

# Prolonged Armed Conflict and Diminished Deference to the Military: Lessons from Israel

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*We examine whether the level of deference shown by the Israeli Supreme Court to military decisions has changed over time by empirically analyzing the entire body of Supreme Court decisions in petitions against the military commander between 1990 and 2005. Setting forth a number of different factors that might generally affect the degree of deference to state agencies, we hypothesized that there would be a decrease in deference in the relationship between the Court and the military commander during the examined period. Our findings show that deference to the military commander has indeed diminished significantly. We argue that this is best explained by the continuation of the armed conflict (and its aftermath, namely, the routinization and increase in the number of petitions by the civilian population) and also—to some extent—by the rise of a substantive rule-of-law legal consciousness, central to which is the importance of human rights.*

## I. INTRODUCTION

On July 12, 2004, an order was issued by the Israeli military commander in charge of the Occupied Territories in the West Bank directed at Zouharia Abu-Dahar. Abu-Dahar was told that military considerations necessitated that the army (IDF) cut down the trees in her orchard, a property of 1.5 square

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kilometers (370 acres) situated in the immediate proximity of the private residence of Shaul Mofaz, Israel's defense minister at the time. Given the location of Mofaz's house at the very outskirts of Kochav Yair—a township built right on the Green Line (the line separating Israel and the Occupied Territories)—the IDF concluded that Abu-Dahar's orchard could provide cover for an attack targeting Mofaz and his family. The commander consequently notified Abu-Dahar that her trees would be completely cut down and the orchard turned into an open field.

After Abu-Dahar's lawyer objected, the commander notified Abu-Dahar that the order had been "incorrectly drafted," and that he did not intend to cut down the trees entirely. Rather, the trees would be cut so as to leave thirty centimeters (one foot) above the ground, which would allow the trees to grow back in the future, while still meeting the security demand for an unobstructed line of sight.

Abu-Dahar was not satisfied with this amendment and exercised her right to appeal the order before the military commander. After the appeal was rejected, she applied to the Israeli Supreme Court, sitting as the High Court of Justice, against this order (*Abu-Dahar v. IDF Military Commander in Judea and Samaria*, 2005). The Court quickly issued an interim order enjoining the commander from cutting down the trees until the case was heard, coupled with an order nisi asking the state to justify the commander's order. When the issue came before the state attorney's office, the commander showed greater willingness to accommodate Abu-Dahar's rights and notified the Court, through the attorney general, that after further consideration he had decided that cutting only 60 to 70 percent of the trees (while leaving, as promised, one foot-tall stumps) would suffice to prevent a security risk. The state added that Abu-Dahar was entitled to compensation for her pecuniary loss and promised to be generous in determining its amount. But Abu-Dahar insisted that money could not remedy the infringement of her rights. She wanted the IDF to find other means of protecting Mofaz, ones that would not involve the destruction of her family's orchard.

The Court noted that there was no reason to suspect that the commander had any motivation for issuing the order other than the good-faith desire to minimize the clear risk to the Mofaz family. Nonetheless, the Court went on to decide that the order could not withstand the scrutiny of the proportionality test. The judges noted that for a number of years the orchard had not been maintained and bushes had been allowed to grow, and that the main obstruction impeding the ability to adequately survey the perimeter of the land appeared to come from the dry branches. The security concerns could probably be alleviated, the Court stated, if only the dry bush and branches were trimmed, and the tree trunks themselves were not harmed. The Court accordingly issued an interim order allowing the military commander to cut dry branches only, and prohibiting any damage to the tree trunks in Abu-Dahar's orchard.

The *Abu-Dahar* judgment did not receive much attention in Israel.<sup>1</sup> But we found it striking. While dealing with the relatively minor problem of an individual—a routine decree issued by the military commander in charge of the Occupied Territories—it epitomized what we saw as a gradual but dramatic decline in the deference accorded to the military commander by the Supreme Court. To be sure, *Abu-Dahar* followed a number of more important groundbreaking judgments in which the Court questioned the commander's decisions with regard to the use of "physical pressure" (that is, torture) (*Public Committee against Torture in Israel v. Government of Israel* 1999), the demarcation of the security barrier (*Surik Village Council v. Government of Israel* 2004), and "confinement" (deportation) of West Bank residents to Gaza (*Ajuri v. IDF Military Commander in the West Bank* 2002), as well as others. In these high-profile cases, the Court showed willingness, at least as a matter of principle, to favor human rights considerations over security ones. While one could certainly question whether these judgments truly curtail the IDF or rather serve to legitimize<sup>2</sup> other problematic practices associated with the occupation (see Imseis 2001; Kretzmer 2002; Gross 2007; Sultany 2007), it would be difficult to deny that these judgments portray the Court as more open to intervening in military decisions. But the *Abu-Dahar* decision is arguably even more remarkable because the ruling on such a specific and relatively mundane issue demonstrates the degree to which the Court is actually willing to intervene in cases involving the discretion of the commander. The Court went into the smallest details of the commander's considerations, overruling his "professional" judgment with regard to the means necessary to achieve the security goal as well as the acceptable degree of security risk. This case thus reveals almost no judicial deference to the commander regarding the military means necessary to address security risks. Is deference to the military a thing of the past? We decided to examine this question empirically by looking for changes in the level of deference to the military in the period between 1990 and 2005.

## II. BACKGROUND AND HYPOTHESES: FIVE DETERMINANTS OF DEFERENCE

This section endeavors to list the various factors that might generally influence the degree of deference shown to the military, followed by our

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1. Some years later the case served as inspiration for a feature film titled *Etz Limon (Lemon Tree)*, directed by Eran Riklis (Israel 2008).

2. In order to generate legitimacy, the Court must *on occasion* and in highly visible (albeit rare) cases intervene. By doing so, the Court actually legitimizes all the *other* cases in which its review was sought but it chose not to intervene. Put differently, by demonstrating that it is willing to intervene with a judicial review when necessary, it generates legitimacy over the entire project.

hypotheses concerning these factors in the context of the Israeli Supreme Court and its deference to the military commander. We should begin, however, with a short introduction for those not familiar with the Israeli-Palestinian story line or with the structure of the Israeli legal system.

The West Bank and Gaza have been under belligerent occupation since 1967, when Israel took the land pursuant to the 1967 war. Since 1970, Israeli settlements have been built in the area. In 1987, an intifada, or uprising, broke out, and after six years the Oslo Accords were signed by Israel and the Palestinian Liberation Organization, according to which Israeli forces withdrew from Palestinian cities and a Palestinian Authority was established to govern the Palestinian people in the West Bank and Gaza as part of a process intended to lead to a permanent agreement. In 1994, a peace treaty was signed between Israel and Jordan. In 2000, after discussions pertaining to the permanent agreement failed, a second intifada erupted. In 2002, following a wave of suicide bombings, Israeli armed forces took back much of the West Bank and Gaza. At the beginning of 2005, the forces had partially withdrawn from some of the areas in the West Bank—although military control was still maintained—and during the summer of 2005 had totally withdrawn from Gaza, pursuant to the “disengagement plan” (which involved dismantling the Jewish settlements there). But the situation remained perilous, as the recent incursion into Gaza reveals.

The Israeli Supreme Court has a dual role in the Israeli legal system. It is the highest court of appeals and it also functions as a High Court of Justice. In its latter capacity it can consider any petition against a state organ, including the IDF, and issue any order it deems necessary in the interest of justice. The Court saw itself authorized to hear petitions by Palestinians at the commencement of the occupation, and as a result it frequently considers claims against the military commander. The role of the judiciary in this context has attracted considerable (and often critical) scholarly attention (Shamir 1990; Kretzmer 2002; Barzilai 2004).

Much like courts in other countries, the Israeli Supreme Court generally exhibits some degree of deference to the forward-looking decisions of governmental agencies. Such deference sometimes means respect for the expertise and judgment of the other branches of the government, while at other times the Court goes further and submits completely to the judgments of the other branches (Dyzenhaus 1997, 2007). The former meaning of deference is merely an acknowledgment of the obvious fact that decision making falls primarily to the elected and expert branches, so courts should not replace the judgment of a government official with their own. More interesting and controversial is deference of the latter kind, when courts lower the standard of review in some way—whether explicitly or implicitly—and refrain from “interfering” even though such interference is otherwise required, or at least expected, according to the governing doctrine. The government is thus given some leeway, or room to maneuver, to act in ways that would otherwise be

curtailed under a straightforward application of substantive law (Davidov 2001) or by judges' use of "the full amplitude of their powers" (Kavanagh 2008, 184; King 2008). We use the term "deference" in this latter sense of the word.

The degree of deference has traditionally been especially high in cases in which decisions by the military or decisions otherwise alleged to involve security matters are being reviewed. Regardless of whether such deference is normatively (or institutionally) justified, as a descriptive matter this has been the case in Israel (Shamir 1990; Kretzmer 1993) as well as in the United States (O'Connor 2000; Lichtman 2006) and elsewhere (Gross and Ní Aoláin 2001). Moreover, there has been greater judicial tolerance to infringements of civil liberties during times of war and during times of perceived emergency or crisis (Rehnquist 1998; Gross 2003; Scheppele 2004; Epstein et al. 2005; Stone 2006).<sup>3</sup> But what happens when war is no longer an isolated event, limited in time and place, but more like a permanent "condition" (Tushnet 2003), as the post-September 11 phrase "war on terror" implies, or as occurs during prolonged periods of postwar occupation when a degree of an armed conflict persists? Does heightened deference to governmental wartime actions become a permanent feature of judicial review as well? Some commentators have already raised this question (Reinhardt 2006; Ní Aoláin and Gross 2008).<sup>4</sup> Perhaps some lessons can be learned from the experience of Israel, which has been embroiled in a lengthy (and likely long-lasting) state of hostilities.

The goal of the current study was to examine whether deference to the military commander has diminished in Israel in recent years and, if so, to understand (to the extent possible) why. In order to achieve this goal, it was necessary to set out a theoretical framework bringing together a number of different factors that have the potential to influence the degree of deference and then examine their possible interplay over time. We put forward five general determinants that are likely to influence the degree of deference, noting in particular their impact in the military context and their "vector"—that is, whether we expected each factor to point toward greater or lesser deference, considering the social and institutional changes Israel has experienced in recent years. The first two factors listed here are the "official" normative justifications that often appear explicitly to support and explain

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3. There is some controversy over the impact of wartime deference on future crises and peacetime jurisprudence—whether it brings about a dilution of standards or rather creates new legal constraints (see Cole 2003; Tushnet 2003). However, this has no bearing on the practice of deference during the emergencies themselves.

4. There is some controversy over the interpretation of key post-September 11 judgments of the US Supreme Court—whether they represent a decline in deference or not (Tushnet 2003; Stone 2006; Yoo 2006). Even if this is indeed the case, surely US Supreme Court jurisprudence is still characterized by a significant degree of deference to the military and deference to the government in security matters.

deference. It should be stressed that we neither endorse nor criticize these justifications; in fact, we make no normative claims in this article. Normative claims are discussed only insofar as they form a testable hypothesis regarding the changes in the degree of deference over time (as a matter of fact). The other three factors we list focus on explanations from the “law-in-action” point of view, in the sense that they capture the incentives of the institutions at play.

### **Institutional Competence and Public Trust**

First, deference is often justified and explained on the basis of judicial limitations in terms of institutional competence. Such justifications rely in particular on the agencies’ superior expertise (Bickel 1970, 175; Fuller 1978), which is especially apparent in times of emergency, when there is need to respond swiftly in the face of uncertainties (Posner and Vermeule 2007). Decisions by the military are usually paradigmatic examples of issues that require special expertise and fall outside judges’ competence (Cole 2003, 2570). The pressure for deference to military decisions is especially acute in Israel, where the Supreme Court considers almost any governmental (including military) decision justiciable, including many issues that in the United States are categorized as “political questions” or “foreign affairs” that are not subject to judicial review.

Special deference to the expertise of others relies not only on the belief in their (professional) capabilities but also on some degree of trust that they will not abuse this deference by, for example (in the military context), invoking claims of national security for measures that in fact have little to do with it.

Both of these underlying assumptions are likely to be undermined in situations of a prolonged conflict (and especially if such conflict entails the administration of a civilian population kept under belligerent occupation). Military conflicts are usually messy and require difficult decisions under pressure. As a result, they can be expected to bring to the fore questionable decisions by military officials. The longer the conflict, the more petitions are likely to be brought before the Court challenging military (and other governmental) decisions that affect the civilian population under occupation, thereby exposing an increasing number of practices of the military to judicial review. It appears, therefore, that from the point of view of the judges, the armed conflict is “routinized,” and, consequently, it becomes more difficult to treat the decisions of the military as part of an acute emergency response that warrants deference to the expertise of the military. If indeed the number of petitions per year against the military increases, the views of the judges concerning the expertise and trustworthiness of military officials can be expected to turn more negative over time, as a result of greater exposure to military misconduct and the ensuing changed perception of the judiciary.

However, it could also be the case that the overall trust that governmental agencies in general enjoy is (or has been) in decline, and such decline would affect attitudes toward the military. Indeed, polls show that in recent years there has been some decline in the public trust of military officials (Vigoda-Gadot and Mizrahi 2006)—and public trust in other state agencies and institutions in Israel has similarly plunged over the last few decades (Arian, Atmor, and Hadar 2006). So, on the basis of this explanation, a decline in deference (lower public trust) is not a phenomenon solely affecting petitions against the military, but can be expected to appear in judgments against other state agencies as well. In order to examine whether there has been a unique change in deference shown to the military commander, we would therefore have to examine whether there have been changes in deference to the IDF in general and compare any such changes to the patterns of deference regarding other governmental agencies.

### **“Democratic Legitimacy” and the Role of the Courts**

A second explanation (and justification) rests on concerns for “democratic legitimacy” and accountability and, more generally, on a notion of the separation of powers and the role of courts. The heads of state agencies are either elected or otherwise subordinate (and accountable) to elected officials. Military officials, while not elected, are subject to dismissal by elected representatives if military policies are found wanting. In contrast, at least a segment of the judiciary is purposefully insulated from political processes (Perry 1994, 106) and thus is not subordinate, in most Western democracies, to elected representatives or to the electoral process. Given that some degree of uncertainty is inherently present in any forward-looking governmental policy, including security matters, judges are often hesitant to intervene in the discretion of government agencies since the adequacy of such discretion should be reviewed by the electoral processes. Judges are particularly inclined to defer to governmental agencies in charge of security matters because the price of erroneous intervention is particularly high (Davidov 2001; Stone 2006, 1315; Posner and Vermeule 2007). When a decision could have life-or-death consequences—and likely on a large scale—a prudent court might conclude that such a decision is better left to the elected branches, if only because the elected branches enjoy a more direct base of public accountability (Cole 2003, 2570).

While this argument, which rests on the separation of powers, is generic, it is not impervious to context. More specifically, the force of this argument may shift as the armed conflict continues over time (especially when such a conflict involves prolonged rule over a civilian population whose ability to meaningfully self-govern is by definition curtailed). When an armed conflict is prolonged, it becomes normalized in a sense, and thus it becomes harder for

judges to reconcile the pull toward deference with the underlying ethos of the judicial role as a substantive component of a democratic regime. To the extent that judges (and the polity) consider the judicial role to be that of guardians of human and civil rights, and in light of the collateral infringement of rights associated with armed conflicts, we can expect that judges would become more reluctant to authorize violations of basic rights, even in the name of security concerns, when the armed conflict is no longer conceptualized as an acute and contained state of emergency. Moreover, a prolonged armed conflict, which entails governance by the military of a civilian population, strains the normative force of the democratic accountability argument, if only because the population under belligerent occupation lacks effective participatory channels through which to challenge the wisdom (or moral worthiness) of military policies. Under this explanation, judges are therefore less likely to allow infringements of basic rights once they realize that the situation giving rise to such infringements has become a more-or-less permanent condition. So we can expect a decrease in deference as a result of the prolonged conflict and occupation.

Three additional developments in recent years that have had an important impact on Israeli law should be mentioned as possible influences on the degree of deference shown to the military in the context of the separation of powers and the role of courts. First, since the 1980s, the Supreme Court has increasingly viewed its role as the guardian of a “substantive” rule of law, which involves checks on unreasonable or disproportionate governmental action (Edelman 1994; see Dyzenhaus, Hunt, and Taggart 2001 on the relationship between justification and deference). This has been accompanied by a relaxation of the justiciability bar and an expansion of the standing doctrine. Altogether, the Israeli Supreme Court is now willing, much more than before, to review the exercise of discretion of government agencies in general.

Second, over the last two decades we have witnessed an increase in the emphasis given to the protection of human rights and arguably also a strengthening of such protection. Although human rights have been prominent in the Israeli judicial ethos since the establishment of the state, the adoption in 1992 of two Basic Laws that protect human rights (such as property rights, rights to move freely to and from Israel, and human dignity) resulted in an overall upgrade of human rights in the Israeli legal system. The Court interpreted the new Basic Laws as the supreme law of the land (“the constitutional revolution”) and thus as necessitating the reexamination of doctrine in all areas of the law when human rights violations are at stake (*Ganimat v. State of Israel* 1995). Consequently, the Court now expects government agencies to present a stronger case when infringing on human rights.

Third, in recent years the Israeli legal community (like its counterparts in other jurisdictions) has increasingly turned to international norms, including in matters pertaining to the use of force and to the governance of an occupied territory. While the Court referred to the Geneva Convention and



other supranational instruments as early as the 1970s (Kretzmer 2002), these instruments were interpreted as placing little constraint on the commander. As of the mid-1990s, in contrast, the judicial treatment of these instruments has been more rigorous, perhaps in an effort to convince jurists from other jurisdictions that international norms are indeed taken seriously in Israel (Reichman 2001).

All three developments listed here could be expected to push in the same direction: less deference, especially in the context of human rights. However, none of these developments is necessarily unique to the military context. If deference has declined as the result of a shift in the Court's self-perception (as the guardian of a substantive rule of law), or as a result of the "constitutional revolution," we can expect to witness a lower level of deference to *all* state agencies, rather than just the military—at least when basic rights are at stake. To a large extent, the same is true if deference has diminished as a result of increased acceptance of international norms: although international law is especially relevant to a review of actions by the military commander, it is sometimes applicable—or can be expected to have influence—in other contexts as well. Nevertheless, it is also plausible that the military has in the past enjoyed special deference beyond the deference afforded other agencies. If this is the case, then the rise of a substantive rule-of-law consciousness might work toward bringing the legal treatment of the military (and the commander) in line with the judicial treatment of other state agencies.

### Managing Institutional Capital

The next three factors that could be viewed as determinants of the level of deference are external *explanations* rather than normative explicit justifications. The third determinant focuses on matters of institutional economy: deference can be seen as a tool used by the Court to manage its institutional capital vis-à-vis the agencies under its judicial oversight. Assuming the reviewed agencies would rather their decisions (and policies) not be overturned by the Court, these agencies are likely to develop a set of tools by which to exact a certain "price" from the Court when such overturning occurs. Such tools may include generating negative public campaigns regarding the Court's lack of understanding or the grave consequences of its interference, thereby seeking to depreciate the degree of public confidence and support enjoyed by the Court (Caldeira 1986); applying political pressure for the law to be redrafted in order to overturn the judicial decision; generating bureaucratic resistance within the enforcing agencies (that is, taking the time to implement the decisions or implementing them only partially, under a contrived interpretation thereof or under "lack of resources" claims); applying pressure for the choice of more favorable judicial nominees in the future; and

other forms of backlash, such as joining forces with other agencies in order to frustrate judicial policies in other areas (see Rosenberg 1992 for US legislative context). Fully aware of these risks, and mindful of the executive's "zone of tolerance" (Hamilton and Braden 1941, 1343), the Court may sometimes invoke deference with the aim of preserving its institutional capital for the cases in which it finds it most crucial to override the agencies (cf. Choper 1980, 129–70). Since the Court is not insulated from external pressures, it cannot ignore the institutional context, which informs the options available to judges (cf. Segal and Spaeth 1993).

In the specific context of the relations between the Supreme Court and the military in Israel, it appears that the Court manages its institutional capital in an innovative way. As shown by Dotan (1999), who examined petitions against the military commander during the first intifada, in order to protect human rights but at the same time avoid direct conflict with the military and the government, the Court encourages the parties to settle either directly, in the courtroom, or indirectly, by enlisting the help of the attorney general's office through a carrot-and-stick technique. As a repeat player, the attorney general's office is mindful of its institutional capital and thus, in order to avoid public rebuke by the Court (and an unfavorable precedent), the attorney general's office, Dotan showed, screens the cases that actually get litigated by accepting some or all of the remedy sought in a substantial number of cases. Examining a sample of petitions filed by Palestinians between 1986 and 1995, Dotan showed that while most of the petitions were not granted, most of them were not denied either. A large number of cases were settled in a way that gave the petitioner some or all of the requested remedy, thus obviating the need to issue a coercive order concluding an adversarial hearing. This method obviously has its drawbacks.<sup>5</sup> But for our purposes here, resort to this method—that is, enlisting the attorney general's help in order to settle cases—reflects a balance between the internal and external pressures to intervene in military decisions in order to protect human rights and the pressure to preserve institutional capital (of all agencies concerned). Assuming that the Court continues to use this system of encouraged

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5. The main drawbacks are, first, that in the absence of comprehensive and consistently applied judicial review with precedential value, legal "gray zones" (which correspond, in part, to Dyzenhaus's (2006) "grey holes" remain, where the military may operate without being officially told that it is acting *ultra vires*, unreasonably, or disproportionately; second, that such a technique depends on the cooperation of the attorney general's office and its lawyers, and on the persistence of the petitioners; third, that this method is problematic insofar as petitions that should have been granted in full end up receiving only partial remedy, because of the parties' anticipation that the Court would adopt a deferential stance in a given case; and lastly, that by refraining from explicitly accepting justified petitions against the commander, the Court—while mitigating in part the effects of the occupation on Palestinian individuals—is arguably helping to legitimize military actions and the occupation in general by providing institutional recognition of the legal machinery by which the occupation is administered.

settlements, we therefore see no reason to expect any change in the level of deference to the military on this specific basis (that is, institutional capital).

### Minimizing the Legitimizing Effect

A fourth factor influencing the level of deference is the legitimizing effect of judicial judgments. Thinking of other audiences (beyond the immediate parties), judges may sometimes wish to appear to be dismissing a case without taking a position on the merits, thus minimizing the legitimizing effect of dismissing a petition as lacking in merits (see Shamir 1990) as well as lowering the dismissal's precedential value. The doctrine could thus be understood as a shield among the Court's deflective or "passive" legal instruments, viewed as a "virtue" by some (Bickel 1961) and as a "vice" by others (Gunther 1964).

This strategy may be utilized in particular when a case is of interest to an international audience. The fact that an international audience is watching may lead the Court in opposite directions. It may lead it to exercise *greater* deference to the military, in order to avoid legitimizing the occupation, on the one hand, or exposing the Israeli military as a culprit, on the other hand. But it may also pressure the Court to show *less* deference and thereby convince the international audience that the Court is vigilant in complying with international norms (assuming that these norms set a lower deferential bar). To the extent that the Court is sensitive to the legitimizing effect of its conduct, the presence of an international audience may thus work in opposing directions: a greater pressure to uphold international norms but also a greater pressure to sidestep controversial issues that may be detrimental to the standing of the state in the international arena. We have no reason to expect one of these poles to have generated greater pull in recent years, so we formulated no hypothesis based on the fourth deference determinant when applied to the particular context at hand.

### Managing Judicial Resources

Finally, deference also plays a role in the management of judicial resources, because it allows the Court to conserve the judicial time and energy required for elevated levels of scrutiny of governmental decisions. This can be seen as a fifth determinant of the level of deference. Put bluntly, deference allows the Court to retain its unique position as an agency in charge of reviewing administrative action, without itself becoming an administrative agency. This aspect is especially pertinent in the Israeli context, where the Supreme Court retains original jurisdiction over large swaths of public law matters. While the Court does have some mechanisms with which to control

its own docket, these are limited as a matter of law and as a matter of legal culture. The Court is at least somewhat bound by its publicly explicit commitment to its role as the guardian of the rule of law and by the expectation that petitioners who seek redress against violations of their basic human rights be provided (at least the appearance of) meaningful access to justice. Most notably, the Israeli Supreme Court, when sitting as a High Court of Justice, may not, as a matter of law, simply write, “Cert. denied.” It must provide at least some reasons for the denial.

In such institutional settings (and under such a normative design), the doctrine of deference operates as a safety valve of sorts: the Court may deploy it when it senses that on the merits the behavior of the state is “reasonable” under the circumstances without spending further resources to fully investigate the matter. It would therefore resort to deferential language of the sort of “We saw no reason to intervene in a matter lying within the expertise (or the competence) of the commander.” Beyond conserving resources in the case at hand, such a technique may also yield future gains, as it may be useful in ensuring the “buy-in” of the reviewed agency. Respecting the judgment of the agency on the matter by deferring to it decreases the likelihood that the agency will in the future prefer resistance over compliance, a course of action with clear implications for managing judicial resources.

Given that the caseload before the Israeli Supreme Court has risen dramatically over the years, without any significant rise in the number of judges, one could expect the Court to *increase* its tendency to resort to the use of deference. However, there is another alternative; taking into consideration the fact that other determinants (listed previously) are pushing for a *decrease* in deference, the Court could resort more extensively to the method identified by Dotan (1999)—intervention by way of encouraging the attorney general to settle, thus reaching an acceptable outcome without increasing the judicial resources spent on the case. Either way, any impact that managing judicial resources has on the level of deference is not expected to appear specifically in petitions against the military commander, but rather in any other group of petitions as well.

### The Goal and Structure of the Study

We have listed five different factors that in general could affect the level of deference shown by courts to the other branches of government. We have also applied this general framework to the specific context of the Israeli Supreme Court’s attitude toward the military commander and have asked whether it could be expected to have changed in recent years. We summarize this analysis in Table 1. On the basis of this analysis, the main hypothesis we set out to examine in this study is that in recent years the level of deference

**TABLE 1.**  
**Summary of Deference Determinants and Hypotheses**

General determinants of deference	Application to the context of deference to the military commander	Hypothesis concerning the change in recent years in the Israeli context	Possible alternative explanations (control groups)
Deference to institutional competence and expertise of other agencies—subject to abuse of trust	Deference to the expertise of military officials is traditionally high.	Prolonged conflict exposes the Court to military misconduct, which leads to lower trust, which in turn leads to less deference.	Lower public trust in government agencies in general leading to decreased deference could be a general phenomenon (not unique to cases involving the military commander).
Deference to elected branches, which enjoy stronger participation-based legitimacy—subject to the Court's self-perception regarding its role as guardian of substantive rule of law	Deference to government and vicariously to (unelected but supervised) military officials is traditionally high—especially when high-risk matters are at stake (since the Court wishes to deflect accountability concerns in case of judicial error).	Prolonged conflict creates routine violations of human rights leading to increased pressure (internal and from the legal community) on the Court to intervene as the guardian of substantive rule of law leads to less deference.	Increased review of the discretion of government agencies, increased emphasis on human rights, and increased emphasis on international norms all suggest that decreased deference could be a general trend not limited to cases involving the military commander.
Deference in order to manage institutional capital (i.e., limit conflicts with other branches)	Court may minimize interventions (since in emergencies the military is less tolerant), and “camouflage” the rare cases in which it issues remedies by recourse to favorable dismissals.	No change expected	
Deference in order to minimize the legitimizing effect of the judgment	Court might use more deference to avoid legitimizing the occupation, or less deference to show strict adherence to international norms.	No specific change expected	
Deference in order to manage judicial resources (i.e., limit the number of detailed judicial inquiries and judgments)	Large number of petitions could trigger more deference or, alternatively, a resort to favorable dismissals—but this is not limited to petitions against the military commander.	No change unique to cases involving the military commander expected	

the Supreme Court grants the military commander has decreased as a result of the prolonged armed conflict.

In order to measure judicial deference, we had first to define the judicial output. In an important study, Dotan (1999) showed that judicial decrees do not exhaust the judicial product; rather, informal proceedings and settlements—sometimes in the shadow of the expected judicial proceedings and sometimes as part of those proceedings, with the active encouragement and solicitation of the bench—are a significant component of judicial business. However, unlike Dotan's study, which focused on the overall performance of the Court, this study focuses on deference, and deference has to be manifested somehow in a Court's decision. Consequently, the judicial product relevant to our research was all the Supreme Court cases filed against the military commander and decided during a specified period of time, including decisions consisting of no more than a few lines that summarily dismissed cases for whatever reason.

For our purposes, these decisions were divided into three groups: rejected petitions (decisions that flatly rejected a petition), granted petitions (decisions granting the requested remedy, or parts thereof, by finding for the petitioner as a matter of law), and favorable dismissals (decisions that rejected or dismissed the petition while ensuring that the remedy would nonetheless be provided or had been provided by the commander). Decrease in deference is reflected, under our hypothesis, by an increase in granted petitions or an increase in favorable dismissals.<sup>6</sup>

The outcome of the case is the clearest indication regarding deference (or lack thereof)—but the phenomenon of deference is not limited to the outcome. By definition, deference reflects preferential treatment accorded to the *discretion* of the state agency, and therefore analyzing deference requires probing into the details of each case (to the extent these could be gleaned from the judgment) in order to understand the reasons behind the decision. We therefore suggest some additional indicia for deference. First, the judicial response to the specific causes of action put forward by the petitioners may reveal whether the Court is more (or less) receptive to causes of action that directly challenge the commander's discretion, such as the "reasonableness" or "proportionality" of the decision. The more seriously the Court entertains "errors of discretion" claims, the less deferential the Court is. Second, and in a similar vein, a deferential Court is likely to bow, both rhetorically and substantively, to the argument of urgent military needs. Therefore, attention should be paid not only to the arguments put forward by the petitioners, but also to those advanced by the state. Third, indirect variables

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6. While we generally treat, in this study, petitions that were favorably dismissed as reflecting a nondeferential posture, it is important to keep in mind that this method of intervention is chosen by the Court in order to achieve at least some of the same goals that deference is expected to achieve. This point will further be developed in the following pages.

are also informative. It stands to reason that a deferential Court is more inclined to side with the government by indicating that it trusts the government's judgment when a detailed affidavit is filed on behalf of the commander (or some other government agent) and perhaps even more so when the commander appears in person before the Court to provide *viva voce* testimony. Lastly, the rhetoric and forms of argumentation the Court uses can be indicative; a deferential Court is likely to use standard and laconic templates, while a less deferential Court is likely to highlight the uniqueness of each case and the special considerations that should apply to the particular case before the bench, thereby revealing a closer scrutiny of the commander's discretion.

If we have adequately unpacked the concept of deference, an empirical examination of the relevant judicial product should reveal whether the *Abu-Dahar* case is an anomaly or whether our hypothesis regarding the decline in judicial deference to the military commander is indeed a pattern. If it is, it is then necessary to compare this pattern to the judicial attitudes toward the IDF in general (that is, in cases not related to its activities in the Occupied Territories), as well as to judicial attitudes toward other state agencies, in order to be able to understand the contours of the pattern and—to the extent possible—the reasons for it.

### III. METHOD

We located all the judgments handed down by the Israeli Supreme Court in petitions against the military commander, from August 1990 through August 2005, as available in electronic databases—altogether 439 judgments. These data include decisions to dismiss a petition because the commander had voluntarily changed his mind as well as for any other reason. We broadened our search to include various alternative titles that were used instead of that of military commander, that is, petitions against the IDF, the IDF commander, the chief of staff, and other such permutations. We used the public database of the official Web site of the Supreme Court, as well as a number of commercial databases available in Israel, to corroborate the data.<sup>7</sup>

For each retrieved judgment, we noted the subject matter of the petition (which involved distinguishing among fifty-two different kinds of petitions,

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7. The Supreme Court official database is available at <http://www.court.gov.il>. There are probably additional cases that have not reached the electronic databases for various reasons, especially those occurring in the earlier period (the early 1990s), which preceded the establishment of those databases. Although the databases cover the earlier periods as well, coverage of these periods is far from complete. We believe, however, that such omissions have no significant bearing on this study. There is no reason to suspect that any cases we may have missed are statistically tilted toward greater or lesser deference.

which were later grouped together), the causes of action, whether any of the parties submitted affidavits or expert opinions, whether an IDF official appeared in person before the Court, whether the commander argued that there was an urgent military necessity for his decision, and what kind of rhetoric the Court chose to use. Special attention was paid to the results of the petitions. For each judgment, we noted whether the petition was flatly rejected; accepted in whole or in part (and what was the cause of action accepted); accepted even after the state promised to rectify the situation; dismissed (or withdrawn) for reasons not related to the filing of the petition (for example, the petition had become irrelevant); dismissed after the petitioner received the requested remedy, whether in whole or in part, as a result of filing the petition; or dismissed on the basis of the state's promise to reconsider the commander's decision.<sup>8</sup>

Our research assistant read all the retrieved judgments and prepared a case summary for each judgment with all the required information. We then devised an appropriate coding scheme, and the same research assistant coded the entire body of case summaries. Another research assistant independently read and coded 20 percent of the judgments (randomly selected) to enable the assessment of interrater reliability. Reliability was very high, with kappa values ranging from .76 (93 percent agreement) to 1.0 (100 percent agreement) for all the variables.

For purposes of comparison, we located all the judgments handed down by the Israeli Supreme Court in petitions against the IDF unrelated to the Occupied Territories during the same period (August 1990 to August 2005). Altogether we found 78 cases in this group. We also selected a random sample of 398 Supreme Court judgments in general petitions (unrelated to the IDF) from the same period (20 for each year during the 1990s; 33 for each year during 2000–2005, to match the collected data concerning the military commander). For these two additional groups of cases, we examined the same indicators (except for those that were inapplicable) and used the same coding scheme. We also examined which of the “general” petitions were related to human or civil rights in order to check for changes in the Court's attitude toward such cases in contexts unrelated to the military.<sup>9</sup> One research assistant read through and coded each of these groups, and another assistant ensured interrater reliability in a similar way for these cases as well. Reliability was again very high, with kappa values ranging from .86 (97 percent agreement) to 1.0 (100 percent agreement).

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8. We examined various other components of each judgment that are not directly related to this article.

9. Of the 398 cases in our sample of general petitions, only 45 turned out to be human or civil rights petitions. To improve the possibility of finding significant changes in this context, we added 31 randomly selected cases in which human or civil rights claims were raised. Altogether, this created a 76-strong group of cases characterized as dealing with human or civil rights.



## IV. RESULTS

### The Practice of Favorable Dismissals

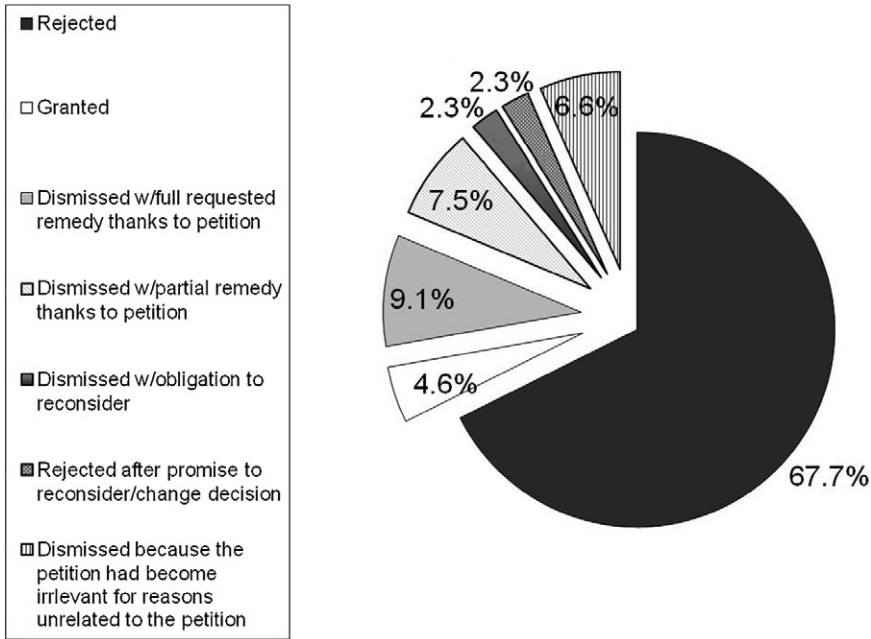
Of the 439 petitions against the military commander during the examined time period, only a small number (4.6 percent, 20 cases) were granted, in the sense that the Supreme Court issued a decisive order against the military commander.<sup>10</sup> Hence, at first sight the Court's approach might appear to be highly deferential, as would be expected for petitions against the military commander. However, a closer look reveals a different picture. Our results corroborate the finding of Dotan (1999) that a large number of cases end with a favorable result for the petitioner—in the sense that the petitioner achieves at least some of the requested remedy—even though the petition is formally dismissed.

During the fifteen-year period we examined, 67.7 percent of the petitions against the military commander (297 out of 439) were flatly rejected. As already noted, only 4.6 percent of the petitions were granted. We analyzed the rest of the petitions carefully to differentiate those that were dismissed because the matter had become irrelevant from those that were dismissed because the petitioner had, as a matter of fact, received all or part of the requested remedy *as a result of filing the petition*. Altogether 21.2 percent of the cases (93 out of 439) could be characterized as being in the last group. This includes settlements reached with the Court's encouragement, as well as other cases in which, as a result of the petition, the commander decided to change his decision (or was forced by the state attorney's office to do so), and, on the basis of this development, the Court dismissed the petition. It also includes cases in which the state promised to reconsider its position, and the Court dismissed the petition or rejected it on the basis of that promise. We refer to all these cases together as favorable dismissals.<sup>11</sup> These results are summarized in Figure 1. For the rest of the analysis, we excluded the 29 petitions that were dismissed because they had become irrelevant for reasons unrelated to the petition itself (for example, when the commander, for his own reasons, no longer intended to use the military means to which the petition objected).

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10. This includes three interim orders and one decision accepting a petition for a rehearing. Only in sixteen cases did we find a final order on the merits of the case.

11. Admittedly, cases in which the state promised to reconsider its position did not necessarily end with a favorable result for the petitioner. But in the Israeli legal culture, the government (and the military) cannot and do not easily ignore the recommendations of the Court or their promises before the Court. So in practice it is fair to assume that in many of these cases the petitioner did indeed achieve some of the requested remedy. In any case, only ten cases (2.3 percent) fall in this category, so even their exclusion from the "favorable dismissals" group of cases will have no dramatic bearing on the results as reported here.



**FIGURE 1.**  
 Court's decisions for 439 petitions against the military commander, 1990–2005

While the basic finding of Dotan (1999) regarding the significance of this phenomenon was corroborated, its magnitude appears to be of a lesser degree than he found. Our result of 21.2 percent favorable dismissals is much lower than the 51.7 percent found by Dotan. However, this can be explained by the fact that Dotan's data included petitions that were settled out of court and as a result were probably withdrawn by the petitioners themselves; that is, they did not even reach the stage at which they might have been formally dismissed by the Court. Since the aim of the current study was to examine judicial deference over time, the study covers only cases in which a judgment was handed down. Moreover, we covered a longer period of time than that covered by Dotan (who examined the years 1986–1995), and we analyzed the entire body of available judgments that resolved petitions brought against the military commander rather than just a sample.

Turning to our control group, we found that the practice of favorable dismissals is not restricted to petitions related to the Occupied Territories or even to petitions against the IDF more generally. Of the 78 petitions against the IDF that were not related to the territories, 21.8 percent (17 judgments) were favorable dismissals. Of the examined 398 petitions against state agencies unrelated to the IDF (general petitions), 23.0 percent (91 judgments)

were similarly favorably dismissed.<sup>12</sup> We thus found this judicial technique for avoiding confrontation with the other government branches to be prevalent and not limited to any particular kind of case.

Our evidence shows that when the Court intervenes for the petitioner, it is much more likely to do so via a favorable dismissal; if we leave aside the rejected petitions and focus on the other two groups—granted petitions and favorable dismissals—we find that the latter represent 82.3 percent of all favorable judgments in petitions against the commander, 70.8 percent of the favorable judgments in other petitions against the IDF, and 68.4 percent of favorable judgments in general petitions. This seems to suggest that the Court is very mindful of the need to preserve institutional capital and manage judicial resources, as noted previously.

The fact that on average the Court deploys this technique more readily in petitions against the military commander may indicate that the Court prefers to avoid issuing a direct ruling against the commander *more* than it cares about projecting such an appearance in petitions against other agencies. Interestingly, we did not find a similar judicial attitude when we looked separately at those general petitions (unrelated to the military) that could be characterized as dealing with human or civil rights. Among this group of seventy-six cases, thirty-three ended favorably for the petitioners, but only ten of them—30.3 percent—by way of favorable dismissals (the other twenty-three petitions were granted explicitly and conclusively). The Court is apparently less apprehensive of head-on confrontations with other governmental agencies (compared with the military) when the protection of basic rights is at stake.

### More Petitions against the Commander Ending Favorably

Examining the data by looking for possible changes *over time* between the years 1990 and 2005, we found an increase in the number of petitions against the military commander ending favorably (either being granted or favorably dismissed)—or, put another way, a decrease in the number of rejections. To examine the change over time, we computed the Spearman correlation between the year of decision and the ratio of petitions that were rejected to those ending favorably. We found a modest but significant negative relationship ( $r = -.17, p = .001$ ), indicating that the number of rejections decreased significantly over time. As shown in Figure 2, this difference is quite clearly accounted for by the increase in favorable dismissals.

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12. The percentage of *granted* petitions was higher in our two control groups: 9.0 percent in petitions against the IDF not related to the territories, 10.6 percent in the sample of general petitions.

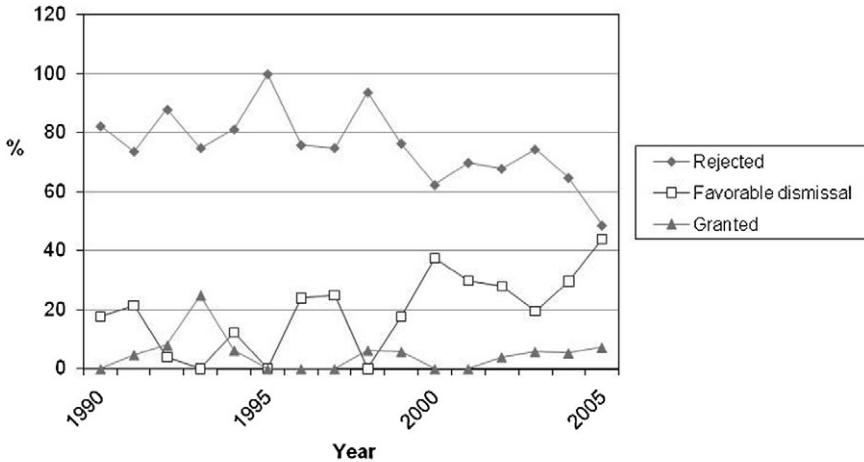
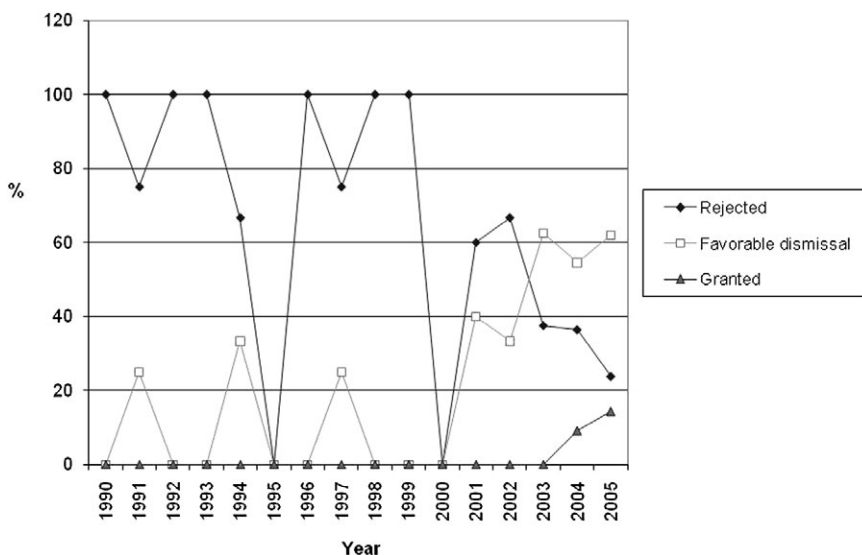


FIGURE 2.  
Decisions in cases of petitions against the commander by year

The Court's changing attitude toward the military commander seems even more remarkable once we exclude the petitions of Jewish settlers as well as matters that do not directly influence the daily lives of Palestinians (such as petitions against commissions of inquiry, petitions against the promotion of IDF officials, etc.). When we focus on "routine" Palestinian petitions concerning the commander's day-to-day decisions<sup>13</sup>—311 cases altogether—and examine the change over time, the correlation is stronger ( $r = -.23, p < .001$ ). Even stronger is the increasing willingness of the Court to intervene in the context of Palestinian petitions concerning the demarcation of the security barrier, infringement of property rights, and travel permissions to leave or enter the Occupied Territories. We located 88 judgments bearing on these concerns altogether, and rejections fell dramatically over the years from 1990 to 2005 ( $r = -.47, p < .001$ ). The results in this group of cases are presented in Figure 3. It is important to note, however, that we found no evidence to suggest that the diminished deference is a result of any *specific* policy of the commander, that is, that this change can be attributed to any one specific reason.<sup>14</sup>

13. Requests for entry/exit permits, limitations on movement or area of residence, deportation, demolition of houses, the separation barrier, takings and other infringements of property rights, roads blocking, requests for protection, requests concerning burial, rights of detainees and their families, family unification, residency status, business license permits, and similar issues.

14. For example, over the last few years the Supreme Court has faced a barrage of petitions against the exact demarcation of the separation barrier (which in several places is drawn east of the Green Line, that is, within the Occupied Territories). While the Court demonstrated its willingness to entertain such claims, and while on occasion it granted a petition (12.5 percent



**FIGURE 3.** Decisions in cases of Palestinian petitions against the commander concerning the security barrier, property rights, and entry/exit permits by year

An illuminating way of presenting the change is to divide the examined period of time into two periods around the median case. If we compare the 203 cases handed down between 1990 and 1999 with the 207 cases handed between 2000 and 2005, the rejection rate in petitions against the commander falls from 79.8 percent to 64.7 percent.<sup>15</sup> This is a result of the rise in favorable dismissals from 15.3 percent of the cases during the first period to 30.4 percent during the second one. If we look only at Palestinian petitions, the rejection rate is quite similar during the 1990s (79.9 percent) but falls more dramatically to 59.9 percent from 2000 through 2005. While the number of petitions formally granted did not change much, the number

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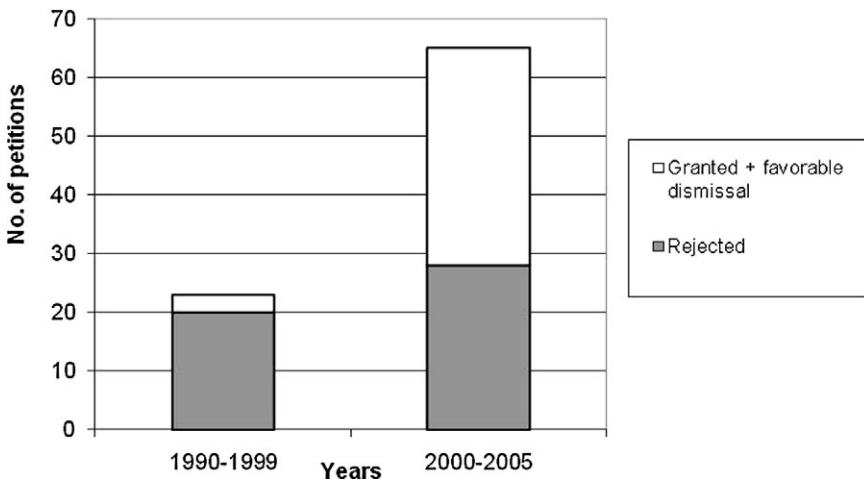
of twenty-four petitions) or favorably dismissed others (41.7 percent of those petitions), such an attitude does not by itself account for the overall increase in the rate of favorable outcomes. If we exclude the cases related to the separation barrier and redo the statistical analysis, there is still a significant drop in rejections over the years ( $r = -.12, p = .016$ ).

15. As stated, we chose the periodization primarily as a way to split the data into two groups of cases of relatively equal size (that is, around the median case), a technique that enables us to bring the change over time into sharper focus. However, we are well aware of the fact that one might expect the outbreak of the second intifada in 2000 to influence judicial performance. One would have expected the Israeli Court to *increase* its deference during a period of high-intensity conflict by restricting judicial involvement altogether and refraining from granting petitions, whether in toto or partially. Our data, however, do not reveal a drop in the number of petition granted or in the number of favorable dismissals. The increase we find in the number of favorable dismissals is therefore noteworthy. We discuss the further analysis of this increase and its possible relation to high-intensity strife in the following pages.

of petitions ending favorably for the plaintiffs certainly did. Palestinian petitions against the military commander during the 1990s were flatly rejected four times out of five. Between 2000 and 2005, the rejection rate fell to three times out of five. This means that in two out of every five petitions, the commander was forced to change or reconsider his decision as a result of the petition. Deference to the military commander has therefore significantly declined. To be clear, this decline in deference is observable continually over time—it is not associated with any marked change in 2000. The division into two periods of time is used here merely as an additional way to present the data because we believe it to make this change especially clear.

When the same convenient division into two periods of time was used, and only petitions concerning the demarcation of the security barrier, infringement of property rights, and travel permissions to leave or enter the Occupied Territories were examined, the rejection rate dropped from a whopping 87 percent (twenty out of twenty-three cases) during the 1990s to merely 43.1 percent (twenty-eight out of sixty-three cases) during 2000–2005 (see Figure 4).

Dotan (1999) tied his findings concerning favorable dismissals to the intifada that took place during the years he examined. He argued that out-of-court settlements are used ingeniously by the Court—and by the state attorney's office (High Court Division) as its "agent"—to protect the human rights of Palestinians during times of strife, while avoiding a clash with the other branches of government. Our study shows a continuing



**FIGURE 4.** Decisions in cases of Palestinian petitions against the commander concerning the security barrier, property rights, and entry/exit permits, 1990–1999 and 2000–2005

growth in the rate of favorable dismissals, which accounted for 14 percent of the judgments from 1990 to 1993 (until the end of the first intifada), 16.8 percent in the period between 1994 and 1999, and as much as 30 percent from 2000 onward (the period of the second intifada). It is therefore not clear whether this practice is limited to times of particular strife. While a significant increase in favorable dismissals occurred at the beginning of the second intifada in 2000, one can also observe a continuing increase over the years, not necessarily during peaks in the Israeli-Palestinian conflict. On the other hand, even during the era of the Oslo Accords in the 1990s, the armed conflict never completely ceased. We observed no correlation between the intensity of the strife and the resort to favorable dismissals. We can therefore surmise that the logic of Dotan's argument can be extended: favorable dismissals are a tool used by the Court in the context of armed conflict. But the focus then changes; it is no longer the distinction between times of strife and times of peace (or the intensity of the conflict) that determines the recourse to this judicial technique, but rather the prolongation of the armed conflict. We discuss this further in Part V.

An analysis of our control groups reveals that the decline in deference is a development unique to petitions against the military commander—at least in magnitude. Looking at petitions against the IDF in matters unrelated to the territories, we found some indication of a drop in the number of rejections as a result of more favorable dismissals—but this reduction was not statistically significant ( $r = -.07$ , ns). When we compared this result with the rejection rate for petitions against the commander, the difference between the two correlations was not significant ( $Z = .81$ , ns), not even when we compared it only with Palestinian petitions ( $Z = 1.27$ , ns). We also found similar indications of a decrease in deference over time in the general petitions dealing with human and civil rights—yet once again with no statistical significance ( $r = -.13$ , ns), and no significant difference when compared with the correlation of petitions against the commander ( $Z = .34$ , ns;  $Z = .81$ , ns, when compared only with Palestinian petitions). Finally, there was no indication of diminished deference in our sample of general petitions—indeed, the rejection rate even grew slightly (though not significantly) over the years ( $r = .02$ , ns). Importantly, comparison of the change in deference in the commander's decisions with that in the general decisions showed the difference between them to be significant ( $Z = 2.72$ ,  $p < .001$ ), and it is even more dramatic when the comparison is between general decisions and Palestinian petitions only ( $Z = 3.37$ ,  $p < .001$ ).

In Figure 5 we present the estimated slope, computed through the use of linear regression analysis, of the change in deference over time for each group of cases (petitions against the commander, Palestinian petitions against the commander, petitions against the IDF unrelated to the territories, general petitions, and human and civil rights petitions).

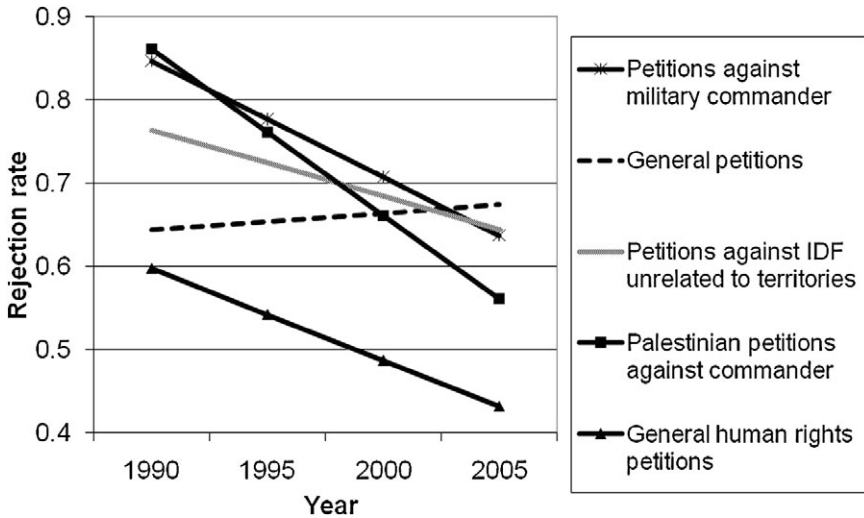


FIGURE 5.  
Rejection rates for all petitions brought before the Court

#### Causes of Action: Greater Willingness to Review the Commander's Discretion

Our results show that the Israeli Supreme Court is no longer willing to accept unquestioningly decisions made at the military commander's discretion. The increasing willingness of the Court to closely monitor (if not to second-guess) the commander's decisions can also be observed by way of an examination of the causes of action upon which the petitions are legally based.

Over the fifteen-year period we examined, there was a steady decline in petitions questioning the legal authority (competence, or *vires*) of the commander to make certain decisions and an increase in claims that the commander erred in applying his discretion. Most notable is the new focus on the question of proportionality—which invites a more detailed examination of the commander's decisions and whether those decisions achieved an appropriate balance between competing rights and interests. Figure 6 contrasts the use of *ultra vires* arguments and arguments that the commander's decision violated the principle of proportionality. It shows how proportionality arguments, which began to arise only in the early 1990s, quickly became prominent: during 2000–2005, such arguments were raised in at least 33.3 percent of the petitions every single year and as much as 50 percent in 2005. In contrast, *ultra vires* arguments were popular during the early 1990s, appearing in as much as 68.4 percent of the petitions in 1991, but the percentage gradually dropped, and we found such arguments only in 31 percent of the petitions in 2005. The decline in *ultra vires* arguments ( $r = -.15, p = .033$ ) and



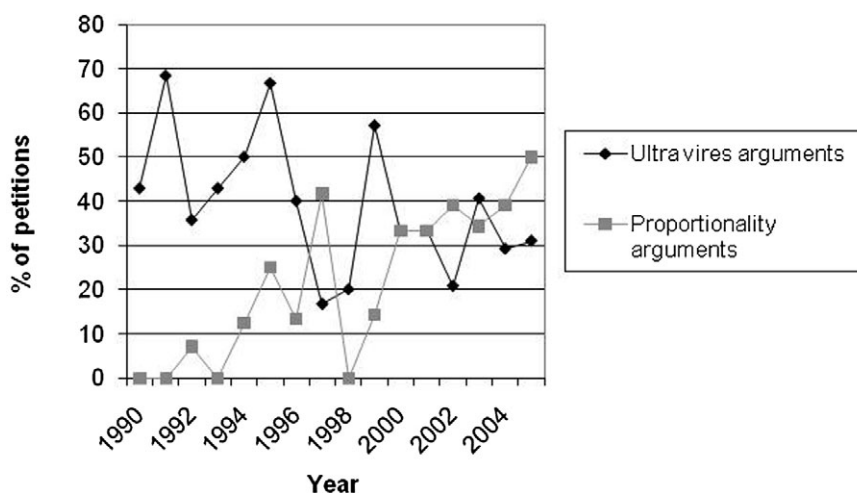


FIGURE 6.  
Arguments used in cases of petitions against the commander by year

the rise in proportionality arguments ( $r = .35, p < .001$ ) over the years are both significant.<sup>16</sup>

Comparing these figures with our control groups, we found a growing tendency to resort to proportionality arguments in the general petitions as well ( $r = .20, p = .001$ ), especially when human or civil rights were involved ( $r = .46, p = .008$ ). Interestingly, however, this change was not significant in petitions against the IDF unrelated to the Occupied Territories ( $r = .14, ns$ ). Moreover, we did not find an accompanying decrease in ultra vires claims. In the general petitions these are still popular and have even grown slightly in number ( $r = .08, ns$ ), and the same is true for human and civil rights petitions ( $r = .18, ns$ ). In petitions against the IDF unrelated to the territories, there was some decline, but it was not significant ( $r = -.05, ns$ ). Overall, then, petitions against the military commander appear to be unique in the significant shift from ultra vires arguments to claims of disproportionality. This provides additional support for the growing willingness of the Court to examine in detail the decisions of the commander in a less deferential manner.

### Additional Evidence for Growing Mistrust

We found additional evidence of the Court's growing skepticism of the military commander. Looking only at cases in which the commander filed an

16. We do not rely here on the cause of action on the basis of which petitions were *granted* because the number of granted petitions is too small to allow for statistical analysis. But the direction certainly appears to be similar in such petitions as well: a greater tendency to accept proportionality arguments—as opposed to ultra vires arguments—over the years.

affidavit or an expert opinion,<sup>17</sup> we found a significant increase in the percentage of rejected petitions over the years ( $r = .43$ ,  $p = .013$ ). Once again this is evident in a comparison between the 1990s and the period from 2000 to 2005. In the first period of time, the commander filed an affidavit in nineteen cases, of which fifteen (78.9 percent) were flatly rejected. In the second period, in contrast, an affidavit was filed in fourteen cases, of which only five (35.7 percent) were rejected. When only Palestinian petitions are taken into account, the difference is even more striking: an 86.7 percent rejection rate during the 1990s as opposed to only 35.7 percent during 2000–2005. To be sure, it is likely that affidavits are filed only in cases that are more difficult from the state's point of view. Nonetheless, in the past an affidavit filed by the commander was able to carry the day: a detailed explanation of the military considerations usually meant a rejection of the petition. It was highly unlikely that the Court would dispute the stated facts or the weight of the military concerns articulated in the affidavit. But during 2000–2005, approximately two out of three cases in which an affidavit was filed ended with at least some acceptance of the petitioner's position.

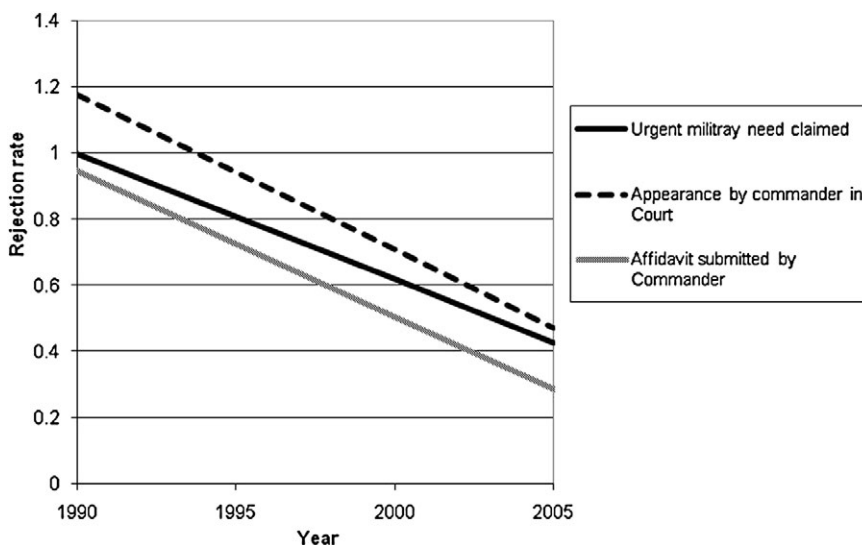
In terms of our control groups, although there was some indication over the years of a greater number of rejections of petitions despite the filing of an affidavit, this change is not statistically significant ( $r = .08$ , ns, in the general petitions;  $r = .17$ , ns, in petitions against the IDF unrelated to the territories).

Further support for diminished deference can be found in the cases in which the commander argued an urgent military necessity (thirty-five cases altogether). We examined the extent to which the Court showed willingness to intervene despite such a strong statement by the commander. In cases where the commander invoked this argument, the rejection rate fell over the years. While the change is not significant in terms of the entire body of cases related to the military commander,  $r = -.22$ , ns, it becomes significant once we consider only Palestinian petitions (twenty-seven of those thirty-five cases):  $r = -.40$ ,  $p = 0.038$ .

Even more powerful is the decline in the impact that the personal appearance of the military commander had on the Court. One would expect a relatively high degree of deference to a high-ranking general appearing in person before the Court to explain his military decision. But the stature of the commander has apparently suffered a great blow over the years. We found six cases during the 1990s in which the commander appeared in Court, in *all* of which the petition was flatly rejected. But during 2000–2005, when there were nine appearances, only in five of them (55.6 percent) did this lead to

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17. In Israel the state is automatically required to submit an affidavit when an order nisi is issued, but the state may also submit such an affidavit in its preliminary response to the petition. Sometimes an affidavit—whether in response to an order nisi or in the attorney general's preliminary response—is laconic in nature, and therefore not mentioned by the Court. We refer here only to cases in which we find explicit reference in the judgment to such an affidavit/expert opinion.



**FIGURE 7.** Rejection rate of cases of petitions in which the commander submitted an affidavit, appeared before the court, or argued urgent military need by year

rejection of the petition. Of the other four cases, one petition was granted, and the other three can be classified as favorable dismissals (not surprisingly, these were all Palestinian petitions). Examining the relationship between the appearance of a military official in Court and the rejection rate throughout the period, we found a strong and significant negative correlation ( $r = -.634$ ,  $p = .011$ ), that is, significantly fewer rejections over the years.

Figure 7 shows the estimated slopes, computed by linear regression analysis, of the change in rejection rates over time for Palestinian petitions when (1) the commander submitted an affidavit ( $N = 29$ ), (2) the commander appeared in Court ( $N = 15$ ), and (3) urgent military necessity was claimed ( $N = 27$ ).

### A Change of Rhetoric

Unlike its American counterpart, the Israeli Supreme Court hears and determines what course of action to take regarding an enormous number of petitions each year (in 2005, for example, 2,497 petitions were heard).<sup>18</sup> It is therefore hardly surprising that the judges tend to make repeated use of some

18. According to data from the Court's official Web site (<http://www.court.gov.il>), this figure is in addition to numerous other cases that the Supreme Court decides each year in its capacity as an appellate court (alongside its capacity as the High Court of Justice).

common phrases. An examination of these rhetorical tools lends further support to the conclusion that judicial deference has diminished. Although our data are more limited (we were able to document the use of standard phrases in only 114 cases), the results are revealing. We identified several catchphrases, or “templates,” the Court routinely used to defer to the commander and found a decline in the use of such phrases. For example, “The Court gives decisive weight to the opinion of the military commander” appeared significantly less over time ( $r = -.27, p = .004$ ). This phrase was found in twelve out of thirty-five cases (34.3 percent) during the 1990s and in only seven out of seventy-nine cases (8.9 percent) from 2000 to 2005. Similarly, the phrase “Responsibility falls on the shoulders of the commander,” which featured regularly in the 1990s, was less in vogue from 2000 to 2005. An examination of the appearance of this phrase revealed a significant decrease over time ( $r = -.20, p = .028$ ).

In contrast, contra-deference templates—those in which the Court stressed that it reached its conclusion on the basis of its own assessment of the security risks—were on the rise. For example, “We have been convinced that there is a real security threat” appeared much more in the first five years of the twenty-first century (significant increase over time,  $r = .22, p = .019$ ). These patterns demonstrate that the judges increasingly rejected petitions only after making their own determination of the necessity of military decisions rather than basing such judgments on the commander’s opinions. At the very least, it suggests that this is the message judges sought to convey to the various audiences attuned to the judicial performance.

## V. DISCUSSION

The judgment in the *Abu-Dahar* case—which revealed a surprising lack of deference to the military commander—was not, as this research revealed, an isolated incident. As we suspected, it was a sign of changing times. An examination of the entire body of Supreme Court judgments in petitions against the military commander from 1990 through 2005 reveals a clear pattern of change. Deference to the military commander has notably diminished.

### A Brief Summary of the Findings

We found a significant shift in attitude toward the military commander during the period from 1990 to 2005. The number of Palestinian petitions flatly rejected fell from approximately 80 percent during the 1990s to approximately 60 percent during 2000–2005. This was not the result of any change in the rate of granted petitions. Rather, the change is the result of an

increase in favorable dismissals. This practice of the Court—dismissing petitions after ensuring that the petitioner has received (or will receive) some of the requested remedy (or all of it)—is not new. But the rate of such occurrences has increased. At the very least, the numbers reveal that it has become more common for the Court to specifically note, as part of its decision, that the remedy sought has in fact been granted (in whole or in part) even if the case is dismissed. In so doing, the Court guarantees that the petitioner receives a legally binding assurance that the remedy will be provided. Some additional findings demonstrate the relative depreciation of the military's stature in the eyes of the Court. Primarily, the reasoning of the Court and its rhetoric rely more on substantive examination of the reasons put forward by the commander than on the commander's expertise or ultimate responsibility. The change is documented by the growing use of proportionality arguments, which invite an examination of each decision on its merits, as opposed to an examination of formal legality. The rhetoric of the Court—which relies less on an unquestioning acceptance of the commander's discretion and more on an independent assessment of his decision—provides additional support for this change. In a similar vein, while in the past an appearance by the commander before the Court, the submission of an affidavit signed by the commander, or the mention of urgent military needs would almost automatically lead to rejection of the petition, today the Court is much less impressed by such tactics. Indeed, it appears that the Court has developed a degree of skepticism, if not mistrust, of the military commander.

Comparison with a number of control groups revealed that this is not a general phenomenon. We did not find a similar change in attitude—at least not a statistically significant one—with regard to petitions against the IDF as a whole (unrelated to the Occupied Territories), petitions against other governmental agencies, or a sample of petitions dealing with human or civil rights.

### **Diminished Deference Does Not Necessarily Help the Palestinian Population**

Before we discuss the possible underlying reasons for the shift we detected, it should be stressed that this shift does not necessarily mean that the situation “on the ground” has improved for the Palestinians. A rise in favorable dismissals and greater willingness to entertain claims regarding proportionality are just that. Other factors—such as access barriers to courts and possibly harsher baseline military policies—may mean that the net effect has been a negative one for the Palestinian population. Furthermore, lesser deference does not necessarily mean a fairer system. For example, diminished deference entails a greater willingness by the Court to exercise its own

discretion and review the decisions of the military (and the government lawyers) on their merits. This shift from a more rigid system of rules to a more nuanced system of discretion may amount to a shift from a system of rights to a system based on “the pleasure of the ruler”—the Court being the ruler here. The expressive content associated with such benevolence entails a form of subjugation, even if the benevolent ruler in fact improves daily conditions (and, as mentioned, this is unclear). Similarly, judicial willingness to explicitly refer to the remedies the petitioners have been granted even as the petition is dismissed may be means of placating the possible criticism that might otherwise be launched against the system for its lack of responsiveness (cf. Nonet and Selznick 2001). The diminished deference may thus be a revised tool for maintaining the overall perceived legitimacy of the system (cf. Shamir 1990; Kretzmer 2002; Gross 2007). We therefore do not make the claim here that this diminished deference necessarily entails a greater protection of human rights *de facto*. We realize that the change detected in judicial attitude is only one part of the larger web of norms and institutions involved in governing the occupied territories. However, it is sometimes important to focus on the trees rather than the forest; understanding trees helps us understand forests.

### Explaining the Change in the Level of Deference

In Part II we put forward a number of possible explanations for changes in the level of deference shown to the military commander and hypothesized a decrease in such deference. The results corroborate this hypothesis. We did not find evidence that the Court was becoming more deferential in order to avoid legitimizing military actions. Nor did we find evidence that deference increased as a means to overcome massive caseloads.<sup>19</sup> We also found no support for a decline in deference *across the board* as a result of lower public trust in governmental agencies as a whole—our sample showed that the level of deference in cases of general petitions remained relatively constant over the years from 1990 to 2005.

The main hypothesis supported by our findings connects the decline in deference to the military commander with the existence of a prolonged armed conflict. We hypothesized that while the Court has shown heightened levels of deference to the military—especially in times of war—as the conflict lingers, this is changing. The longer the armed conflict lasts, the more the Court is exposed to cases of poor judgment and unnecessary infringement of

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19. Admittedly, the growing resort to favorable dismissals could be seen as serving the same function of managing judicial resources. But given the fact that these cases end up in a favorable result for the petitioner, they do not represent deference in the sense of a lower level of interference.

rights by the commander, which leads to a deterioration of trust and, as a result, diminished deference. Furthermore, the longer the armed conflict lasts, the more routine petitions under the military governance become, and thus the commander's decisions lose the air of urgency and the claim to deference associated therewith. This is not to suggest that the Court necessarily developed mistrust in the integrity of the military personnel, but rather that the Court has been willing to look closer at cases it would, under acute emergencies, have only given short shrift, and upon such closer look, the balance of security considerations and the protection of human rights reached by the commander appears off kilter enough to warrant judicial pressure for a settlement more favorable to the petitioner. The data appear to be more consistent with this hypothesis than with any other.

The fact that we found only a nonsignificant change (in the same direction) in petitions against the IDF unrelated to the territories provides further support for this conclusion. It raises the possibility that the strain between the Court and the commander has "spilled over" to affect the attitude of the Court toward the IDF more generally—but makes clear what the direction of change is. Admittedly, we did not find a *significant* difference between the correlations of cases against the commander and cases against the IDF unrelated to the territories, so we cannot rule out the possibility that the decline in deference to the military is rooted in some explanation that is not specific to the Occupied Territories. But the prolonged occupation and armed conflict nonetheless appear to be the best-supported explanation for the diminished deference.

We cannot rule out the possibility that the decline in deference also results, to some extent, from a more general change in the judicial culture, according to which preserving the substantive rule of law and protecting against violations of human rights, including international human rights, are the central role of judges. Although our sample of human and civil rights petitions did not show a significant decrease in deference, there was also no significant difference between the commander's decisions and decisions involving human rights when we compared the two correlations. It is therefore quite possible that some of the change can be attributed to broader developments related to the growing stature of human rights and proportionality analysis in the Israeli legal system. But the findings also show clearly that this cannot be the entire picture. We found ample evidence for diminished trust in and deference to the military commander, which was *not* found in the sample of human right judgments.<sup>20</sup>

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20. There is also a possibility that deference to the military has been a "holdout" area, that is, that deference to other state agencies decreased in the 1980s, with the assent of the "reasonableness" doctrine in Israeli administrative law, and only later (during the examined period) reached the military. Yet the question remains: why did it not remain so?

### Diminished—Not Extinguished (or, Why Favorable Dismissals?)

Our findings show that levels of deference have declined but that deference still plays some role in judicial behavior: the manner in which the Court chooses to intervene—issuing favorable dismissals, rather than explicitly granting the petition, even if in part—reflects concerns that echo some of the previously mentioned determinants underlying deference (cf. Barzilai 2004). The fact that the Court feels more comfortable not finding the commander explicitly at fault suggests that the Court is still sensitive to pressure regarding the style or appearance of the intervention, even though the Court has in fact intervened more as of late (or at least is careful to demonstrate that petitioners are not left without redress). The practice of favorable dismissals may also signal that the Court senses that the petitioner is better off with an official judicial decision that documents the settlement (rather than relying only on an out-of-court agreement). Such a document may save the petitioner future trouble when he or she has to negotiate with soldiers on the ground, who may not be aware of the settlement reached in Court. This may signal another dimension of the routinization of the prolonged armed conflict, as the Court may be taking into account the structure of the bureaucratic aspects of ensuring enforcement of the outcomes of the legal process. At the same time, it must be recognized that such routinization may be used as a technique to legitimize the occupation and may also carry other negative effects on Israeli society (see Kimmerling 1983).

### Broader Implications

Our conclusion that the prolonged armed conflict in the Occupied Territories has been a cause for diminished deference could have important implications that go beyond the Israeli context. Obviously these findings could be applicable to the relationship between courts and armed forces in other jurisdictions as well. Further comparative research is necessary in order to examine whether loss of deference is part of the “legal price” armed forces pay for prolonged occupation or similar situations in which they are governing the daily lives of civilian populations. As the war on terror becomes a permanent reality in many countries, the Israeli experience may shed light on developments that can be expected in terms of the deference accorded to other militaries and governments dealing with security threats. Interestingly, in recent years a growing number of commentators have argued that the US Supreme Court is learning from its own mistakes and is improving the protection of human rights from one emergency to the next (Cole 2003; Tushnet 2003; Stone 2006; cf. Scheppele 2004). This seems to suggest a decline in deference over time. Our empirical findings concerning the Israeli



experience, in terms of changes in deference during a prolonged armed conflict, perhaps provide some support for this claim.

More generally, it could be the case that when any governmental agency—not only the armed forces—is highly active (that is, exercising its powers on a massive scale) for an extended period of time, the population (and stakeholders) may respond by generating legal pressure (via an ongoing stream of petitions), with the ultimate result of the erosion of the Court's deference. Arguably, our findings are not limited to the military context, but show that when a governmental agency is facing a lengthy battle that brings about a large number of legal challenges, the mistakes of the agency are unavoidably exposed to the courts at an increased pace. A prolonged conflict could thus be seen as a catalyst for judicial learning about the limitations of government officials (cf. Tushnet 2003; Stone 2006). This in turn leads to diminished trust and deference. Whether, as a result of the heightened activity, courts limit their deference to the level that is really due (Scheindlin and Schwartz 2004; see Hunt 2003 on the concept of due deference), or end up underestimating the professionalism and trustworthiness of the government agency, is another question. Additional research is needed to examine such broader implications.

In this sense, our research relates to other examinations of decreases in deference. In their study of American prisons, Feeley and Rubin (1998) documented the decrease in judicial deference to prison officials in the period from 1965 to 1986. As they explained, judges had heard complaints about the conditions of confinement in the South for many years but refused to intervene. What made them change their mind in the mid-1960s? According to Feeley and Rubin, it was at this point in time that judges came to the realization that the treatment of prisoners was outrageous (158–62). Feeley and Rubin connected this change of heart with a number of societal developments, most importantly the civil rights movement. It is interesting to compare this study with our own findings. There are similarities in the way judicial deference to American prison officials and to the Israeli military commander has diminished. Our own study, which examined empirically the reasons for the decline in deference, has found that increased attention to human rights may indeed be part of the story—just as Feeley and Rubin argued in their own context. But even more important has been the continuation of the armed struggle. The exacerbated exposure to problematic decision making by the commander has taken its toll on the Court-commander relationship.

### Alternative Explanations

A couple of alternative explanations could potentially explain our findings. First, it could be the case that the change has occurred not with the

Court at all, but in the attitude of the commander. Perhaps it is the case that over the years from 1990 to 2005, the commander instituted stricter policies regarding the Palestinians, in part as a result of the second intifada (which started in 2000). The fact that deference diminished throughout the period, not only during peaks in the Israeli-Palestinian conflict, somewhat weakens this explanation, although we cannot rule out the possibility that the commander resorted to harsher policies at other times for some other reason (such as a change of personnel). If this is the case, it is interesting to note that the Israeli Supreme Court has been acting against the expected trend. As noted in Part II, the common view is that in times of war, deference is higher—courts give more latitude to the military and government in the choice of actions. Institution of stricter policies by the commander could have been expected to attract the same level of intervention, at most, given the intensification of the armed conflict as of 2000.

Second, it could be the case that the Court has changed its attitude not toward the military, but toward the attorney general. It is accepted that the position of the commander is often shaped in conjunction with the government lawyers (and the commander's affidavit is written by them). Traditionally, the attorney general's deputies who appear before the Supreme Court enjoy a high degree of credibility, and, as "repeat players," this credibility is essential to their ability to enjoy the benefit of the doubt embedded in an administrative law doctrine known as the presumption of legality. In recent years, however, there have been accusations that at least in matters related to Palestinian land rights, the government lawyers have not provided the Court with a full or sufficiently accurate picture (not necessarily intentionally, but perhaps because of lack of coordination with the IDF branches, or because this is how the IDF branches chose to portray the situation to the government lawyers) (*Azoun City Council Chair v. Government of Israel* 2006).<sup>21</sup> Moreover, there is anecdotal evidence suggesting that pursuant to the collapse of the Oslo Accords and in light of personnel changes (namely, retirement and promotion) in the public law department of the attorney general's office, key figures in the department have adopted a more pro-military stance,<sup>22</sup> while the judiciary adopted, as mentioned, a more skeptical approach. This can perhaps explain at least some of the changes in the judicial attitude in cases of petitions against the commander.

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21. In contrast, with the prolongation of the conflict, lawyers working for NGOs representing Palestinians have increasingly gained experience and credibility in the eyes of the Court (Barzilai 2007).

22. A clear manifestation of this development can be found in the amendment to Israel's citizenship law, designed to restrict family unifications between Israeli Palestinians and residents of the Occupied Territories. Despite the heavy price of infringing on basic rights of Israeli (and Palestinian) residents, the amendment was strongly defended and promoted by some members of the attorney general's office.

## VI. CONCLUSION: TOWARD DUE DEFERENCE?

This study shows that in recent years the Israeli Supreme Court has been much more willing to intervene in decisions of the military commander pertaining to the daily lives of Palestinians in the Occupied Territories. In recent years, persistent petitioners (with like-minded lawyers) have been considerably more likely to receive, in whole or in part, the requested remedies than they were in previous times, when the Court was less willing to interfere with military discretion.

We began this article by offering a theoretical framework that put forward a number of different factors determining the level of deference. Applying this framework to the Israeli context, and in particular to changes that have occurred in recent years, we hypothesized that deference to the military commander has diminished in recent years. Our findings, based on case law from 1990 to 2005, corroborated this hypothesis. We found support mainly for an explanation that connects this change with the repercussions of a lengthy armed conflict. It is also possible that the ascent of human rights discourse has contributed to the decline in deference to the commander, although there are no significant correlations to support this. Interestingly, the diminished deference manifested itself mostly through favorable dismissals, which ensures at least part of the requested remedy for the petitioners, but without loss of face by the military commander. So while the empirical findings convincingly demonstrate the erosion of the commander's stature in the eyes of the Court, they also suggest that the Court has resorted to innovative alternative methods to achieve the same goals that deference was designed to achieve (such as preserving institutional capital and managing judicial resources). At the very least, these methods may be used by the Court to offset somewhat the criticism that its review stops at the Green Line without explicitly overruling the commander.

These conclusions could be useful for understanding what other legal systems might experience in the face of prolonged conflicts, especially now that the war on terror is relevant to so many governments and courts. Even more generally, this article can shed light on the various determinants of deference and how they might change over time. There has been some discussion in recent years about the concept of "due deference," suggesting that "deference from the courts must be *earned* by the primary decision-maker" (Hunt 2003, 340; see Young 2009). Regardless of whether this is justified at a normative level (see Allan 2006 for a critique), the current study could be seen as lending support to this concept at a descriptive level. The Israeli military commander enjoyed the benefit of the doubt in the past, but increased awareness of human rights, and especially the prolongation and routinization of the conflict, has changed that. The Israeli Supreme Court has apparently come to the conclusion, over time, that the commander no longer deserves a special degree of deference—he has not *earned* such respect (above

and beyond the respect accorded to other agencies). It is quite possible that the same dynamics also characterize—or will characterize—relations between other courts and other agencies.

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