



PRIV-WAR Report – Israel

National Reports Series 01/10

Israel:
**The use and regulation of private military and security companies
in situations of armed conflict**

Dr. Yaël Ronen, Sha'arei Mishpat College, Israel
1 September 2010

PRIV-WAR

Regulating privatisation of “war”: the role of the EU in assuring the compliance
with international humanitarian law and human rights

The PRIV-WAR project is supported within the 7th Framework Research Programme by the
European Commission DG Research

PRIV-WAR Report – Israel

National Reports Series 01/10

Israel: The use and regulation of private military and security companies in situations of armed conflict

Dr. Yaël Ronen*

1. Scope of the Report

This report was prepared in the context of the Project ‘Regulating Privatization of War: The Role of the EU in Assuring Compliance with International Humanitarian Law and Human Rights’ (PRIV-WAR), coordinated by the European University Institute through the Academy of European Law. The aim of this report is to provide an account of existing Israeli legislation applicable to private military and security services, pursuant to work package 7. The bulk of the report concerns the civilianization and privatization of security and military functions previously performed by state authorities, within Israel and in areas under its control. In addition the report addresses the regulation of the export of security and military services by private entities.

There is no formal definition or designation of the terms ‘military’, ‘defense’ and ‘security’ under Israeli law. As a consequence of multiple and often overlapping contexts, these terms also do not necessarily refer to mutually-exclusive functions. Accordingly, the present report utilizes the term ‘security’ loosely to cover the various situations to which the laws of armed conflict may apply. The term Private Security Companies (PSCs) is utilized to describe private corporations involved in providing security services in this wide sense.

2. Privatized Military and Security Activities in Israel and in the West Bank

Israel does not participate in multi-national military operations or peace-keeping forces. Consequently, it is not involved in the activities with which private contractors are most commonly associated. However, Israel has been occupying the West Bank for over 40 years under the law of occupation.¹ In addition, in its 62 years of independence,

* Assistant Professor, Sha’arei Mishpat College, Israel. I am grateful to the various named and unnamed interviewees for assisting me in collating the information and analyzing it, as well as to Adv Sari Bashi, Dr Amir Paz-Fuchs and Adv Ido Rosenzweig for their helpful comments on earlier drafts.

¹ It is not necessary to examine for present purposes the status of Israel vis a vis the Gaza Strip, since there is no military presence in the Gaza Strip, let alone private operators. While there has been a long – and at the time of writing largely redundant – debate whether the Geneva Convention IV applies in the area, Israel has never contested its status as occupying power under the Hague Regulations, 1907.

Israel has been involved in numerous armed conflicts. Thus, the Israeli military is continuously involved in situations that are likely to raise issues relating to the laws of armed conflict.

In addition, Israel is continually dealing with terrorist activity threats within its sovereign territory. In line with trends elsewhere, Israeli jurisprudence has increasingly regarded terrorism as falling within the armed conflict paradigm rather than within the criminal law paradigm.² However, institutional mechanisms to address terrorism are not entirely distinct from domestic crime-fighting mechanisms. Thus, a significant share of Israel's police resources have been directed towards anti-terrorism (defensive) operations, especially since the second *intifada* in 2000 has made city centers and other sites within Israel targets for terrorist activity.³ Police anti-terrorism operations include intelligence activities for the prevention of terrorist acts; response to terrorist attack scenes, neutralizing suspicious objects, instruction and monitoring of guards, and guarding of public and other locations to ensure normal civilian life. In 2003, for example, the police reported having carried out over 550 anti-terrorist operations, responded to 700 calls regarding suspicious objects in the Jerusalem area alone (as opposed to 200 calls previously), and instructed hundreds of security officer and security personnel.⁴

The main contexts in which private contractors carry out security functions in Israel and in the West Bank are:

1. Day-to-day management of the crossings between Israel and the West Bank and between Israel and the Gaza Strip. At present the process of privatization applies to locations that are characterized as 'last checkpoint prior to entry into Israel', of which there are between 30 and 40 (the number fluctuates as crossings are continuously under construction while others close down). The bulk of this report concerns this activity.
2. Guarding of various public and private establishments in Israel and in the settlements in the West Bank. With respect to government and public utility buildings this practice follows worldwide convention and dates to the establishment of the state. It expanded to a variety of other establishments in the early 1990s, when following the breakout of the first *intifada* terrorist activity against civilians within Israel became more frequent, manifesting itself in remote-controlled bombs and suicide bomb attacks on buses, bus stops, cafés, markets, etc. For example, a Government decision of 1995 placed the responsibility for securing schools on the police. With time, some of these security services (eg in schools) have been privatized. In 2008, for example, 21.1% of

² *The Public Committee against Torture in Israel and LAW v The Government of Israel and Others*, H CJ 769/02 Supreme Court of Israel Judgment of 14 December 2006, [16]-[21].

³ For statistics and details of terrorist activities since 2000 see Israel Ministry of Foreign Affairs, 'Suicide Terror Attacks 2000-2007', www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Palestinian+terror+since+2000/Suicide+and+Other+Bombing+Attacks+in+Israel+Since.htm.

⁴ The Police and Society Forum of the Police and the Israel Democracy Institute (Gidon Fishman, ed), *Balancing Police Action Between Terror and Maintaining Public Order – a Summary of an Era and Challenges for the Coming Years* (2005), 36 (in Hebrew).

the police's shopping budget went to civilian manpower services (although these probably encompass more than security services).⁵

3. Guarding of other public and private establishments: The use of PSCs became prevalent also among private establishments in the early 1990s, The outbreak of the second *intifada* in 2000 reinforced this trend, leading to a significant growth in the number of private security personnel (almost threefold from 1995 to 2003⁶).⁷

4. Guarding of the construction of the separation barrier in the West Bank since 2003. The responsibility for engaging security services is in the hand of the construction contractors.⁸

5. Guarding in the old city in Jerusalem and in Jewish residential enclaves in East Jerusalem. Guarding in East Jerusalem is performed under the auspices of the Ministry of Housing, which outsources the services to PSCs. The security operations of this Ministry – irrespective of whether they are carried out by private contractors or directly by ministry employees – have been subject to consideration by a committee appointed in 2005 by the then-Minister of Housing (the Orr Committee). The committee recommended that security operations be transferred to the responsibility of the police. The government endorsed this recommendation but later retracted its endorsement.

This report focuses on the first category of services, which is the one most likely to raise questions of international humanitarian law (IHL). However, these services are regulated by legislative instruments similar to those of services under categories 2 and 3, and which will therefore also be addressed.

3. Crossings: Background

Following the occupation of the West Bank and Gaza Strip in 1967, the IDF declared these areas closed. Entry into and exit from the West Bank and Gaza Strip were made conditional upon a permit.⁹ For many years a general permit was in place, allowing unrestricted access of Palestinians into Israel, but in 1991 the general permit was annulled. Since then Palestinian residents of the West Bank and Gaza Strip require individual permits for exit from the West Bank or the Gaza Strip (into Israel or to Jordan or Egypt, respectively). Permits to exit the West Bank or Gaza Strip into Israel are referred to as 'entry permits' because of the interface with Israeli law. These permits are granted by the Civil Administration operating under the Coordinator of the

⁵ Israel Police, 2008 Budget, www.police.gov.il/mehozot/agafTichnon/Pages/takziv_amishtara.aspx (in Hebrew).

⁶ Shuki Handels, *Guards and Security Guards in Israel 1995-2003* (Ministry of Industry, Trade and Labor, Planning, Research and Economics Administration (2003) (in Hebrew).

⁷ Until 2005, these security services were provided on a contractual, non-statutory basis. Such services fell exclusively within the framework of domestic law paradigms.

⁸ Ministry of Defense, 'Israel's Security Fence, Operational Aspects', www.securityfence.mod.gov.il/Pages/Heb/bitzua.htm.

⁹ Military Commander's Order on Closed Areas (West Bank) (Amendment) (No 34), 1967 of 8 July 1967.

Government's Activities in the Territories, a unit within the Ministry of Defense. Since 2003 entry from the West Bank and Gaza Strip has been regulated by the Nationality and Entry into Israel (Provisional Measure) Law, 2003, which restricts the authority of the Military Commander of the West Bank (until 2005 it also applied to the authority of the military commander of the Gaza Strip) and of the Minister of Interior in permitting entry to Israel other than for specified purposes (work, medical treatment, and family reunification for persons above a certain age). The Law's criteria for permitted entry largely formalized criteria that had already been employed by the Military Commander prior to the adoption of the Law. The Law thus did not change the practice so much as it formally limited the discretion of the Military Commander and of the Minister of Interior.

Physically, entry from the West Bank and Gaza Strip into Israel was mostly unchecked until the 1990s, at which time various means of monitoring began to be utilized. Those culminated in the construction of the separation barrier in the West Bank, which began in 2002 (and has not yet been completed, primarily due to financial constraints¹⁰).¹¹ In addition, within the West Bank itself there are some 60 internal checkpoints that monitor movement within the area. Entry into Israel is, at the time of writing, monitored through some 30 permanent, staffed, around-the-clock crossings, also referred to by the Israeli government as 'crossings', characterized as being points of entry into Israel and exit therefrom.¹² Most of these crossings are located inside the West Bank, up to several kilometers from the Green Line (the 1948 ceasefire line). A handful of additional crossings control entry into Israel from the Gaza Strip.¹³ Various crossings are designated specifically for the movement of pedestrians, vehicles or commercial goods, and are designed accordingly.

4. Civilianization and Privatization of the Crossings: History and Rationales

The civilianization and privatization of the crossings has to be examined against the backdrop of a more general process taking place in Israel, namely the civilianization and privatization of the Israeli Defense Force (IDF). The IDF is unique among national defense forces in that its role in Israeli society has always extended much further than the performance of security functions. At the time of independence, the socialist, nation-building regime intentionally used the military service as a tool in shaping the 'new' Israeli, and used the military as the single most useful agent in implementing the government's agenda during a difficult economic period. Comprising unpaid yet well-organized conscripts, the IDF proved a relatively disciplined, cheap, practical tool to

¹⁰ IDF response in Comments of the Prime Minister to State Comptroller's Annual Report No 59A (for 2008) (2009), 16.

¹¹ A security fence was erected around the Gaza Strip in the late 1990s.

¹² Implementation Law Article 10(a).

¹³ At the time of writing only two crossings are operative, Erez and Kerem-Shalom.

carry out government policies.¹⁴ Thus, Israeli law allows the posting of an IDF soldier to serve in the Israeli police; or in a military unit located in another government office or in a public entity under the supervision of a government ministry, whose purpose is a national security goal in one of the following areas: immigration absorption, education, health, homeland security, or voluntary actions for IDF soldiers.¹⁵

In the late 1980s and early 1990s, economic and technological developments, as well as emerging political challenges, prompted a renewed assessment of IDF functions. Successive committees recommended that functions performed by the military be opened to civilian industry,¹⁶ and measures were adopted towards this goal, although not in a systematic manner.¹⁷ In November 2000 the government of Israel adopted a decision according to which the IDF would list the tasks that can be performed by the civilian sector and their implications.¹⁸ The outsourcing of services began with food catering, laundry and transportation. It then expanded to construction of military systems, including the separation barrier.

Strictly speaking the IDF was concerned not so much with privatization but with civilianization, namely the transfer of functions to non-military authorities, which may themselves be state organs. In practice, the first functions which underwent this process – food catering, laundry and transportation - were not only civilianized, but also privatized. At present there are suggestions to civilianize entire units which have a dominant professional component that is obtainable in the civilian market, such as the Military Advocate General's office, the medical services, the computerization units, and the budget unit.¹⁹ Some of these functions might also be privatized, such as the medical services, which would be provided by the health-care associations.

With respect to human services, civilianization without privatization, i.e. maintaining the function within the civilian civil service, is perceived as increasing expenses, because it requires the state to pay salaries to civilians instead of benefiting from the services of soldiers who are not paid a substantial salary.²⁰ Privatization, at least when carried out by outsourcing to contractor corporations, lowers the cost of security services, because contractor workers are only entitled to limited social

¹⁴ Guy I Seidman, 'From Nationalization to Privatization: The Case of the IDF' (2010) *Armed Forces and Society* XX(X), 3-4.

¹⁵ Defense Service Act, 1986 Article 26A. A converse mechanism, of 'civilian employees of the IDF', has also existed for many years and is regulated by law. This phenomenon is not reviewed in this report.

¹⁶ The Sadan Committee's report of 1994, the Brodet Committee's report of 2007.

¹⁷ For a succinct description of this process see Guy I Seidman, 'From Nationalization to Privatization: The Case of the IDF' (2010) *Armed Forces and Society* XX(X).

¹⁸ Government Decision 2571 (TM/79), 30 November 2000.

¹⁹ Ministry of Finance, Israel Budget, 2009-2010 Budget, Highlights of the Ministry of Defense's Budget Proposal, 92, www.mof.gov.il/BudgetSite/StateBudget/Budget2009/MinisteriesBudget/Safety/Lists/List/Attachments/1/C1.pdf (in Hebrew).

²⁰ Counterarguments have been put forward, namely that reliance on conscripts generates unique and less visible costs, such as the delay in the entry of young people into the job market.

benefits.²¹ For this reason, where a function is civilianized, the state may also have an interest in privatizing it.

The civilianization and privatization of the functions performed in crossings in the West Bank and around the Gaza Strip are another step in this general framework, although it has some unique aspects, since the civilianization and privatization of the crossings are driven by additional, particular motives, some declared publicly and some less openly articulated.

First and foremost, the IDF was keen to be relieved of securing the crossings because of the emotional toll it was taking on soldiers who were not trained for constant interaction with civilians.²² Research conducted by the IDF itself as well as by NGOs reveal that the constant friction between soldiers and the Palestinian civilian population results in a rising level of dehumanization of that population in the eyes of the soldiers, and in unjustified violence towards it.²³ This friction has other negative consequences on the performance of soldiers, such as a rise in 'ordinary' criminal activity. It has been suggested that extraction of soldiers from securing the crossings and the transfer of this function to civilian hands would eliminate many of the humanitarian law and human rights violations and help preserve the moral credibility of the IDF.²⁴ Civilians would also be older, and thus hopefully less prone to violence and petty crimes.

A related rationale is that the civilianization of the crossings would be accompanied by professionalization of their operation, and thereby improve the level of service offered to Palestinians crossing through the crossings.²⁵ The objectives of civilianization and privatization of the crossings are often referred to today as 'awareness of service quality', efficiency, and improving 'the level of service to Palestinian citizens'.²⁶ For example, there is a preference for private security personnel

²¹ In cases of security functions that have until recently been carried out by non-military persons who received full salaries with social benefits, such as policing and the security services in embassies, the economic advantage is therefore immediate. On the financial motive for privatizing the security services by the Ministry of Housing: testimony of Nitai Levy, in 'Employee Organization – Existing Obstacles and Potential Means to Minimize Them', (20 July 2006) 5, www2.tau.ac.il/InternetFiles/Clinican/UserFiles/File/clinican%2013/hitargenut%20kenes%20a.doc (in Hebrew).

²² Personal communication with Meron Rapoport, journalist (8 July 2010).

²³ Felix Frisch, 'The IDF Admits: Too Many Soldiers Shoot for No Reason' Ynet (10 January 2001), on IDF research revealing increasing dehumanization due to protracted service in the occupied territories (not specifically in the crossings); In 2004 the IDF produced a training kit for checkpoints, Hanan Greenberg, 'New in the IDF: A Training Kit for Serving in the Checkpoints' Ynet (7 September 2004). An increase in the level of violence was reported in military research conducted in 2007, Yossi Yehoshua, 'The Abuse is Revealed' *Yediot Aharonot* (16 December 2007).

²⁴ Highlights of the Conclusions of the Spiegel Committee, publicized 15 August 2004, NRG (24 August 2004) www.nrg.co.il/online/1/ART/772/991.html (in Hebrew).

²⁵ Ministry of Finance, Israel Budget, 2009-2010 Budget, Highlights of the Ministry of Defense's Budget Proposal, 93 www.mof.gov.il/BudgetSite/StateBudget/Budget2009/MinisteriesBudget/Safety/Lists/List/Attachments/1/C1.pdf (in Hebrew).

²⁶ Lt Col Ofer Hindi, Head of the Seam Line Project, Central Command, Ministry of Defense, Knesset Committee on Internal Affairs and Environmental Protection, Protocol no 17 (20 June 2006), 18 .

who have a spoken or written command of Arabic, so that they can communicate better with the Palestinian population and read documents.²⁷

The civilianization of the crossings goes hand in hand with their technological and physical upgrading, a process that has been expedited by the construction of the separation barrier.²⁸ The construction of the new terminals and their civilianization are part of an informal government campaign to establish the crossings as future international terminals.²⁹ This is more clearly the case with respect to crossings along the fence separating Israel from the Gaza Strip, which since the 2005 disengagement Israel regards as an international border.³⁰

Commentators point to other, less-articulated benefits accruing from outsourcing state functions, such as impunity with respect to international humanitarian law and human rights violations. It is argued that such violations are less visible when carried out by private security persons, because PSCs are not bound by the same transparency standards as the state; private security personnel are more easily manipulated into silence because unlike soldiers, particularly reservists who are also no longer subject to disciplinary measures, private security personnel risk jeopardizing their livelihood.³¹ Furthermore, if breaches are exposed, the state can more easily distance itself from the immediate perpetrators. This impunity is politically and economically advantageous.³²

In light of the stated motives for civilianization and privatization of the crossings, the following priorities have been established, in descending order of urgency:³³

1. Crossings in the Jerusalem area, where there is relatively great complexity and considerations of quality of service are particularly strong. In addition, it was felt that crossings in the vicinity of the capital of Israel should have priority in civilianization.
2. Crossings for the passage of goods.
3. Crossings where interaction with the Palestinian population is relatively extensive.

²⁷ Betzalel Treiber, Head of the Passages Management, Ministry of Defense, Knesset Committee on Internal Affairs and Environmental Protection, 16th Knesset, Protocol No 495 (27 July 2005), 16.

²⁸ Alon Yifrach, Ministry of Defense, Knesset Committee on Internal Affairs and Environmental Protection, 16th Knesset, Protocol No 485 (25 July 2005), 27.

²⁹ Betzalel Treiber, Head of the Passages Management, Ministry of Defense, Knesset Committee on Internal Affairs and Environmental Protection, 16th Knesset, Protocol No 495 (27 July 2005), 2.

³⁰ The Entry into Israel (Border Stations) Order, 1987 (as amended) already lists the Erez, Kerem-Shalom, Sufa and Karni crossings between Israel and the Gaza Strip as border stations.

³¹ This is illustrated by the activity of 'Breaking the Silence' (Shovrim Shtika), an organization of veteran Israeli soldiers that collects testimonies of soldiers who served in the occupied territories during the Second *intifadah* in order to document and expose the abuse of power that has become prevalent in the military. See www.shovrimshtika.org/index_e.asp.

³² Neve Gordon, 'Outsourcing Violations: The Israeli Case' (2002) 1 *Journal of Human Rights* 321, 324. See also Meron Rapoport, 'Outsourcing the Checkpoints' *Haaretz* (2 October 2007) www.haaretz.com/magazine/week-s-end/outsourcing-the-checkpoints-1.230416.

³³ Betzalel Treiber, Head of the Passages Management, Ministry of Defense, Knesset Committee on Internal Affairs and Environmental Protection, 16th Knesset, Protocol No 527 (16 November 2005), 6.

4. Secluded crossings, crossings that are easy to operate, and crossings where only Israelis may cross.

5. Operation of the Civilianized Crossings

In 2005, the Ministry of Defense established the Crossings Administration, a unit tasked with setting up crossings, equipping them with sophisticated technologies, and staffing them, in order to gradually replace the units of IDF soldiers, police and border guards that had until then been running the crossings. In practice, outsourcing to PSCs began only in 2006.³⁴ The delay was caused by disputes between the Ministry of Defense, the Israel Security Agency³⁵ and the Israeli police, on the structure and management of the newly-formed crossings. The intention is to expand the process of civilianization to checkpoints within the West Bank, but this has not yet taken place.

At present, the crossings are not actually privatized, because the overall management remains in the hands of the Ministry of Defense (through the Crossings Administration). It is intended that they will eventually be managed by a statutory National Crossings Authority, which has yet to be established; it is therefore more accurate to speak of *civilianization*, namely removing tasks from the responsibility of uniformed military and police persons, to the (civilian) Ministry of Defense, and of *outsourcing*, namely relying on privately-contracted persons to act under instructions of state authorities. The process also involves the outsourcing of all but the superior positions to PSC employees. Exceptional among the crossings is the informal Nahal Oz crossing to the Gaza Strip, which is not recognized under law as an entry point into Israel, is not meant to serve for movement of individuals, but which until recently served as a petrol terminal. It was operated exclusively by a private petrol company (Dor Alon Energy Ltd) and was not guarded. In 2008 a terrorist attack took place in the Nahal Oz crossing, raising the question of whether the responsibility for guarding it lay with the company or with the IDF.³⁶

In the crossings already managed by the Ministry of Defense through the Crossings Administration, the overall authority lies in the hands of an employee of the Crossings Administration, who is a civil servant. In other crossings, overall authority lies in the hands of other state authorities – the police and the IDF. In addition, the crossings are operated by numerous bodies: the Ministry of Defense (in the West Bank), the police (around Jerusalem), the Ports Authority (in the crossings to the Gaza Strip), the Army, the Airport Authority, the military police, the border guards, the Israeli Security Agency, and PSCs. The administrative hierarchy and respective responsibilities of the various governmental bodies are regulated by a classified decision of the

³⁴ Eilat Maoz, 'The Privatization of Road-Blocks and Late Occupation' (10 October 2008) <http://hagada.org.il/hagada/html/modules.php?name=News&file=article&sid=6208> (in Hebrew).

³⁵ previously referred to as the General Security Service.

³⁶ Hanan Greenberg, 'Who's in charge of Nahal Oz security?' Ynet (4 October 2008) www.ynet.co.il/english/articles/0,7340,L-3530037,00.html.

government's security cabinet.³⁷ However, NGOs complain that at least to outsiders, the professional and administrative hierarchies are far from clear.

The corporations providing personnel for staffing the crossings do not fall within the ordinary sense of 'private security companies' because they provide personnel rather than the services themselves. The personnel are instructed by the various governmental authorities. These corporations, engaged after winning governmental tenders, rarely limit their services to security personnel, and characteristically also offer cleaning and maintenance staff. However, for convenience they will be referred to here as private security companies (PSCs).

At the time of writing (July 2010), the process of civilianization and outsourcing of the crossings is underway, and there is great variation in the operation of the various crossings. Private security personnel serve in crossings at three different capacities, although formally they all have the same status. Some are in administrative, security or logistic managerial positions. Others perform security functions, similar to that which is performed within Israel. A third category of private security personnel are system operators, trained in technological skills and service provision.³⁸

In some crossings (eg Irtakh and Eyal, near Kalkilia), the population is no longer in direct contact with any public authorities, but only with private security personnel. The soldiers and public officials working in these crossings sit inside the built terminals, and are invisible and inaccessible to the Palestinian population crossing through the checkpoint. In other crossings, the population comes into contact with private security personnel handling documentation while military personnel secure the perimeter; in others yet, the documentation is handled by border guards or police personnel, while private security personnel secure the perimeter (eg in the area surrounding Jerusalem, where the overall authority lies in the hands of the police rather than the IDF).³⁹ In short, in practice the civilian population going through the crossings often still comes into contact with military personnel and policepersons rather than, or in addition to, civilians.⁴⁰

In a survey conducted in 2003 (prior to the civilianization of the crossings) regarding the profile of security personnel operating within Israel, it was found that security personnel are typically young (under 30), single, Jewish, with a relatively large percentage of students, new immigrants and women (15%). There is no current information as to whether the profile of personnel at the crossings corresponds to these findings, although it is likely that there are fewer women. As the role of PSCs becomes increasingly one of 'defense' against terrorism rather than 'policing' against domestic

³⁷ Decision B/43 of 1999 of the Ministers' Committee for Defense, as amended from time to time.

³⁸ Betzalel Treiber, Head of the Passages Management, Ministry of Defense, Knesset Committee on Internal Affairs and Environmental Protection, 16th Knesset, Protocol No 495 (27 July 2005), 6-7.

³⁹ Personal communications with Hanna Aviram, Machsom Watch volunteer (24 June 2010); Hanna Berg, Machsom Watch volunteer (30 June 2010); Adv Oded Brook, Deputy Legal Advisor, Ministry of Internal Security (4 July 2010).

⁴⁰ State Comptroller's Annual Report No 59A (for 2008) (2009), 69.

crime, the percentage of Arabs (Israeli citizens) employed in security services decreases.⁴¹ More recent observations suggest that private security personnel characteristically hail from the socio-economic periphery of Israeli society. Although there are no official figures, it is argued that they are mostly Druze and Bedouins, native Israelis of Middle Eastern origin, and immigrants from Ethiopia and the former USSR.⁴² Given the preference for personnel with command of Arabic, at least in some positions, the claimed predominance of the former population groups may be deliberate rather than the consequence of socio-economic factors.

Opinions are divided as to whether PSCs offer better service than the military. Volunteers of Machsom Watch (a women's NGO which reports on the conduct of state authorities at crossings and checkpoints) say that one of the major effects of the civilianization and privatization is the diminished sense of accountability of checkpoint personnel. First, it is argued that the civilian management of the crossings (governmental or, at the lower levels, private) considers itself a 'service provider', which operates as a commercial enterprise and is less cognizant of its responsibility towards the population in view of its formal powers.⁴³ This results in a rigid approach, in circumstances where military authorities have in the past been more forthcoming. Second, the institutional remoteness of the civilian management is exacerbated by physical remoteness, resulting from the deliberate design of the terminals. While the built-up terminals offer the Palestinian population relief from physical hardships during the long wait (shielding it from cold, or heat, enabling access to toilets and providing privacy), they also place obstacles in gaining access to the management of the crossings when problems arise that require intervention from higher echelons.⁴⁴

6. The International Legal Framework for PSC activity

According to Israeli jurisprudence, since the second *intifada* began in 2000 a continuous state of armed conflict has existed between Israel and the various armed groups that operate from the West Bank and Gaza Strip. Specifically, this armed conflict is governed by the law relating to *international* armed conflict.⁴⁵ The relevant

⁴¹ Shuki Handels, *Guards and Security Guards in Israel 1995-2003* (Ministry of Industry, Trade and Labor, Planning, Research and Economics Administration (2003), 9-10 www.moital.gov.il/NR/rdonlyres/C2755515-EFD5-49B3-8221-255D690D2099/0/X6169.doc (in Hebrew).

⁴² Eilat Maoz, 'The Privatization of Road-Blocks and Late Occupation' (10 October 2008) <http://hagada.org.il/hagada/html/modules.php?name=News&file=article&sid=6208> (in Hebrew).

⁴³ Personal communication with Hanna Berg, Machsom Watch volunteer (30 June 2010).

⁴⁴ Personal communication with Hanna Berg, Machsom Watch volunteer (30 June 2010). See also Gideon Levy, 'Twilight Zone/Charlie's Angels' *Haaretz* (1 September 2007) www.haaretz.com/hasen/spages/899356.html.

⁴⁵ The Supreme Court explained that 'According to this approach, the fact that the terrorist organizations and its members do not act on behalf of a state does not make the struggle merely an internal matter of the state. Indeed, in today's reality a terrorist organization may have a considerable military capacity, sometimes exceeding even the capacity of states. Dealing with these dangers cannot be limited merely to the internal affairs of a state and its criminal law'. *The Public Committee against Torture in Israel and LAW v The Government of Israel and Others*, H CJ 769/02 Supreme Court of Israel

case law further provides that the normative arrangements that the applicable *ius in bello* consists of both the laws relating to combat in an international armed conflict and the laws of belligerent occupation. *Ius in bello* is *lex specialis*; and where it leaves a lacuna, the lacuna can be filled by means of international human rights law. In addition to the provisions of international law governing an armed conflict, the basic principles of Israeli public law are likely to apply. These basic principles are ‘carried by all Israeli soldiers in their backpacks’ and accompany them wherever they go.⁴⁶

However, not every action involving Israeli forces and Palestinians is governed by the laws on the conduct of hostilities. With respect to actions of the IDF in the West Bank, a distinction is made between law enforcement (policing) functions and combat functions. While the primary legal framework is IHL as it relates to occupied territory, the IDF view is that ordinary policing activities carried out by Israeli soldiers in the West Bank are subject to the law enforcement paradigm – to which international human rights law applies more directly.⁴⁷ The authority for such law enforcement activities lies in Article 43 of the Hague Regulations. According to this view, each function of the military has to be examined individually in order to ascertain whether it is a combat operation or a law enforcement one. The operation of the crossings, whether by soldiers or by PSCs and their employees, is perceived as law enforcement functions similar to those of a police force, rather than as combat functions. It is therefore governed by criminal law and by international human rights standards more directly than rather than by the laws on the conduct of hostilities. In this respect, the law governing the operation of PSCs in the crossings to the West Bank (the majority of which are outside sovereign Israeli territory) does not differ significantly from the law governing the operation of PSCs within Israel. In the few cases where actions of private security personnel have been investigated, they were considered within the framework of Israeli criminal law (which is applicable also outside Israeli territory, as discussed below), rather than within the framework of the laws of armed conflict.⁴⁸ Prominent human rights lawyer Michael Sfard suggests that the state is willing to examine the conduct of private security personnel in light of criminal law, but if the conduct in question had involved IDF soldiers, the state would likely have claimed it to be an act governed by the laws of

Judgment of 14 December 2006, [21]. While both statements may be true, they are not directly relevant. The distinction between an international and a non-international conflict is not a consequence of the military capacity of the non-state actor; and designating a conflict as non-international does not render it immune to international legal regulation.

⁴⁶ *The Public Committee against Torture in Israel and LAW v The Government of Israel and Others*, HCJ 769/02 Supreme Court of Israel Judgment of 14 December 2006, [16] (upholding earlier jurisprudence), [18], [21].

⁴⁷ Personal communication with Lt Col (Res) David Benjamin, Adv, former Head Legal Advisor to the IDF for the Gaza Strip (8 July 2010); see also Kenneth Watkin, ‘Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict’ (2004) 98 *American Journal of International Law* 1.

⁴⁸ No reference was made at any point to the possibility that at issue are crimes under international law. This is not unique. Israeli law does not contain a category of ‘war crimes’ or other international crimes. Soldiers are prosecuted under domestic law irrespective of whether the act in question may constitute an international crime.

armed conflict.⁴⁹ This would support the claim that the state relies on the status of private security personnel to distance itself from violations of law which it feels bound to defend when committed by soldiers. However, whether the state would indeed claim the applicability of the laws of armed conflict to similar conduct by soldiers remains speculative as the question has never arisen directly in court. Police action within Israel is generally governed by international human rights law and criminal law.⁵⁰

It is worth noting that even if the law of armed conflict applies to the operation of the crossings, rather than human rights and criminal law, under Israeli jurisprudence the distinction between the two paradigms is less than clear. In addition to general doctrinal questions on the parallel application of the two paradigms, elements of international human rights law seem to have permeated into international humanitarian law as interpreted by the Israeli court. In the *Targeted Killing* case, the High Court of Justice determined that the practice was governed by the law of armed conflict. Nonetheless, President Emeritus Barak ruled that in light of the principle of proportionality, a civilian (directly participating in hostilities) may not be the target of a lethal attack if a less injurious means is available.⁵¹ By implication, in determining whether a certain action was permissible, the standard of conduct demanded of security personnel, particularly private security personnel, might not necessarily be IHL as ordinarily understood when applied to regular military forces.

A separate question theoretically arises as to the international legal status of private security personnel, namely whether they are civilians or combatants;⁵² and if they are civilians, whether they are directly participating in hostilities in terms of Additional Protocol I Article 51(3), which reflects international customary law and therefore binds Israel despite the fact that it is not party to Additional Protocol I.⁵³ This question, while of academic interest,⁵⁴ has little significance in the specific instance of Israeli forces. The status of a person directly participating in hostilities does not endow any *powers* on that person. Rather, the classification of a person as a combatant, a civilian directly participating in hostilities or a civilian *tout court* or otherwise goes primarily to his or her *immunity* to intentional targeting, as only combatants and persons

⁴⁹ Personal communication with Adv Michael Sfar, Attorney specializing in litigating humanitarian law violations by Israeli security forces (19 June 2010).

⁵⁰ Although under Israeli law, the wide definition of ‘combat action’ which applies also to counter-terrorism activity, can apply also to incidents within Israel under certain circumstances. The matter of state immunity is discussed below.

⁵¹ President Emeritus Barak said that if a terrorist may be arrested, interrogated and put on trial, this is preferable to the use of force. *The Public Committee against Torture in Israel and LAW v The Government of Israel and Others*, H CJ 769/02 Supreme Court of Israel Judgment of 14 December 2006, [40]. However, such less-injurious means would achieve a different goal than use of lethal force (in a nutshell, legal proceedings are retributive rather than preventive).

⁵² Private security personnel are subject to a hierarchical command, wear a uniform, wear their weapons openly, and regard themselves as bound by the laws of armed conflict.

⁵³ *The Public Committee against Torture in Israel and LAW v The Government of Israel and Others*, H CJ 769/02 Supreme Court of Israel Judgment of 14 December 2006, [30].

⁵⁴ Program on Humanitarian Policy and Conflict Research, Harvard University, ‘Private Security Companies in the Occupied Palestinian Territories: An International Humanitarian Law perspective’ (2008), 8-9 http://opt.ihlresearch.org/_data/n_0013/resources/live/briefing3734.pdf.

directly participating in hostilities may be intentionally targeted. However, the rules on targeting apply to acts by persons who are recognized as combatants under international law. The potential attackers of Israeli private security persons are members of Palestinian organizations, who are not combatants under international law.⁵⁵ Arguably, if the question of the status of PSC personnel did arise for whatever reason, it is likely that the state would argue that they are civilians not directly participating in hostilities, since their function is a law-enforcement one rather than a combat function.

7. Regulation of the Conduct of Private Security Persons under Israeli Legislation

PSCs are subject to licensing by a statutory committee, under a law regulating the provision of security services.⁵⁶ Their conduct is further governed by contractual relations with client institutions. Since 1998, the security operations of individually-designated public bodies and public utilities providers are regulated by law.⁵⁷ However, until 2005 private security persons had no legal authority to demand that individuals identify themselves, to search personal property, or to detain a person. In 2005, the Powers for Maintaining Public Security Law, 2005 was enacted. This Law provides powers for use in ‘order to maintain public security against terrorist activity and violence’;⁵⁸ it is thus directed primarily towards the threat of terrorist activity rather than towards ordinary criminal violence.⁵⁹ Its purpose was to create an efficient and uniform regulatory framework for security services, with respect to licensing, control, training and standardization.⁶⁰ The Law also forms part of a general move to replace provisional legislation which applied only during a declaration of an emergency situation (such a declaration has been in force in Israel since its establishment), by permanent legislative instruments. In short, the Law largely entrenches practices that had already been in place,⁶¹ but these actions are now carried out under state authorization.

The Powers for Maintaining Public Security Law, 2005 regulates the powers of four types of persons: soldiers, policepersons, public officers, and (private) security

⁵⁵ They are not the regular forces of a party to the conflict, they do not carry distinct insignia, and they do not operate, either individually or as an organization, in accordance with the laws of armed conflict, see Geneva Convention III Article 4 and Additional Protocol I Article 44; Criminal Case 1158/02 (Tel Aviv) *State v Berguti*, District Court of Tel Aviv Judgment of 19 January 2003, upheld in *The Public Committee against Torture in Israel and LAW v The Government of Israel and Others*, HCI 769/02 Supreme Court of Israel Judgment of 14 December 2006, [24]-[25].

⁵⁶ Law on Private Investigators and Security Companies, 1972.

⁵⁷ Law for the Regulation of Security in Public Bodies, 1998.

⁵⁸ Powers for Maintaining Public Security Law, 2005 Article 1.

⁵⁹ Knesset Committee on Internal Affairs and Environmental Protection, 16th Knesset, Protocol No 425 (19 May 2005), 14-15.

⁶⁰ Yuri Stern, Chairman, Knesset Committee on Internal Affairs and Environmental Protection, 16th Knesset, Protocol No 46 (10 July 2003), 1.

⁶¹ Adv Rachel Gottlieb, Deputy Legal Advisor, Ministry of Internal Security, Knesset Committee on Internal Affairs and Environmental Protection, 16th Knesset, Protocol No 46 (10 July 2003), 2.

personnel authorized under the law. The Law authorizes the Minister of Internal Security to grant the powers under the Law to a person, i.e. a private security person, if the Minister is convinced that this authority is necessary for security activity and maintenance of public safety in a location to which the public has access. In practice, the Minister does not designate individual persons to whom the powers are granted, but instead designates types of locations, where any authorized security personnel may then operate under the law. On this basis, the Minister has authorized the operation of security personnel in public and private transport services, shopping malls and shops over a certain size, restaurants and establishments serving alcohol, hospitals and places holding medical equipment and products, entertainment halls, water attractions, banks, natural gas and petrol depots, open areas under regional government jurisdiction, police stations and more.

A person may be authorized under the law to act as a security person if he or she is a citizen or permanent resident of Israel; is physically fit; holds a permit to possess a weapon, has 12 years of schooling, and has received ‘appropriate training in the field of security and in the field of the authorities granted’ under the Law ‘in light of the type of location where those authorities would be used’.⁶² PSC employees are trained by various authorities and in a variety of tasks. For private security personnel operating in Israel, training is under the overall guidance and supervision of the police. The Ministry of Defense is expected to guide and monitor the training of private security personnel operating in the crossings, but it is not clear to what extent it exercises this responsibility.⁶³ Some of the training is itself outsourced to private companies specializing in security training.⁶⁴

Within Israel, private security personnel have powers similar to those of soldiers, policepersons and public officers: They may demand that a person seeking entry to the designated location to identify him- or herself, and may conduct a body search for that purpose at the entrance and the vicinity of the places indicated in the Law. If a person refuses the search, a private security person may prevent the person’s entry, including through use of reasonable force. If a person refuses the search and the private security person has reasonable suspicion that the person is illegally carrying a weapon or about to make illegal use of a weapon, the private security person may also conduct the search despite the refusal, including through use of reasonable force.⁶⁵ A private security person may also detain such a person until the arrival of a policeperson. Unlike soldiers, however, private security personnel may not detain a person on the sole ground of reasonable suspicion that a person may commit an offense. This limitation on the powers of private security personnel was maintained on the ground that they are private civilians who should not be in a position to exercise excessive power over other

⁶² Powers for Maintaining Public Security Law, 2005, Article 8(7) and Article 13(3)(b) amending the Implementation Law.

⁶³ Personal communication with Meron Rapoport, journalist (8 July 2010).

⁶⁴ Personal communication with Meron Rapoport, journalist (8 July 2010).

⁶⁵ Powers for Maintaining Public Security Law Article 5(b).

civilians.⁶⁶ Furthermore, private security personnel are not subject to disciplinary measures like soldiers and policepersons.⁶⁷

Another reflection of the special character of private security operations is the provision in Article 1 of the Law, that use of the powers under it would be ‘in a location and means which will guarantee maximum protection of human dignity, privacy and rights’. This provision is superfluous in the sense that all legislation and use of executive power are subject to the constitutional right to human dignity.⁶⁸ This formulation was nonetheless adopted to emphasize the need to protect human dignity in legislation that is addressed to private actors.⁶⁹

The 2005 Law concerns primarily security services within Israel⁷⁰ but it also addresses the security services in the crossings. Initially the military legal authorities dealing with the occupied territories were apprehensive about breaking the state’s monopoly on the use of force and by outsourcing security functions, whether in the crossings or in other contexts (such as securing commodity trucks entering Israel from the Gaza Strip before 2005), to private hands which have not been fully qualified.⁷¹ Accordingly it was proposed to regard the powers of private security personnel as limited to those available under ordinary criminal law to any civilian, such as performing a citizen’s arrest under certain circumstances,⁷² assistance to a policeperson in carrying out an arrest, etc.⁷³ however, at the last stages of drafting the 2005 Law, provisions were added so as to extend its reach also to the crossings.

The 2005 Law amends the Law on Implementation of the Interim Agreement regarding the West Bank and Gaza Strip (Adjudication Powers and other Provisions) (Legislative Amendments), 1996 (hereafter ‘the Implementation Law’), which regulates passage between Israel and the West Bank and Gaza Strip. The Implementation Law

⁶⁶ Adv Rachel Gottlieb, Deputy Legal Advisor, Ministry of Internal Security, Knesset Committee on Internal Affairs and Environmental Protection, 16th Knesset Protocol No 430 (26 May 2005), 3, 6.

⁶⁷ Adv Miri Frenkel-Shorr, Legal Advisor to the Knesset Committee on Internal Affairs and Environmental Protection, Knesset Committee on Internal Affairs and Environmental Protection, 16th Knesset Protocol No 430 (26 May 2005), 7.

⁶⁸ Basic Law: Human Dignity and Liberty Article 8 provides: ‘There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required’.

⁶⁹ Adv Rachel Gottlieb, Deputy Legal Advisor, Ministry of Internal Security, Knesset Committee on Internal Affairs and Environmental Protection, 16th Knesset Protocol No 485 (25 July 2005), 6.

⁷⁰ A similar arrangement to that of the law was adopted for the Israeli settlements in the West Bank, Military Order 1628 (20 January 2009).

⁷¹ Personal communication with Lt Col (Res) David Benjamin, Adv, former Head Legal Advisor to the IDF for the Gaza Strip (8 July 2010); Hagai Alon, former advisor to the Minister of Defense, quoted in Meron Rapoport, ‘Outsourcing the Checkpoints’ *Haaretz* (2 October 2007) www.haaretz.com/magazine/week-s-end/outsourcing-the-checkpoints-1.230416.

⁷² Eg the Criminal Procedure Law (Enforcement Power – Arrests), 1996 Article 75 allows any person to detain another until the arrival of a policeman, including through non-injurious use of force, if the other person is suspected of having carried out an offense of violence, a crime, theft or an offence which caused significant damage to property. Such detention may not last more than 3 hours.

⁷³ Personal communication with Lt Col (Res) David Benjamin, Adv, former Head Legal Advisor to the IDF for the Gaza Strip 8 July 2010.

defines ‘crossings’ as locations designated by the Minister of Interior as points of entry into Israel from the West Bank and Gaza Strip, and exit from Israel to these areas. With respect to crossings, the authority to grant powers to private security personnel lies also with the Minister of Defense.⁷⁴

The powers of private security personnel in the crossings differ slightly from their powers within Israel. While within Israel their powers are almost identical to those of the other categories, in the crossings they are more limited. The amended Implementation Law authorizes security personnel at the crossings to demand of any person going through the checkpoint to identify him or herself. The private security person may also search the property or vehicle of the person entering or exiting. However, a bodily search by a private security person may be carried out only under supervision and monitoring of a policeperson, soldier or civil servant; and a private security person may refuse passage through the checkpoint to a person refusing to be searched only upon authorization of a policeperson, soldier or civil servant, who must be summoned as soon as possible.⁷⁵ The Ministers of Internal Security and the Minister of Defense may designate other functions that a private security person may not carry out unless supervised and monitored by a policeperson, soldier or public officer.⁷⁶ The requirement of authorization or monitoring by a public officer again derives from the fact that private security personnel are not subject to disciplinary measures for their actions.⁷⁷

8. Rules of Engagement

Private security personnel are instructed on rules of engagement (RoE) by the police and the IDF, as appropriate, in light of their specific activity. At least initially, the intention was for the RoE in the crossings to be similar to those applicable in Israel. The RoE presently applicable to the various security services within Israel, in the West Bank and in the crossings, including the RoE applicable to PSCs, are classified.

A number of incidents illustrate the significance of the uncertainty surrounding the RoE of private security personnel:

1. In August 2007 an Israeli Arab national, Ahmed Hatib, seized a weapon from a private security person in the old city of Jerusalem and ran away. The private security person chased him, and at some point grabbed Hatib, who shot him and continued to run

⁷⁴ Given that the powers of the executive are limited to Israeli territory, one might query why the authority to designate points in territory outside Israel is vested in the Minister of the Interior rather than with the Military Commander.

⁷⁵ Law on Implementation of the Interim Agreement regarding the West Bank and Gaza Strip (Adjudication Powers and other Provisions) (Legislative Amendments), 1996 Article 11(c).

⁷⁶ Law on Implementation of the Interim Agreement regarding the West Bank and Gaza Strip (Adjudication Powers and other Provisions) (Legislative Amendments), 1996 Article 11(a1). To date there have been no such designations.

⁷⁷ Adv Miri Frenkel-Shorr, Legal Advisor to the Knesset Committee on Internal Affairs and Environmental Protection, Knesset Committee on Internal Affairs and Environmental Protection, 16th Knesset Protocol No 495 (27 July 2005), 13.

away. A gun battle ensued between Hatib and the private security person's patrol partner, who eventually wounded Hatib mortally. According to bystanders, after Hatib was shot the private security person performed a 'confirming the kill' procedure (shooting from a short distance to ensure that the victim is dead). However, sources involved in the investigation said that the private security person 'confirmed that the terrorist was neutralized'. The distinction is a fine one, but significant: Confirmation of neutralization stems from concern that a person who continues to hold a weapon could, despite being seriously wounded, make a final effort to use the weapon.⁷⁸ The police conducted a criminal investigation, concluding that the security personnel acted 'professionally' and in accordance with the procedures. This brought to the fore the question of the RoE applicable to private security personnel, and the extent of the obligation of the PSC and the police to investigate the incident.

2. In June 2009 an unarmed individual (later found to be an Israeli national, apparently mentally unstable) arrived at the Erez checkpoint to the Gaza Strip, and began to climb the fence into Gaza. The private security forces called on him to halt, but he did not heed their calls and proceeded to climb the fence. The private security forces opened fire. They hit the man in the leg's main artery, causing him to bleed to death. It is not clear whether the order to shoot was given by the PSC senior officer or by the IDF commander. Given that a person running away from Israel does not constitute a direct threat, the basis for opening fire has been questioned. The IDF and the Defense Ministry said that while the incident was undoubtedly irregular, an initial probe shows that the force's actions were impeccable.⁷⁹ Official security sources reportedly noted that the RoE in such cases are similar to the RoE in the case of attempted infiltration into Israel, since climbing the fence could be an attempt to distract security forces as part of broader terrorist activity. However, it has also been suggested that the shooting was aimed at avoiding the potential kidnap of an Israeli citizen by Palestinian forces.⁸⁰

Both incidents illustrate the difficulty in transferring the authority to use deadly force on to civilian – and private – hands, since the situations that present themselves are complex both militarily and morally. Any discussion of the RoE of private security persons is nonetheless curbed by the fact that it is not clear whether the RoE applicable to regular security forces apply equally to private security persons, nor what the RoE for regular security forces are.

⁷⁸ Jonathan Liss, Jack Khoury and Yoav Stern, 'Film of Jerusalem attack counters family claim that assailant was innocent' *Haaretz* (12 August 2007), www.haaretz.com/print-edition/news/film-of-jerusalem-attack-counters-family-claim-that-assailant-was-innocent-1.227329.

⁷⁹ Hanan Greenberg, 'Israeli climbing fence into Gaza shot dead', *Ynet* (12 July 2009).

⁸⁰ Report by Nissim Keinan, quoting the crossing's commander, and personal communication with Brig Gen (Res) Zvi Fogel, Former head of the Southern Command Staff, *Reshet Bet* (12 July 2009). On the rules of engagement allegedly permitting use of force in such circumstances see Sara Leibovich-Dar, 'the Hannibal Procedure' *Haaretz* (21 May 2003).

9. Enforcement and Accountability

Civilian security personnel employed by PSCs are not generally considered civil servants, and the state is not their employer. During the consideration of the 2005 law in the parliamentary committee, a number of questions were raised on the implications of their legal status for the enforcement of legal sanctions if they act in excess of their powers. The matter remained unaddressed. Since the powers of a civilian security person are more limited than those of a policeperson or a soldier, it was suggested that there is less urgency in regulating these issues since the probability of legal suits being submitted against civilian security persons was low.⁸¹ In reality, there have been numerous incidents involving the use of force by PSC employees against civilians.⁸²

A practical difficulty is that as noted above, one of the consequences of the multiplicity of authorities involved in the running of the crossings is the lack of a clear addressee for complaints and problems. Lawyers representing victims report the difficulty in finding addressees for the complaints.⁸³

9.1 Disciplinary Measures

In principle, complaints relating to PSCs in the crossings may be submitted to the military commander or civil servant acting as director of the checkpoint. However, it is not clear what authority the director has to investigate and discipline PSC employees. PSC employees are not generally subject to disciplinary measures by any of the various security authorities.⁸⁴

It appears that the contracts with the police (which manages the crossings in the Jerusalem area) allow the police to take measures against the PSC in case of a PSC employee acting outside his or her powers; but it is not clear what these measures are and whether they are available against the PSC or directly against the employee.⁸⁵ The police maintain a procedure for investigating complaints about the conduct of security personnel in establishments for which the police is tasked with professional guidance, i.e. public institutions as well as the crossings.⁸⁶ This mechanism appears to address complaints alleging criminal conduct. There is apparently no mechanism for addressing

⁸¹ Adv Miri Frenkel-Shorr, Legal Advisor to the Knesset Committee on Internal Affairs and Environmental Protection, Knesset Committee on Internal Affairs and Environmental Protection, 16th Knesset Protocol No 425 (19 May 2005), 9-10.

⁸² Program on Humanitarian Policy and Conflict Research, Harvard University, 'Private Security Companies in the Occupied Palestinian Territories: An International Humanitarian Law perspective' (2008), 3-4 http://opt.ihlresearch.org/_data/n_0013/resources/live/briefing3734.pdf.

⁸³ Personal communications with Adv Gaby Lasky, (30 June 2010); Adv Michael Sfard (19 June 2010).

⁸⁴ Adv Rachel Gottlieb, Deputy Legal Advisor, Ministry of Internal Security, Knesset Committee on Internal Affairs and Environmental Protection Protocol No 430 (26 May 2005), 7.

⁸⁵ Personal communication with Adv Tali Nir, Association for Civil Rights in Israel (7 July 2010).

⁸⁶ Procedure 03-300-053 of 28 March 2007 (in Hebrew, on file with the author).

complaints on violations of human rights or other non-criminal matters,⁸⁷ or complaints regarding security personnel in non-public institutions.

9.2 Civil Liability

State liability: Given the state authorities' tight control over, and guidance of, the conduct of private security personnel, it is likely that the state can be held vicariously liable for their acts, despite the fact that it is by no means their employer.⁸⁸ A further question is whether the particular circumstances of action in the crossings may give rise to immunity of the state from liability. Various statutory provisions on exemption are worth examining.

The Civil Tort Law (Liability of the State), 1952 exempts the state from liability for combat action by the IDF.⁸⁹ The Israeli Supreme Court has distinguished between combat action (to which immunity applies) and law enforcement (to which it does not) according to the purpose of the operation, its location, duration, the identification of the military forces involved, and the military force used during the operation.⁹⁰ Since the IDF regards the operating of the crossings as a law enforcement activity, the state would find it difficult to claim immunity for torts committed in the course of that operation. However, a 2002 amendment to the Civil Tort Law (Liability of the State), 1952, defines 'combat action' as 'including any action conducted to combat terrorism, hostile actions, or insurrection, and also any action for the prevention of terrorism, hostile actions, or insurrection committed in circumstances of danger to life or limb'.⁹¹ This amendment likely excludes many potential suits, since the entire set up of the crossings is aimed at preventing the infiltration into Israeli of terrorist.

Nonetheless, the applicability of the combat immunity exception to acts of private security personnel is arguable: The provision on combat immunity applies to 'the IDF'. The reference in another article in the Law to the IDF as inclusive of 'other defense forces of the state of Israel'⁹² implies that in the context of combat immunity, the term 'IDF' should be interpreted narrowly. Accordingly, it is unlikely to cover acts of private security persons the combat immunity exception.

Another exemption from liability available to the state follows a 2005 amendment to the Law, according to which the state is immune to liability for torts caused in the West Bank as a result of action by the IDF, 'including other defense forces of the state of Israel operating in the area'.⁹³ In light of the fact that private security

⁸⁷ Personal communication with Adv Lila Margalit, Association for Civil Rights in Israel (6 July 2010).

⁸⁸ Torts Order, Article 14.

⁸⁹ Civil Tort Law (Liability of the State), 1952 Article 5.

⁹⁰ *Bani Uda v State of Israel* Supreme Court of Israel CA [Civil Appeal] 5964/92, *Judgment* of 20 March 2002.

⁹¹ Israeli Civil Tort Law (Liability of the State), 1952 Article 1.

⁹² Civil Tort Law (Liability of the State), 1952 Article 5A(1). see discussion immediately below.

⁹³ Civil Tort Law (Liability of the State), 1952 Article 5A(1).

personnel operate under IDF instruction and supervision, it is reasonable to interpret this provision as providing immunity to the state for acts of private security personnel for which it would otherwise be liable on the basis of vicarious liability.

Finally, the 2005 amendment to the Law extends the immunity of the state to claims for injuries sustained by nationals of enemy states (unless their stay within Israel is legal), by persons who are active member of a terrorist organization, or by persons who are injured while acting as agents of an enemy state or terrorist organization.⁹⁴ Residents of the West Bank and Gaza Strip are not ‘nationals of enemy state’, as these areas are not states and their residents are mostly either stateless or nationals of Jordan, which is not an enemy state. However, the Government is currently proposing an amendment to the Law, which would expressly expand the exemption from liability also to injuries sustained by residents of the Gaza Strip.⁹⁵

Individual and corporate liability: In the early stages of the parliamentary debate on the 2005 Law, the question was raised as to the individual civil liability for torts committed by private security personnel. It was assumed that private security persons are vulnerable to legal action similar to all civilians. It should be noted, however, that if it is held that under general tort law the state is liable for the acts of a private security person, but that the Civil Tort Law (Liability of the State), 1952, exempts it from liability for whatever reason, the individual private security person would also be immune, under the same Law.⁹⁶

If the individual private security person is liable for a tort, the PSC itself is vicariously liable under general tort law.⁹⁷ In addition, the Ministry of Internal Security noted that PSCs may only operate under license by the Ministry of Interior, and the terms of this licensing may stipulate expressly the responsibility of the company for the employee’s conduct.⁹⁸ However, concern was expressed that PSCs could easily evade their liability. On the one hand it was suggested by the Association for Civil Rights in Israel that there should be added a mechanism for the Minister of Internal Security (responsible for implementation of the law) to consider additional remedies for victims of excesses of authority. On the other hand it was argued that private security persons

⁹⁴ Israeli Civil Tort Law (Liability of the State), 1952 Article 5B. The immunity is qualified, principally with respect to certain injuries caused to a person while under custody of Israel. second supplement to the Law.

⁹⁵ which was declared hostile territory on 19 September 2007, www.mfa.gov.il/MFA/Government/Communiqués/2007/Security+Cabinet+declares+Gaza+hostile+territory+19-Sep-2007.htm. The 2005 amendment also expanded the immunity to claims of residents of ‘conflict zones’ (areas outside Israel that are designated by the Israeli Defense Ministry as areas in which active combat occurred), and provides that the state would not be liable for any action taken by the defense forces within such conflict zones. In December 2006, the Israeli Supreme Court declared this expansion unconstitutional. H CJ 8276/05 *Adalah v Government of Israel*, Supreme court of Israeli Judgment of 12 December 2006, http://elyon1.court.gov.il/files_eng/05/760/082/a13/05082760.a13.pdf.

⁹⁶ Civil Tort Law (Liability of the State), 1952 Article 7B.

⁹⁷ Personal communication with Adv Dana Aloni-Nak, Legal Advisor of Sheleg Lavan Ltd, a company providing security and other services (July 2010).

⁹⁸ Adv Rachel Gottlieb, deputy Legal Advisor, Ministry of internal Security, Knesset Committee on Internal Affairs and Environmental Protection, 16th Knesset, Protocol No 430 (26 May 2005), 13.

need additional protection from civil liability, similar to that accorded to policepersons. The parliamentary committee deferred the discussion at least until the powers of the private security personnel were clearly defined.⁹⁹ In 2008 the Law on Private Investigators and Security Services, 1972 was amended, and it now makes the licensing of PSCs conditional upon their providing a financial guarantee or insuring the corporation and its employees against claims of damages by victims of acts or omissions of the corporation's employees.¹⁰⁰

9.3 Criminal responsibility

Israel's extraterritorial prescriptive jurisdiction under the Penal Law, 1977, is extensive. Israeli criminal law is applicable to offenses committed abroad by a person who was, at the time of commission or subsequently, an Israeli citizen or resident, and if they are punishable by more than three months' imprisonment.¹⁰¹ In addition, the Penal Law provides for the applicability of Israeli criminal law to offenses which Israel has undertaken to prosecute under international conventions.¹⁰² This includes grave breaches of the Geneva Conventions, to which Israel is party since 1952.¹⁰³ Accordingly, private security personnel operating within Israel, in the crossings or elsewhere, are punishable in Israel for most offenses under Israeli criminal law. Prosecution for an offense committed abroad is conditional upon consent of the Attorney-General if there is public interest in such prosecution.¹⁰⁴

The question arose in Israeli courts whether a private security person may be regarded as a civil servant or public officer for the purposes of particular offenses in which such status is an element of the offense. The matter arose with respect to a PSC's team leader working in the Ministry of Interior in East Jerusalem, indicted for bribery. Under the Penal Law, a person may be regarded as a 'public officer' for the purpose of this offense if he or she is employed by 'a corporation providing service to the public'.¹⁰⁵ The determination whether a corporation provides service to the public in this context depends on the nature of the service provided (which is assessed according to the vitality of the service, its nature, the extent of governmental monitoring, the financing of the corporation, the extent of discretion that the corporation has in choosing its clients and the measure of choice that individuals among different corporations

⁹⁹ Knesset Committee on Internal Affairs and Environmental Protection, 16th Knesset, Protocol No 425 (19 May 2005), 9-11.

¹⁰⁰ Law on Private Investigators and Security Services, 1972 Article 19(a1).

¹⁰¹ Penal Law, 1977 Article 15(a). The extraterritorial reach of Israeli penal law extends also on bases other than the identity of the perpetrator, but those are less relevant in the present context. See Penal Law Articles 13-17. The Personal jurisdiction noted here is subject to other conditions, such as double criminality (with some exceptions).

¹⁰² Penal Law, 1977 Article 16.

¹⁰³ Israel is not a party to the Additional Protocols or to the ICC Statute.

¹⁰⁴ Penal Law, 1977 Article 9(b)

¹⁰⁵ Penal Law, 1977 Article 290.

providing the service)¹⁰⁶, as well as on the extent of contact that the corporation employees have with the population requiring the service, their authority over that population, and the extent of coercive power that they have over the population.¹⁰⁷ The Supreme Court ruled that the PSC in question provided a service that is in its nature governmental and public,¹⁰⁸ and that accordingly the PSC employee was a ‘public officer’ for the purpose of the offense of bribery. In the particular case, the functions of the PSC employees included, in addition to securing the area, the organization of the queue for entry into the offices of the Ministry. In this capacity, the Court noted the large measure of power that the PSC employees wielded over the population requiring the Ministry’s services, and the population’s dependence on the PSC employees.¹⁰⁹

This ruling, while applied to a particular PSC in a specific location, appears valid also for other PSCs and their employees, particularly in the crossings: In all these locations, the population is entirely dependent on the private security personnel (at least as the first port of call) who hold a large measure of coercive power and have no alternative choice among service providers. Although PSC employees may only carry out searches or prevent entry upon authorization from a public officer, this authorization is obtained outside the view of the civilian population, for whom the PSC employees are the only interlocutors. Thus, as far as that population is concerned, PSC employees appear authorized to use armed force.

In contrast to its finding that the PSC employee was a public officer for the purpose of the bribery offense, the Supreme Court ruled that the defendant was not a civil servant for the purpose of another offense, that of abuse of office. The Court ruled that status as a civil servant of a person who is not directly employed by the government depends on his or her function being central to the Ministry’s function. Since security services are not central to the Ministry of Interior’s function, persons employed in that capacity were not civil servants, despite the public character of the PSC’s role.¹¹⁰ Applying these criteria in the crossings is more complicated, as it depends on the perception of the role of the crossings and on the specific role of the PSC employees there. If one regards the crossings as international entry points (as is the image that the Israeli government promotes) then a distinction may be called for between private security personnel who handle documentation and permits and perform the principal governmental function, and private security personnel who perform security functions, whose role is subsidiary and even marginal to the regulation of immigration. If, on the

¹⁰⁶ *State of Israel v Barak Cohen*, CrimApp 10987/07, Supreme Court of Israel Judgment of 2 March 2003, 29-30.

¹⁰⁷ *State of Israel v Barak Cohen*, CrimApp 10987/07, Supreme Court of Israel Judgment of 2 March 2003, 33.

¹⁰⁸ *State of Israel v Barak Cohen*, CrimApp 10987/07, Supreme Court of Israel Judgment of 2 March 2003, 37.

¹⁰⁹ The Ministry of Interior’s office in East Jerusalem is notorious for the inadequacy of its physical infrastructure and understaffing, H CJ 2783/03 *Jabra v Minister of Interior and Others*, Supreme Court of Israel Judgment of 3 December 2003.

¹¹⁰ *State of Israel v Barak Cohen*, CrimApp 10987/07, Supreme Court of Israel Judgment of 2 March 2003 p. 43.

other hand, one regards the primary function of the crossings as control of the movement of Palestinians (a view advanced by various non-governmental organizations), then the distinction between the various functions of private security personnel become less pertinent.

There is no legislative or other formal regulation of superior criminal responsibility for acts of private security personnel. As noted above, the contracts of the police with PSCs regarding the Jerusalem area crossings allow the police chief to take certain measures against the PSC or its employee. Depending on the nature of this power, it may substantiate a position of superiority for the purposes of superior responsibility of police officers under international criminal law. At any rate, it seems that the perception of the military legal authorities is that the superiors of the private security personnel with respect to the security functions that employees are the military and police commanders, rather than their direct employers within the PSC.

10. Regulation of Export of Security Services by Private Entities

In the past, much of the massive Israeli defense industry was government-owned, although not part of the IDF. However, economic and political realities have proven the government-owned industry vulnerable,¹¹¹ and a gradual process of privatization of the military industry has been taking place for many years. The private defense industry remains under tight governmental monitoring. The present section concerns those aspects of the industry which involve human capital.

Under Israeli law, the export of know-how and security services is subject to monitoring under the Defense Export Control Law, 2007. This Law replaced earlier regulatory instruments, issued under a 1957 law on the control of products and services.¹¹² The objective of the 2007 Law is ‘to regulate state control of the export of defense equipment, the transfer of defense know-how and the provision of defense services’. The stated criteria for regulation under the law are ‘reasons of national security considerations, foreign relations considerations, international obligations and other vital interests of the state’.¹¹³

Defense equipment is defined as ‘Missile equipment, combat equipment and controlled dual use equipment’. Defense know-how is defined as ‘information [including technical data or technical assistance] that is required for the development or production of defense equipment or its use, including information referring to design, assembly, inspection, upgrade and modification, training, maintenance, operation and repair of defense equipment or its handling in any other way’ as well as technology relating to dual-use equipment; and ‘know-how relating to defense forces, including

¹¹¹ Guy I Seidman, ‘From Nationalization to Privatization: The Case of the IDF’ (2010) *Armed Forces and Society* XX(X), 8-9.

¹¹² Control of Products and Services Law, 1957, Order on the Control of Products and Services (Export of Defense Equipment and Defense Know-How), 1986.

¹¹³ Both quotes are from Article 1 of the Export Defense Control Law, 2007.

know-how concerning their organization, build-up and operation, combat doctrine or training and drill methods defense policy or their methods of action, as well as know-how relating to defense policy anti-terror combat and security methods'.¹¹⁴ Defense services are defined as 'a service relating to defense equipment, including its design, development, production, assembly, review, upgrade, modification, repair, maintenance, operation and packaging, as well as instruction related to said equipment, and service regarding defense know-how, including instruction, training and consulting regarding said know-how'.

Israeli citizens or corporations may not be involved in the export of a defense exports outside of Israel (or within Israel to a person who is not an Israeli citizen or an Israeli resident, or to a foreign corporation) unless they have received a defense export license and pursuant to the provisions of that license.¹¹⁵ A defense export license is available from the Ministry of Defense. It is conditional upon registration in the Defense Export Registry. Defense export licenses are granted for renewable periods of two years.

The decision on licensing is adopted by a committee comprising representatives of all branches of the Israeli security authorities (the Ministry of Defense, the IDF, the Mossad, the Israel Security Agency and the police) as well as the Ministry of Foreign Affairs, which holds a near-veto power on the final decision.¹¹⁶ When applying the statutory guidelines for licensing, the committee considers the intended end users of the export as well as potential intermediaries. Its decisions are based on consideration of Israel's national security and export interests, as well as of relations with the government in question and with third states, and of Israel's international legal obligations. Consequently, requests for defense export for non-state actors are by and large rejected, since military assistance to non-state actors (such as rebels and insurgents) would be a violation of Israel's obligation not to intervene in the internal affairs of other countries. In addition, licensing requests are examined in light of applicable UN Security Council on enforcement measures under Article 41.

When considering a licensing request, the Ministry of Defense may demand information on the end use of the defense export and a declaration by the end user regarding that end use, as well as confirmation by an official governmental authority in the state of destination as to the identity of the end user to which the request for export license relates.¹¹⁷ This confirmation aims to ensure that the end user is either the government itself or a body recognized and approved by that government, and permitted to engage in the activity in question. As a policy, the committee also examines the human rights situation in the state in question, guided by the Ministry of Foreign Affairs and relying on UN resolutions, on information from NGOs, and on the practice towards that state of Israel's international allies. According to sources in the Ministry of

¹¹⁴ Export Defense Control Law, 2007 Article 2.

¹¹⁵ Export Defense Control Law, 2007 Article 15(a)(3).

¹¹⁶ Export Defense Control Law, 2007 Article 26.

¹¹⁷ Export Defense Control Law, 2007 Article 6(b).

Defense, where there is concern that the defense export would be used for purposes that are irreconcilable with international human rights standards, a license is likely to be refused.¹¹⁸ In June 2010 the Ministry of Defense for the first time made public certain elements of its defense export policy.¹¹⁹ However, this policy document refers to commercial considerations and makes no mention of the political considerations involved. The Ministry of Defense also publishes a directory of companies approved to offer their products and services.¹²⁰

Holders of export licenses must submit an annual report to the Ministry of Defense regarding their activity under the license.¹²¹ Export of defense equipment, know-how or services without a license or in violation of a license's terms is a criminal offense. It is punishable by three years' imprisonment or a pecuniary fine. Under aggravating circumstances it is punishable by five years' imprisonment or a pecuniary fine, eg when the end user is an 'enemy' state as defined under the Commerce with the Enemy Order, 1939; when the export is classified; or when a person engages in brokering between foreign entities in violation of a UN Security Council resolution.¹²²

The law imposes a duty on corporation officers to supervise and 'do everything possible' to prevent the offenses of unlicensed export by the corporation or by any one of its employees. Failure to discharge this duty is punishable by a fine. An 'officer' is an active director, partner, with the exception of a limited partner, or other official whose responsibilities on behalf of the corporation include the areas of responsibility of the committed offense. Should an offense be committed by the corporation or by any one of its employees, the officer is held to have violated his or her duty of supervision, unless he/she proves that he/she did their utmost to fulfill this duty.¹²³ There is no provision of superior responsibility with respect to other offenses committed by corporate employees.

In addition, if the Ministry of Defense has reasonable grounds to assume that an act or omission has occurred which constitutes an offense under the Law, it is authorized to impose a civil fine upon the person who committed the offense. The Ministry may also impose a civil fine for failure to provide the annual report.¹²⁴ There have been a handful of criminal cases regarding violations of the 2007 Law, all related to export of equipment outside the terms of a license.

¹¹⁸ The press nonetheless reports of lively activity of Israeli arms dealers in many totalitarian states in Africa, including under license from the Ministry of Defense. Most of the private activity, however, appears to concern exports from other states than Israel, to which Israeli law does not apply. Dror Merom, 'Research: No Supervision of Israeli Arms Dealers in Africa' News1 (3 September 2008), www.news1.co.il/Archive/001-D-172482-00.html?tag=15-45-37 (in Hebrew).

¹¹⁹ Defense Export Policy (Ministry of Defense, in Hebrew, 6 June 2010).

¹²⁰ Israel Defense Sales Directory 2009-2010 (Ministry of Defense, SIBAT, 2009), www.sibat.mod.gov.il/SibatMain/HEB/UploadDocs/sibatdir.pdf.

¹²¹ Export Defense Control Law, 2007 Article 28.

¹²² Export Defense Control Law, 2007 Articles 32, 33.

¹²³ Export Defense Control Law, 2007 Article 34.

¹²⁴ Export Defense Control Law, 2007 Articles 35, 36.

The Law only regulates the *export* of defense equipment, know-how and services. It does not appear to regulate the involvement of Israeli nationals or residents in activities outside Israel that do not involve such export. There is no other legislation dealing with such conduct directly.¹²⁵

11. Conclusion

Israel has been involved continually in armed conflict from the day of its establishment, and its legislation and practice on related issues is relatively rich. Moreover, within Israel, the military establishment has originally been involved in various functions that are ordinarily assigned to civilian and even private operators. Consequently, civilianization of the military and privatization of certain functions have long since attracted the attention of Israeli policy makers

However, the regulation under Israeli legislation and practice of the conduct of Israeli actors outside Israeli is very limited. This is probably a reflection of the fact that Israel's exclusive international operating field is in territories that are geographically contiguous to it and in which Israel holds a specific territorial status – that of an occupying power. Military operations in these territories are governed by the laws of armed conflict. Functions that have been transferred to civilian and, in some cases, private hands, are modeled more on the law enforcement model that is characteristically applicable within the state, than on the armed conflict model that characteristically governs outside the country. The situation is complicated by the fact that the law enforcement/armed conflict dichotomy does not overlap with the domestic/international dichotomy. Military forces carry out law enforcement functions, while the police is also involved in matters relating to armed conflict. As a consequence, the conduct of private operators, which are guided by various authorities, often remains insufficiently or unclearly regulated.

¹²⁵ Such conduct may be indirectly regulated if, for example, it constitutes a criminal offense over which Israel has extraterritorial criminal jurisdiction.