs do not include appeal court rulings**

112. Apparently, the authors of the report or Adv. "D" have never seen the computerized rulings index and their contentions regarding this matter are groundless. Lieutenant colonel Erez Hason has been handling this index in person for 7 years, and he has delivered it, as part of his previous position of chief justice of the Samaria court as well as his current one as attorney general of Judea and Samaria, to any lawyer who requested hold of the index. The index contains nothing but the appeal court ruling.

#### **Page 65 – military legislation not publicly disclosed**

113. Military legislation is concurrently made public in the region public record, just as legislative pronouncements are registered in the statute book and in the public record of Israel.

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**Page 70 – indefinite time allowed for drafting bills of indictment**

114. Even though the legal arrangement for limiting the period of detention after prosecution declaration has yet to be explicitly incorporated in region law, the appeal court ruling has established the principles thereof and in practice, courts martial conform to that ruling despite the great number of investigation files processed by military court prosecution.

**Page 72 – comparison to detention ordinance in Israel**

115. In one of the rare occasions where the authors of the report seek comparison between the situation in Israel and that of the region in terms of arrest durations, they mention that the Israeli detention law too deals with persons accused of national security related offenses as well as with major crime.
116. As mentioned before, there is no comparison between the region and Israel in terms of intensiveness of activity – as per amount of manpower employed – and in terms of gravity of offenses. The prevalence of terrorism in the region does not at all resemble the extent of major crime or organized crime in Israel. And still, the region law contains provisions that place limits on detention durations. An amendment to the law, limiting time it takes to conclude detainees' files under supervision by the appeal court (similar to the law applicable in Israel), has been enacted for about 4 years. Let it be stated that only rarely defendants in the region are brought before the appeal court to deliberate extension of detention by 6 or 9 months after the legally set term of detention had expired, as is often the case before the Supreme Court.
117. It is true that nominal detention periods in the region are different, longer, than those permissible in Israel. This is an inevitable consequence of the extent and severity of offenses perpetrated in the region. Let us mention that in other areas, such as detention of soldiers under the mandatory military service act, Israeli legislation accepts that intensiveness of activity or considerations underlying a judicial system warrant periods of detention that are longer than the 24 hours period permissible in Israel. We should also assert that the legal ordinance regarding periods of detention in the region have been repeatedly put the scrutiny of the Supreme Court which dismissed all these petitions.

**Page 78 - the monolog of Adv. "H"**

118. Reading his account, it would seem that this lawyer has reached a settlement in defiance of the qualms he felt, where his legal status and in a matter of defendant who, to the best of his professional judgment, was innocent. One would expect the authors of the report to file a complaint against this lawyer with the ethics committee.

**Page 91 – a minor who elected terrorism as way of life**

119. The plaintiff in case 4233/06 referees to a minor who was party to a long series of grave felonies, including the manufacturing and use of Molotov cocktails, trafficking a detonative vest, and conspiring to carry out a stabbing attack on an IDF road block.

**Page 91 – the defendant's minority was disregarded**

120. The pretence to pass conclusive judgment on ruling policy on grounds of a small number of incidental observations by persons devoid of legal education borders on flippancy. The rulings index – if, of course, one takes the trouble to review it – list dozens of appeal court verdicts

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grouped together under the category of “minors”. And therein, the minority of persons is explicitly addressed, with respect to punishment as well as to a host of other aspects pertaining to rehabilitation and commitment to trial, and all this in addition to clear military law provisions regarding this issue.

Respectfully,

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**Human Rights Department Officer**

Human Rights and Public Inquiries Department

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