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1 For many years, what has been referred to as the Supreme Court’s “hyper activism” has constituted one of the most impassioned debates in Israeli politics, especially with regard to the role and level of control which the highest judicial institution should wield on issues related to the conflict with the Palestinians. Amongst the most criticized interventions are the Court’s rulings on military matters. These are so numerous that the Supreme Court is now considered to be the final authority on what the Israeli Defence Forces (IDF) can do or not do in warfare. The origin of such a phenomenon is a progressive but clear “judicialization” of the Israeli-Palestinian conflict. We shall define judicialization as a process characterized by the ability of the judicial authorities to create norms and restrictions to the detriment of executive and legislative powers.

2 The best proof of this judicialization can be seen in the legal debate over the route of the Security Wall (or Security Fence) between Israel and the Palestinian territories, in which decisions are made within the judicial arena. Such a situation has created numerous legal restrictions, bon an mal an, with regard to Israeli military ethics, which we define as a corpus of values, principles and practices, which have been elaborated in various texts and speeches pertaining to military conduct. Thus, the Supreme Court has undeniably become one of the main “producers” of military ethics, a phenomenon which amply demonstrates to what extent the Israeli political system is engaged in a process of judicialization.

3 We can even assert that every important political and social issue in the State of Israel has been affected by the reconsideration of the role of the judge and, most notably, the Supreme Court. One can even state that the entire “public sphere”, to use Itshak
Galnoor’s formula, has been judicialized, and to such an extent, that, in the eyes of many experts, it has constituted one of the greatest accomplishments of a democratic society. Of course, such a situation has created numerous debates and controversies. Critics of judicial activism have often levelled their attacks at former Supreme Court President, Aharon Barak (1995-2006), since he personified a policy according to which “everything is justiciable”. This policy represents the fundamental basis for the evolution of the role of the Supreme Court role in Israel. But even if Aharon Barak provided an important and crucial impetus, his vision was not the only factor that explains this evolution. The empowerment of the judicial authorities is in reality a form of mirror of the internal and external evolutions of the State of Israel, which allowed the expression of an activist tendency discernable from the early years of the existence of the State. As Eli Salzberger precisely observed, if the personality of Aharon Barak was an important factor in the development of this process, judicialization, as such, should be analyzed through a “fascinating combination” of the personal and institutional factors that have led to the increasing power of the Supreme Court in political, social and military matters. It is this combination which created the ineluctable process of judicialization, as already defined. This phenomenon is based on a very fundamental idea, namely, the Court, as referee, representing a sort of “palliative” authority, in the absence of other political actors (leaders, administrations, etc.

In this sense, the judicialization of the Israeli battlefield constitutes both the expression and the outcome of the rising importance of demands related to various, unsolved problems created by the Israeli military occupation of Palestinian territories since 1967: the legal status of the West Bank and Gaza, the legal status of Palestinians, the legal framework of military activities, and the question of the settlements, etc. Jacques Commaille attributes, quite rightly, this process of judicialization to the “crisis of the political system and its incapacity to mediate social demands” which created an auspicious context for its emergence. In addition, the weakness of decision-making institutions in Israel is quite evident and even emphasized by the strength of partisan politics. Thus, the Israeli political system, characterized by this partisan political environment, has promoted policies, which can be objectively considered arbitrary and partial, since it showed itself unable to solve and even to deal with important political and social issues such as the conflict with the Palestinians. This situation, characterized by a structural weakness of the political regime, has made the Supreme Court one of the most symbolic institutions of the “restoration of the political sovereignty of the Jewish people” (like the military paradoxically), and it is perceived as a guarantee for the preservation of a democratic system plagued by divisions. To cite Martin Edelman, Israelis perceive the “judicial space” as a sort of guardian of their founding democratic values. In such a context, it was considered important to insure the autonomy of judicial institutions. This explains why Israelis have shown such trust in the Supreme Court, and why they perceive it as an “island” of impartiality and independence in a partisan context. This phenomenon is not, by the way, very new: P. Elman noted, in 1971, that the Supreme Court was viewed as a traditional symbol of independence, dispassion and impartiality. However, with regard to military affairs, particularly those related to military conduct and ethics, these three characteristics, though expressed imperfectly, created a new, fundamental restriction over the IDF: the judicial authorities now have the power to review military orders and decisions.
Such a “foray”, a military expression often used by Israeli officers to express their feelings about interventions by the Supreme Court, became paradoxically possible in the context of the fight against terrorism. This “daily battle” is marked, in Israel as in other democratic countries, by a difficult but necessary balance between security considerations, on the one hand, and the imperative preservation of society’s democratic values, on the other. Considered as a real test of Israeli democracy, and one of the most complicated issues at the international level, the war against terror offered the judiciary an opportunity to proclaim that laws are not silent in times of war. Under certain conditions and limits, the Supreme Court functions ideally as an institution of control and, if needed, with the power to sanction military operations in the Occupied Territories.

This question, needless to say, is not new, since the power of judicial authorities over the decisions and actions of the executive power have been amply discussed. A simple look at the literature devoted to this subject, which would necessitate an entire study, illustrates the great interest aroused by the role of the judiciary in conflict-related issues, in Israeli academic circles, and in social sciences, more generally. In this respect, we can mention some fundamental points, based either on an analysis of the Supreme Court’s decisions, or on a more general study of its position and policy toward administrative detentions, expulsions and demolitions of terrorists’ homes. In this sense, David Kretzmer’s book, *The Occupation of Justice*, which offers an in-depth, critical study of the evolution of the Supreme Court’s position towards the Palestinian Territories can be considered the most complete reference. It is, nonetheless, important to note that research on judicial activism in military affairs was greatly influenced by the first Intifada, which represented a real turning point in the Israeli military occupation, since this event created a situation where security concerns became an unprecedented daily preoccupation. The Palestinian uprising of 1987 drastically transformed military and security demands, to the extent that it “considerably undermined Palestinian civilian liberties”, according Yoav Dotan. The subject of many debates and controversies, the jurisprudence of the Supreme Court was viewed by many critics, such as Daphna Sharfmann, as more symbolically, than substantially, protective of Palestinians rights and liberties, without really ameliorating Palestinians daily life. The Supreme Court has even been described as “schizophrenic” by Anat Biletzki, who considers its jurisprudence to be incoherent. On the other hand, the Court’s positions have also been accused of being too liberal, and based on a secular vision of the State of Israel, by critics such as Hillel Neuer, who writes of a “judicial empire” ruled by super-power judges.

As a tentative contribution to this debate we shall try to provide some elements for a political analysis and study of a problem that has become ubiquitous within the Israeli armed forces. We shall be concerned exclusively with issues related to ethics and morality in warfare, and avoid the usual distinction between internal and external factors. The judicialization of Israeli military ethics represents a truly political phenomenon, with multiple causes, which has created new legal restrictions. Such activism also originated in new military perceptions and practices which, in our opinion, also led to the evolution of a new culture of war within the army. We, therefore, wish to study this phenomenon through two main questions: how did the Supreme Court become such an important actor and producer of Israeli military ethics and what is the main impact of this judicial activism on issues related to ethics and morality in war?
The evolution of the Israeli military context

“Israel is not an isolated island, but forms of the international system” (Judge Barak)²⁶

The growing influence of a usually restricted judicial authority is not specific to Israel, for it is the expression of an important new phenomenon: the consideration of the rule of law in armed conflict at the international level. Many scholars have qualified such a process as a victory of the Liberal School based on a “representation of the world in which the use of force is not ubiquitous”²⁷. This process, coming immediately after the end of the dislocation of the USSR, contributed to a notable transformation of the Israeli security paradigm, historically deeply rooted in a Hobbesian “gladiator bearing”²⁸ stance, symbolized by the maximization of power, especially of the military which was seen as the sole guarantee of security in a Middle-Eastern hostile environment. A process of rethinking Israeli perceptions, historically based on a hard-line realistic approach and fervently defended by generations of Israeli officers, emerged and contributed to a more liberal vision. Security remains an absolute referent, but “political, economical, social and even environmental components” are now also important factors²⁹.

Barry Buzan, considered the father of this new approach³⁰, which is largely based on the research of American theoretician, Kenneth Walz, explains that security, in this sense, should be understood as “the ability of a society to keep its own characteristics despite the changing conditions and threats, real or potential. Or rather, security affects the permanence of traditional schemes of language, culture, associations, identity, national or religious practices, considering evolutions deemed as acceptable”³¹. Thus, security obeys the same logic as other democratic institutions, namely, the need to reconcile the interests of the State (defence, way of life, values, national culture, identity, etc.) with the interests of individual citizens (freedom of speech, of movement, etc.). In such a democratic context, which requires an arbiter, the role of the Supreme Court is fundamental and even promoted since it represents an independent institution.

This evolution should be seen in the context of a more general transformation: after the end of the Cold War, a period marked by a realistic vision based on a paradigm of power and interests, there emerged an idealistic vision of international relations founded on the quest for peace. This vision, based on the Kantian concept of perpetual peace, which inspired the first international institutions dedicated to the promotion a peaceful resolution of armed conflict (SDN), foresaw the rule of law as the main instrument in the achievement of peace. The emergence of an international judicial order, which insists on the necessity of justification, of obligation to give accounts³², determine and attribute responsibilities, as well as the development and institutionalization of various processes of repentance (since “to regret means changing the past”³³) perfectly reflect this new culture: a culture of the primacy of the rule of law, at war, and in war. This doctrine, naturally, reinforced the application of laws and of procedures such as the process of appeal to a Court, considered the ultimate guardian of human rights, values and dignity, this even more in times of crisis and chaos than in peaceful situations. The philosopher Michael Walzer, author of “Just and unjust War”³⁴, sums this up when he asserts that, finally, “justice became in this way a military necessity”³⁵. As a result, “both the pretexts of war and the terms of its conduct”³⁶, are now commonly debated in the media.
This international context, influenced by an idealistic vision of the world, encouraged the emergence of private actors, due mainly to the development and sophistication of global communications. This is the reason why some have asserted the existence of “public opinion” as an actor in international relations, since it can supposedly be quickly mobilized for humanitarian or political causes. In contemporary conflicts, such as the Israeli-Palestinian conflict, war, “before being a military matter is a matter of words”\(^{37}\). In such a context, the conduct of Israeli soldiers tends to attract attention and criticism, and create a fury of passions. Indeed, images of the disproportionate use of force by the Israeli army, opposing soldiers against demonstrators, has placed the problem of military ethics in the foreground, both in the media and within the military. Children facing tanks, stones against lethal weapons, bulldozers against families not only constituted negative images of Israel, but also conveyed interpretations of the soldiers’ moral values. These images appeared in complete contradiction with the declared tradition of the Israeli armed forces to uphold high moral and ethical standards and obligations.

This situation is summed up by Steven Metz according to whom, “the era of asymmetry” sealed the end of a period when the military were the guardians of security\(^{38}\). Henceforth, in view of the threats faced by democratic states, the military component of national security remains important but is no longer predominant. Military power has become secondary, especially in political terms\(^{39}\), since asymmetry tends to transfer the conflict from the battlefield to the “Internet, the media, demonstrations, the United Nations, and other forums of political and psychological struggles”\(^{40}\). In consequence, we can better understand why the judicial arena is perceived as a place of possible victory, since winning a military battle is not considered anymore as a \textit{sine qua non} for political victory. Reparations are now part of the conflict, part of the power relations between the actors in a conflict, and these actors are not necessarily members of military institutions – any individual can now enter the arena.

**Converging internal socio-political evolutions**

The empowerment of the Supreme Court can also be explained by various predispositions\(^{41}\) since such as converging elements in the evolution of the Israeli social and political internal context. Citing Jacques Commaille, Hélène Sallon, who analyzed the process of Arab citizens’ collective claims in the judicial arena\(^{42}\), explains the multiplicity of converging elements: she cites “the advent of democratic individualism, the shifting role of the State” as well as, “the \textit{contractualisation} of social relationships”. She also identifies the empowerment of civil society, in opposition to Israel’s dominant military and political cultures which traditionally valorised the armed forces and, in particular, their socializing role. She also describes the emergence of a “peace culture” which came into being following the beginning of diplomatic negotiations for a peaceful resolution of the conflict. In the same vein, Udi Lebel talks about an Israeli civil society in rapid development which began to challenge the historical military sovereignty, the Israel which considered itself an army\(^{43}\).

There is no exhaustive list of conditions for the emergence of this complex judicialization process, but we can find a coordination of concurrent elements involved within a favourable context, namely, the separation of powers. Basically, the principle of the separation of powers is favourable to judicial authorities, and the independence of the Supreme Court is understood as the basis of the democratic ideal and its values\(^{44}\): liberty
of expression, equality, respect for human rights, etc. In this sense, Aharon Barak’s “Lockean” perception underlines what can be considered to be his life mission, his true historical stamp – the establishment of a constitutional block consisting of various fundamental and, henceforth, statutory rights. This Israeli “constitutional revolution” is based on the notion of safeguarding human dignity and individual liberty above all. Any ordinary law, ordinance, order or even decision that breaks with this principle can be rendered void by the Court. This is the fundamental basis of Judge Barak’s judiciary policy in support of restrictions over military actions, since, in his view, the function and role of judicial authorities is to secure a balance of power and establish mechanisms of control in cases of violation of the democratic process. It is also in the name of the separation of powers that the Court’s power of interpretation is considered an important factor in ensuring the independence of the judicial authority. This great capacity of interpretation was used by the Supreme Court to elaborate a liberal case law, more protective of individual rights, thus demonstrating “a certain audacity by applying its control to norms for which its competence is not formally planned.” According to Françoise Dreyfus, this means “choosing between different values and principles, and referring to social values underlined by the rule of law.” For Aharon Barak, as for many other Supreme Court judges, the rule of law represents a reflection of social values. In this case, Israeli society, even before the creation of the State, shaped an ethical framework for the conduct of its soldiers when using force, thus founding a tradition of strong commitment to military ethics.

A military tradition committed to moral conduct on the part of its soldiers

The most moral military in the world?

Both military and political cultures have, almost unanimously, established an ideal for the moral use of force by armed troops. Questions relating to morality in military conduct are so central in Israel that, for some experts, the IDF is the world’s “most moral armed force.” While it is difficult to evaluate the reality of this phenomenon in the field, this reputation is based on a deep, undeniable preoccupation with the ethical dimensions of the use of force, a preoccupation that can be considered an historical political choice by the Zionist leadership even before the establishment of the State. One of the most important debates between the Zionist groups centred around the ethical framework governing the use of military force by the Jewish defence organizations of the Yishuv, and especially the issue of the army’s collective conduct vis-à-vis Palestinian attacks. The Haganah, the embryo of the future Israeli army, adopted a strategy of self-defence for the Jewish community based on a doctrine of restriction, called in Hebrew “Havlagah”. This doctrine of moderation established an ethical signpost for Haganah soldiers and later for the IDF, which inherited a similar principle in the famous concept of the “purity of arms” (Tohar haneshek); this expression was forged before the creation of the State but it has constituted the core of the IDF’s moral values. If the formulation is somewhat clumsy, the intended meaning is clear: the use of military force is limited to counteracting armed enemies and aims to avoid harming civilian populations. This principle ideally suggests that, during military missions, the rules of humanity must be respected. Entire generations of soldiers were inculcated in the principle of the purity of arms, which
means, according to the words of a former commander: “to forgive, to renounce, and to have pity; to do nothing above and beyond military necessity”\(^5\). This concept constitutes the basis of the military ethos to which Israeli society demonstrated its commitment by compelling the army to give an account of its conduct during demonstrations and by enabling appeals to the Supreme Court through Israeli human rights defence associations.

**“Shooting and crying”**

16 The issue of Tohar haneshek as a “moral signpost,” however, is categorically linked to the question of Israel’s war legitimacy, the reconsideration of which has been the occasion to question the content of military ethics\(^5\). After the repressions in the occupied territories following the Yom Kippur War, the Lebanon War and the first Intifada, moral confusion increased within the IDF. Torn between the military necessity to defend their country (e\'in brera, “we have no choice”) and the cultural, social commitment to military ethics, obedience to orders was followed by tears. This phenomenon, known as “shooting and crying” (bokhim vé yorim) represents a challenge to the military’s code of ethics, in an asymmetrical conflict\(^5\). In Israel, as in other contexts (most notably, the Vietnam war for the United States), warfare and its modalities have become, increasingly, the objects of political debates. A real process of desecrating the armed forces has begun and criticism of the army is no longer taboo.

17 This unprecedented phenomenon of questioning led to an important process of reflection on general ethics and morals. In 1994, a Code of Ethics, named officially “The Spirit of the Israeli Defence Forces” (Ruach Zahal), was adopted and became the “identity card of the IDF’s values,” to be used as the reference for all military actions\(^6\). Labelled a failure, especially because its content was not sufficiently rooted in Israeli national culture and values, the code was contested in a country where the political identity of the State is in constant oscillation between Jewishness and secularism. Presented as the formalization of the army’s ethics in one official document (related in part to the growing influence of the ethical discourse within the Zionist-religious camp), the document did not succeed (but could it?) in resolving all the ethical problems that emerge from the battlefield. The problem of military ethics, in general, and the Israeli case, in particular, thus remains unsolved. This is the reason why certain issues are submitted to the judicial authorities where they find the beginning of a solution in respect of what soldiers are allowed to do or not to do.

**The Supreme Court censor of the armed forces?**

18 Amos N. Guiora\(^7\), an Israeli-American jurist who greatly contributed to the study of the laws of war within the armed forces, explains the new phenomenon thus: the Supreme Court of Israel, increasingly intervening in military matters, has become, consciously or not, a general controller of Israeli soldiers’ behaviour in the Territories; this in the name of the democratic ideal of protecting the balance between national security and individual rights\(^8\). It is in this sense that the actions of President Barak, and other members of judicial institutions, should be understood: making democracy real, not simply a formality\(^9\).
Control in the name of a mini-legal revolution

Considering the universally accepted fact that terrorism created new challenges both to military institutions (and the police) and to the need to protect citizens against this form of “arbitrary murder that can hit at any time”, the Supreme Court established an important, fundamental principle: there is no legal vacuum. This explains why it became very common to hear some Israeli soldiers qualifying the highest judicial institution of the country as a censor of the military. The soldiers were obviously not used to such independent intervention, however benevolent, in “their business”, generally believing they are the only institution which ensures the security of Israel and its citizens. Military plans are almost always approved by various cabinets, whose members are often former senior officers, and by society itself since the army is considered the ultimate shield of the State. The Supreme Court itself has not escaped this form of compliance with national interests, all the more so since Israel has never stopped being in a state of war, a fact which has valorised the notion that “for security matters, the Supreme Court should apply minimal control over the actions of the executive power”. However, this situation progressively changed: for the first time, in 1998, with the Schnitzer case, it was ruled that the Supreme Court has the authority to review all decisions, including those taken for Israel’s security. Since then, this principle was clarified and reinforced to the extent that it became applicable to military conduct. It is important to note that throughout its interventions, the Supreme Court tried to set limits (rarely to forbid) in various fields pertaining to military ethics, from military methods used in interrogations to Israel’s humanitarian obligations in the Territories as per international law.

Such control represents an important evolution and it is linked to the question of the admissibility of appeals made by inhabitants of the Palestinian Territories. It is important to precise that, from 1967, it was not easy, nor evident, although theoretically possible, for Palestinians to file appeals to the Supreme Court against military orders that limited their rights and liberties. Because of their minimal knowledge about the Israeli judicial and legal systems, and also because of their refusal to recognize the competence and, thus, legitimacy of Israel’s institutions, appeals by Palestinians were “few and far between”. The jurisprudence initiated by the Elon Moreh case, on the one hand, and the clear definition, after Menachen Begin came to power in 1977, of a policy and strategy toward the Territories conquered in 1967, on the other hand, transformed the rules. From then on, appeals have become more numerous, and in the context of the reconsideration of the admissibility doctrine, the Supreme Court’s potential level of control has grown. The Supreme Court has had to deal with the legal status of Palestinian lands, and the laws that must be applied, which it does when clarifying, case by case, the various international legal instruments as well as Israeli law. In the Ja’afar Ascan case, for example, the Supreme Court made an important clarification when it ruled that the West Bank and Gaza Strip (until 2005) were under a military occupying regime. It also stated that a set of complex and complementary international and national legal rules and principles are applicable to the Palestinian Territories. According to Aharon Barak, “every Israeli soldier” must inculcate these rules and carry them in all circumstances, “like a back-pack”.

The argument of the Supreme Court drew on an interpretation and appreciation of military operations according to a set of national and international instruments, notably...
those we name in Latin, *jus in bello*. The judicial review was based on a reconstruction of the general legal framework and the creation of a *constitutionality block* rooted in the recognition of the constitutional existence of the inalienable rights and liberties of the individual. David Kretzmer speaks quite rightly about a “mini revolution of the constitutional status of human rights in Israel”, which we believe partially revolutionized security questions and the “problem” of the Territories, since the Court affirmed that respect for the rule of law is part of Israeli security. This is why the Supreme Court (especially through its emblematic former President), paraphrasing Cicero, adopted the notion that, on the battlefield, laws are not silent, rather the contrary. After having reversed its own jurisprudence on the admissibility of appeals, formerly based on a refusal to deal with methods used by the military, the Court progressively began to rule on the legal dimensions of issues such as torture, targeted killings, and what is known as “the neighbor procedure”. These rulings, which are highly criticized and commented on, represent symbolically the judicialization of Israeli military ethics, particularly in light of the fact that “military necessity” was used, up to then, as a justification of the above methods, as a lesser evil, and even as a sort of counterweight to possible measures of control. The Supreme Court clearly recognized the possibility of the rejection of its judicial review, for it stated this principle in a 1986 case: “in some cases in which those who are the shields of the State bear the responsibility of its survival and its security, it is considered that some breaches to the rule of law, with the objective to protect the security of the State, are an inevitable necessity”. This consideration of necessity, which has, since then, obviously lost strength, remains however an important element for a justification, still potentially viable and accepted by the Court. Thus, this “ancient” reality of war, which draws on the principle of necessity and emergency, is still present, “preparing our minds to acts of brutality”.

**The power to review military methods**

The judicialization of ethics is essentially manifested in decisions dealing with the use of certain military methods which contradict ethical and legal principles. Previously the only master of warfare techniques or fighting against Palestinian armed groups, the IDF became limited by various legal restrictions, which could be occasionally be annulled when the principle of necessity applied. Physical pressure and interrogation methods employed by the army and the General Security Service obeyed this line of argument; in some cases, because it was both necessary and the only way to obtain crucial information for Israel’s security, a “moderate use of physical pressure” was permitted. Judge Barak, who wrote the majority opinion in one of the most celebrated rulings of the Supreme Court, declared, in 1994, that such methods were illegal. In one clause, the Supreme Court attempted to clarify the notion of security “necessity,” as argued by the Executive, by establishing two concomitant criteria for its admissibility: in a situation of a “ticking bomb” and when there is “an immediate need to preserve human life”. It can, therefore, be concluded, based on this precise definition of absolute emergency, that torture is illegal.

Another interdiction, which stirred up great controversy and even a clamour of indignation on the part of the Ministry of Defence, was that against the “neighbour procedure”. Not well-known by the general public, this is a method of arrest which uses human shields. To be precise, IDF soldiers would use a neighbour to approach a wanted...
man during an arrest operation. The neighbour was used both as a guarantee and protection against possible shooting at the soldiers. Criticized for a long time by international law experts\textsuperscript{79}, this method was contested through a collective appeal by various Israel human rights associations in the name of the Geneva Convention. In one of the paragraphs of the decision pronounced on June 23, 2005, President Barak explained that this method is in complete contradiction with international law since “it comes too close to the normative ‘nucleus’ of what is forbidden” and, in anyway, pertains to “the relatively grey area” of the improper and unfair\textsuperscript{80}. This decision marked a turning point regarding issues dealing with military methods since, for the first time, the Supreme Court categorically forbade the use of such operations. After the publication of the decision, disagreements were expressed at the highest level of military command with Minister of Defence, Shaul Mofaz publicly criticizing the decision as one that “endangered” soldiers, while the Chief of Staff called the troops to immediately apply the decision in the name of every soldier’s duty to respect the Law\textsuperscript{81}.

24 It was expected that a ban on this particular method, which, according to some Israeli associations\textsuperscript{82}, did not really prevent the armed forces from using the method again, would also be applied to another procedure used by the military, called targeted killings or assassinations\textsuperscript{83}. This kind of operation consists in killing a person considered particularly dangerous and threatening to Israel’s security and whose arrest is deemed complicated and dangerous for IDF soldiers. Although it has been used extensively, this method remains a subject of much controversy in Israel and around the world. The modus operandi, generalized as an airforce attack\textsuperscript{84}, is criticized because of the collateral damage such operations may involve\textsuperscript{85}.

25 Considered by some experts as execution without trial and by others as a defensive, preventive action, this method was also reviewed by the Supreme Court. Previously, Judge Barak had officially declared, in publications and lectures, that he wanted to set limits and legal restrictions over this method\textsuperscript{86}. Nonetheless the Supreme Court ruled, on November 11, 2005, that targeted killings cannot be considered in themselves illegal. At the same time, the Court set an important principle of reviewing, case by case, each decision allowing such operations since, according to the opinion written by President Barak, democracies fight sometimes “with one hand tied behind their back”, while the other must continue to preserve the rule of law and respect the liberty of the individual, since this is the foundation of national security\textsuperscript{87}. This decision also set down the principle that targeted assassinations must be considered exceptional, as Judge Beinish wrote in her opinion paragraph, because such operations are of an “extreme nature” and constitute methods to be used only as a last resort. The Supreme Court also established a legal necessity to respect proportionality between the security benefits of a military operation and civil damages when considering the legal principles underlying “necessary caution” and “required diligence”. The military are, therefore, required to take precautions to protect civilians and, in this sense, they have a duty both to clarify the decision-making process of these operations and to set harsh, objective, relevant criteria for identifying targets.

26 Other issues pertaining to military ethics have also been reviewed, such as arrest\textsuperscript{88}, house arrest\textsuperscript{89}, home demolitions\textsuperscript{90} and humanitarian obligations toward the Territories\textsuperscript{91}. In these cases, the Supreme Court framed the procedures by reinforcing them, thus encouraging the emergence of a new culture within the armed forces with regard to legal demands.
Awareness of the appeal process and its consequences

Fighting with the shadow of the Court?

With the development of the enlarged role of the Supreme Court in military matters, it became very common to hear some Israeli soldiers talk about the existence of an “appeal awareness” among soldiers. In other words, judicial activism led to the awareness that, in each operation, every military movement could be reviewed at any time. This situation has also led to instructions during briefings to always act with the awareness that every case can be submitted to the Supreme Court. Officers often insist on the fact that such control and, in some cases, sanctions, pertain to a sphere other than military justice, since the Supreme Court aspires to be the guardian of human rights and reviews issues in total independence. The Court’s omnipresence is reinforced by its will to assure access at anytime, even in “real time”, particularly when an appeal contests violations of human rights. Sometimes, an appeal and a ruling will occur while fighting is ongoing, and it is, in these cases, that we realize that the Supreme Court is an actor in the conflict. The case of the Nativity Church in Bethlehem represents the best example of such a situation: appeals based on humanitarian law principles were made while the holy site was still under occupation.

The emergence of a new culture

The IDF has integrated this new reality of the omnipresence of the Supreme Court and the immediacy of its rulings. It has begun various processes for the incorporation of new norms and principles which the Court has compelled it to respect in its operations. This is the reason why a code of ethics, specific to anti-terrorist operations, was drawn up by the “philosopher of the military”, Professor Asa Kasher; some of its principles have been largely confirmed by the Supreme Court in its decisions on targeted killings. It is also behind the obligation set down by the Supreme Court to teach armed conflict law to all troops. Previously taught only to officers, this law, whose importance has been stressed by the Supreme Court, is now fully part of military education, in an essentially preventive function, since humanitarian law proposes an operation manual for avoiding the worst scenario, according to Judge Dorner.

In order to fulfil these objectives, a Military Law School was established in 1994, a fact which underlines the new Israeli military culture and can be attributed to the evolution of an international system for the judicialization of conflicts and violations of jus in bello, as seen in the ad hoc court for ex-Yugoslavia and Rwanda and the 1998 ruling of the International Criminal Court. The creation of the School was the occasion of the publication of a manual on armed conflict law, which was distributed to all army units. The School also publishes a scientific review, the Israel Defence Forces Law Review, which aims to provide a forum for discussion and research on the legal aspects of conflicts in which the IDF is involved and the conduct of warfare. The School has also developed an interactive software to teach eleven points of law relative to conduct at checkpoints, using a clear legal framework and simulation of very harsh, controversial, contested situations. It is clearly making use of new technologies in military education.
choice is partly due to the difficulty in finding and mobilizing competent personnel to teach international law in such a context. However, the main objective of this practical method is not the attainment of a perfect knowledge of armed conflict law, but to give soldiers practical tools to carry out their operations while respecting the basic principles of such a law.\footnote{101}

The awareness of the Supreme Court’s power has also produced an unexpected phenomenon: the constant elaboration of arguments by the IDF’s legal advisers in response to possible Supreme Court reviews. David Kretzmer explains that “the mere existence of a judicial review process has exercised a restrictive power among militaries.” It is now very common to see authorities abandoning a planned action, when threatened by a possible legal appeal or petition to be presented to the Court, or after the army’s legal advisors inform commanders that their actions will be sanctioned by the Court.\footnote{102}

We can consider such a process as auto-censorship, and it is also visible within military courts. Many military lawyers take into consideration these new frameworks when formulating opinions and conclusions, and more and more try to negotiate with a plaintiff, if they predict possible sanction against the army, in the case of an appeal to the Court. At a more macro level, one can say that the first generation of military legal advisers has emerged in Israel to enlighten and guide decision-makers, and is contributing to a decision-making process which has integrated judicial activism.\footnote{103}

The constitutional revolution based on the supremacy of the rule of law, as per the vision of Aharon Barak, who embodied for a long time the courage of the Supreme Court, gave birth to a revolution which opened the door to greater legal involvement in daily military operations in Israel. Even the armed forces, which “possess a State”, to quote Mirabeau’s description of the Prussian military model, cannot escape today tighter control of their operations, as a result of the judicialization of military ethics and the growing legal formulations around troop morality. The fight against terrorism has considerably reinforced, in a certain way, the role of the judicial authorities, which is characterized by clear independent aspirations, even though such a situation might be reversed in the future. The Supreme Court considers itself to be an arbiter between two important pillars of democracy: the duty to ensure effective security and a normal life for its citizens and the protection of individual liberties, including those of the enemy camp, although a \textit{minima}. The thoughtful, sensitive but necessary Israeli synthesis between security and liberty, far from being perfect, represents for many experts a model, since it has pushed back the army’s historical immunity in social, political and legal domains. Nevertheless, we are still far from the Liberal School which advocates for a (utopian?) perpetual peace between nations based on the virtues of the law, and for an approach described by Michael Walzer, in \textit{Just and Unjust War}, as: “do justice, let the sky fall!”\footnote{104}. 

\textbf{Choice is partly due to the difficulty in finding and mobilizing competent personnel to teach international law in such a context. However, the main objective of this practical method is not the attainment of a perfect knowledge of armed conflict law, but to give soldiers practical tools to carry out their operations while respecting the basic principles of such a law.}

\textbf{The awareness of the Supreme Court’s power has also produced an unexpected phenomenon: the constant elaboration of arguments by the IDF’s legal advisers in response to possible Supreme Court reviews. David Kretzmer explains that “the mere existence of a judicial review process has exercised a restrictive power among militaries.” It is now very common to see authorities abandoning a planned action, when threatened by a possible legal appeal or petition to be presented to the Court, or after the army’s legal advisors inform commanders that their actions will be sanctioned by the Court. We can consider such a process as auto-censorship, and it is also visible within military courts. Many military lawyers take into consideration these new frameworks when formulating opinions and conclusions, and more and more try to negotiate with a plaintiff, if they predict possible sanction against the army, in the case of an appeal to the Court. At a more macro level, one can say that the first generation of military legal advisers has emerged in Israel to enlighten and guide decision-makers, and is contributing to a decision-making process which has integrated judicial activism.}

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NOTES

2. We will use equally the words “ethics”, “morality” and “values”.
5. One should recall the violent controversies between constitutionalists regarding the “government of Judges” in the United States, and also the recurrent criticism levelled at the status and role of the Conseil Constitutionnel in France since its creation.
10. Anat Bitelzki speaks of the “schizophrenic” attitude of the Supreme Court when it deals with matters of national security. See “The Judicial Rhetoric of Morality, Israel’s High Court of Justice on the legality of torture”, Occasional Papers of the School of Social Sciences, n° 9, January 2001, p. 2.
15. In contrast with Cicero’s sentence: inter arma silent leges. The idea is that laws are even more important in times of war than peace, a principle which has been asserted several times in court, e.g. in a decision of 1991, H.C. 168/91, Morcos vs. Minister of Defence, 45(1) P.D. 467, 470-71.
20. E.g. David Kretzmer, “Judicial review over the demolition and sealing houses in the Occupied Territories”, in Itzhak Shamir, Klinghoffer on Public Law, Jerusalem, Harry Sacher Institute

22. Yoav Dotan, op. cit., p. 321
23. See Daphna Sharfman, Living Without a Constitution, Civil Rights in Israel, New York, Armonk, 1993, pp. 147-158.
25. Ibid., p. 4.
32. Ariel Colonomos, op. cit., p. 36.
33. Ibid, p. 46.
39. Ibid.
40. Ibid.
41. Itzhak Galnor, op. cit., p. 506.
46. Ibid., p. 17.
47. Aharon Barak, A judge in a Democracy, op. cit., p. 49.
49. Ibid.
50. Aharon Barak, A judge in a Democracy, op. cit., p. 3.
52. The first person who used this expression was Berl Katznelson, before the creation of the State. In, Ehud Luz, op.cit., p. 77.
54. Professor at Haifa University and expert on issues of conscientious objection in Israel, Ruth Linn explains perfectly that the reconsideration of ethics is deeply rooted in the transformation of the conflict’s nature: “from war of attrition to moral attrition”. See, Conscience at war, the Israeli soldier as a moral critic, New York, SUNY, 1996 (especially chapter XI, pp. 211-224).


56. The actual version has replaced a longer preceding version, but also considers criticism made of the first document. Preamble to the code, available online: http://www.idf.il

57. Former commander of the IDF Military law School, now lecturer in law in the United States, Guiora contributed extensively to the School’s activities.


63. Françoise Dreyfus, op. cit., p. 67.


67. HCJ 390/79, Azar Muhamad Mustafa Dweikat v. Government of Israel (1979). The Court invalidates a military order to requisition lands as it is only motivated by strict political considerations.

68. For a complete review of the applicability of international and Israeli law to Occupied Territories, see, The Occupation of Justice, David Kretzmer, op. cit., especially chapters 2 et 3, p. 31-56.

69. HCJ 393/82 Ja’amait Ascan v. IDF Commander in Judea and Samaria (1982).


72. For example, the Morcos case, see footnote 13.

73. Concerning the evolution of this principle, see Suzie Navot, “The Supreme Court of Israel and the war against terror”, European Public Law, vol. 9, Issue 3, 2003, p. 323-333.

74. H.C. 428/86, Barzilai v. Gov’t of Israel (1986)

75. Michael Walzer, Just and Unjust War, op. cit., p. 449

76. HCJ 5100/94 Public Committee Against Torture in Israel v. The State of Israel. This decision also describes various methods employed during interrogations.

77. This expression refers to a situation in which a suspect is arrested by security services and possesses important information about the location of a potential bomb. In this case of extreme emergency, pressure is permitted in order to obtain necessary intelligence.


81. Yediot Aharonot, 10th of June 2005.

82. Most active associations are Adalah, B’tselem, Physicians for Human Rights, the Association for Civil Rights in Israel or also The Public Committee Against Torture in Israel.

83. There is a quite partisan controversy over the name of such operations, which we shall ignore by using both expressions. On this point, read, Steven R. David, “Fatal choices: Israel’s policy of targeted killings”, Mideast Security & Policy Studies, n° 51, September 2002, p. 2-26.

84. Poisoning was another technique used to eliminate wanted activists, as in 1997 against Khaled Meshaal, the Hamas leader.

85. The elimination of Salah Shahadeh in July 2002 is a perfect example, since 14 civilians where killed.


87. HCJ 3799/02 Adalah v. Military Commander of the West Bank, 23 June 2005.

88. For example, the following two 2002 decisions: HCJ 3278/02 The Center for the Defence of the Individual v. The Commander of IDF Forces in the West Bank; and HCJ 3239/02 Marab v. The Commander of IDF Forces in the West Bank.

89. HCJ 7015/02 Ajuri v. The Commander of IDF Forces in the West Bank.

90. HCJ 2006/97 Janimat v. OC Central Command.

91. HCJ 3114/02 Barakeh v. The Minister of Defense.


93. For example this 2004 decision, HCJ 4764/04 Physicians for Human Rights v. Commander of the IDF in the Gaza Strip.


95. The content of this code was extensively published and disseminated in many scientific publications. For example, Asa Kasher and Amos Yadlin, “Military ethics of fighting terror: an Israeli perspective”, Journal of Military Ethics, vol. 4, Issue 1, 2005.

96. The code established “scales of implication” in terrorist activities against Israel (criteria of direct or indirect implication). The document is built around the notion of military necessity.

97. HCJ 2936/02 Physicians for Human Rights v. The Commander of IDF Forces in the West Bank.


99. This manual was published by the IDF Military Law School, under the supervision of Captain Erez Hazon, “Laws of war in the battlefield”, Department of International Law, 1998.

100. IDF to set up simulator city, Amir Buhbut, Maariv, 1st July 2004.

101. Balancing IDF checkpoints and International Law, teaching the IDF code of conduct, op. cit.


103. This situation is not specific to the Israeli army: on similar problems facing the British armed forces in Northern Ireland since their enlistment in 1969, or also the British Police when fighting terrorism, see Anne Mandeville, L’Armée Britannique en Irlande du Nord. Contribution à une théorie du maintien de l’ordre, mémoire pour le DEA de science politique, Université de Toulouse I sciences sociales, 1983. See, also, Les Autorités responsables du maintien de l’ordre public dans le Royaume-Uni. Éléments pour une analyse politique du système britannique de maintien de l’ordre public, Thèse pour le doctorat de science politique, Université de Toulouse I sciences sociales, available online http://www.biu-toulouse.fr/uss/scd/theses/fiches-pdf/mandeville-a/ThAMandeville.pdf

ABSTRACTS

For many years, the judicial activism of the Israeli Supreme Court constituted one of the most impassioned debates in Israeli politics, particularly in respect of the definition of the role which the highest judicial institution in the country should play in military issues. The Supreme Court’s most controversial interventions pertain to the Israeli-Palestinian conflict and these are so numerous that the Court can be considered an active player in the task of defining what the Israeli Defence Forces are allowed to do or not in warfare. This judicial activism in the realm of the IDF’s ethics is rooted in the wide-scale phenomenon of the “judicialization” of politics and of the entire public sphere in Israel. This phenomenon has contributed to the emergence of a new culture within the armed forces, which is characterized by a deep awareness that the Supreme Court can, at any time, intervene, control and, if necessary, punish.

Depuis plusieurs années maintenant, l’hyperactivisme de la Cour Suprême n’a cessé d’alimenter des débats passionnés en Israël sur le rôle et le contrôle que peut exercer la plus haute institution judiciaire du pays dans le conflit. Et parmi les interventions les plus critiquées figurent les très nombreuses décisions de la cour dans les affaires militaires rendant ainsi progressivement la Cour, juge de ce que Tsahal est autorisé ou pas de faire. L’origine d’un tel phénomène se situe clairement dans l’évidente judiciarisation du conflit israélo-palestinien, créatrice de nombreuses contraintes juridiques, bon an mal an intégrées par une armée sommée de prendre en considération que la sécurité nationale ne peut plus être assurée indépendamment du respect du droit. Progressivement, la Cour Suprême israélienne est devenue actrice de cette éthique militaire israélienne au point de créer une culture nouvelle chez les militaires, fondatrice de ce que nous appelons la « conscience du recours »: à tout moment, le juge peut intervenir, contrôler la légalité des opérations et sanctionner le cas échéant.

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