THE PRIVATIZATION OF SECURITY IN THE OCCUPIED PALESTINIAN TERRITORY

The role and impact of private military and security companies (PMSCs) and settlement civilian self-defense forces on Palestinian Human Rights

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A Palestinian boy with a bicycle looks at a group of Israeli settler children and a private security guard, Silwan, East Jerusalem, April 4, 2007. The neighborhood of Silwan in East Jerusalem contains what some Jews consider to be “The City of David”. Even though Silwan is a Palestinian neighborhood, the Housing Authority in Israel assists archeological organizations and settlers in seizing control of property in the area by declaring houses absentee properties (often while people still live in them) and demolishing homes that were built without permits that Israeli authorities have made virtually impossible to obtain.

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The present report analyzes the role of Private Military and Security Companies (PMSCs) and their implication in human rights violations in the occupied Palestinian territory (oPt). We need to understand the nature and use of PMSCs in general in order to understand their specific role in the oPt.

Since the Declaration of the State of Israel in 1948, the Israeli government has used the pretext of security to justify the occupation of the Palestinian people, committing terrible atrocities and violating human rights, for example blockading Gaza and building the Wall.

In this context, Israeli security and defense policy is a controversial issue which we need to understand on two levels. First, Israel does not defend all its citizens: it excludes the non-Jewish, their properties and rights, through more than 50 rules and regulations that discriminate against Palestinians living in Israel. Secondly, as pointed out by the Palestinian lawyer Raja Shehadah, military actions in the oPt aim to control all spheres of Palestinian life and to colonize the territory.

The Israeli notion of security is closely linked to their concept of terrorism, drawing an extremely thin line between terrorism and resistance. The right of the Palestinian people to resist Israeli military occupation is not only a moral right but also a recognized right under customary international law. Continuing Israeli noncompliance with international humanitarian law in the occupied Palestinian territory serves as a framework for the ongoing regime of criminalization of nonviolent Palestinian struggle. The use of armed settler militias and, more recently, PMSCs serves to intensify the oppression of the Palestinian people. PMSCs are a key actor within this “matrix of control”, in the words of Jeff Halper (co-founder and co-director of the Israeli Committee Against House Demolitions).

In this volume, Leticia Armendáriz analyzes the use of PMSCs by Israel in the oPt, with reference to concepts, declarations and policies of the Israeli authorities, and gauges the impact of PMSCs on the human rights of the Palestinian people. This report will be used to demand further reparations and accountability, while also putting forward recommendations for limiting the privatization of warfare and security, measures that are needed to achieve a just and lasting peace.

NOVACT – International Institute for Nonviolent Action
EXECUTIVE SUMMARY
EXECUTIVE SUMMARY

As part of the NOVACT study series on privatization of war and security, the present report analyzes the military and security privatization dynamics in the occupied Palestinian territory (oPt), where Israel enjoys the status of occupying power. As in previous reports, this study focuses on the issue of private military and security services (PMSCs) from a human rights perspective, exploring the impact of the use and activities of PMSCs on the human rights of the Palestinian people and assessing the extent of their regulation under national and international law.

Highlights of the report

- As an occupying power, Israel has replicated its internal policy of security outsourcing in the oPt through the adoption of military orders and by means of amendments of applicable internal laws. Outsourcing dynamics came about mainly from a revision of Israeli Defense Forces tasks and consists of a combination of civilianization and privatization: traditionally military-assigned tasks have been transferred to Israeli civilian state organs, civilian communities and private citizens, and private corporations alike.

- The presence of PMSCs is now visible in a number of contexts in the oPt, including checkpoints, industrial zones and settlement enclaves in the West Bank and East Jerusalem, private establishments and construction sites along the Wall. Furthermore, while their activities comprise the typical tasks of escort and protection services, in many contexts they also have an important component of law enforcement, which includes the exercise of policing powers such as the use of force, searches and seizures, and the conduct of arrests and detentions.

- Additionally, one particular aspect of the outsourcing dynamic in the oPt has been the delegation of security functions to private citizens within the settlement areas and outposts in the West Bank (a specific type of “civilianization”): though not corporate agents, settlement civilian security coordinators (CSCs) and their guard teams amount to auxiliary military forces armed, instructed and authorized to act on behalf of the Israeli army with funding from the Israeli Ministry of Defense in order to defend settlements against “terrorist infiltration” and other self-qualified threats. Although part of the broader trend to outsourcing law enforcement functions, a clear distinction is visible between PMSCs and the role of CSCs, which is more political, aligned ideologically with the settlement project, and often used as a means, under the so-called security pretext, to expand the territories of settlements and outposts. Overall, this also means that the powers and supervision of settlement guard forces are less regulated than for private security companies and the impact of their activities on Palestinian lives is much more immediate, harming their rights to property and life.

- Preliminary results of the Observatory on Private Military and Security Companies & Human Rights show that incidents have been reported in every one of the contexts where PMSCs and contractors operate, and are certainly superior in number in the context of settlements and at nonviolent demonstrations against the Wall. Furthermore, many incidents involve the use of armed
force in a manner that reflects a wide discretion in interpreting the existence of a potential threat, abuse of power, and confusion regarding the applicable rules of engagement.

- The report has made clear that the conclusion reached about the qualification of settlement guard teams and some PMSCs as civilians under international humanitarian law is neither clear-cut nor fully satisfactory in the light of their role in practice, and should be further clarified by Israeli authorities in military orders.

- The report has explored the limitations to contracting that arise from the scope of the humanitarian obligation of the occupying power to maintain public law and order in the occupied territory. In this regard, it is argued that the operation of international law introduces important red lines against a complete transposition of Israeli national legislation on public security to the oPt, as a territory outside its sovereignty and having occupied status. In particular, the fact is that the delegation of security and law-enforcement powers to settlement civilian forces and PMSCs in the West Bank and East Jerusalem contributes to perpetuating a grave violation of IHL and is prohibited per se. Israel cannot use private police, neither settler guard teams nor PMSCs, to protect illegal settlements or to allow their expansion.

- The report closes by highlighting the consequences in terms of accountability that can result from the use and activities of PMSCs and civilian contractors. In particular, we maintain that the fact that Israel is not the direct employer of private security contractors in the oPt does not prevent it from engaging in international responsibility if they commit violations of international law. Furthermore, the fact that IHL also binds individuals makes it possible for private military and security contractors to bear criminal responsibility under international law for the perpetration of and participation in violations of IHL. In this regard, PMSC employees and their directors, as well as settlement Civilian Security Coordinators and their guard teams, should be aware of the diverse forms of participation in crimes established under international law when accepting and executing their mandate or powers.

- As a whole, the content of this report reinforces the case for an international binding regulation of private military security companies and a limit to the privatization of war.
Last decades have witnessed a strong shift towards the privatization of war and security. On the one hand, since the end of the Cold War states have relied, to a much greater extent than before, on civilian private contractors to support their military operations abroad; on the other hand, the role played by these non-state actors in armed conflicts and other hostile or unstable situations has evolved greatly: with a minimum of public debate, functions traditionally performed by national armies and public authorities – such as the interrogation of detainees, protection of military assets, security and police functions, training of local armed forces, collection of intelligence, and other defensive and even offensive military activities – have increasingly been contracted out to private military and security companies (PMSCs).

In some cases, states have outsourced these functions because they lack the manpower or the technical expertise to undertake them, while in others the use of PMSCs is just the result of a policy of re-formulation of the role and aim of contemporary national armies or simply the evolution of the internal national dynamics of privatizing state functions. Yet, to be clear, it is not only states which are pursuing this policy; in the field of security-related services, non-governmental organizations, transnational corporations or international organizations like the United Nations and the NATO are also among the clients of PMSCs.

Although it was mainly during the armed conflicts of Afghanistan (2001) and Iraq (2003) that this privatization policy acquired unprecedented dimensions, both quantitatively and qualitatively, the use of PMSCs is not a new phenomenon. On one side, the delegation and contracting out of military functions is clearly reminiscent of past experiences concerning the mercenary issue (even if PMSCs are not formally contracted in a combat role, and their personnel do not generally fall under the legal definition of mercenary). At the same time, the hiring of PMSCs can be seen as the contemporary evolution of the historical practice of using civilians to accompanying state armed forces to war zones in direct support of their military operations. Furthermore, the military and privatization phenomenon has not been limited to armed conflict scenarios. Private contractors now replace soldiers and public officers in a variety of situations that include peacekeeping, counter-piracy operations, home-land security and prolonged armed occupation.

As part of NOVACT study series on privatization of war and security, which explore the use and activities of private military and security companies (PMSCs) in a number of countries and situations, the present report analyzes the military and security privatization dynamics that take place in the occupied Palestinian territory (oPt), where Israel enjoys the status of occupying power. As in previous reports, this study focuses on the issue of PMSCs from human rights perspective, exploring the impact of this policy on the human rights of the Palestinian people and assessing the extent of their regulation under national and international law.

The study takes as a starting point the position of the UN International Court of Justice regarding the status of the oPt in its 2004 Advisory Opinion on the Legal Consequences of the Construction of
a Wall\(^1\), i.e. that the West Bank, Gaza Strip and East Jerusalem remained occupied territories at that time and Israel continued to have the status of occupying power. Since then this qualification has not substantially changed\(^2\) with the exception of the situation in the Gaza Strip after the unilateral Israeli Disengagement Plan in 2005. In this regard, the report considers the majority opinion of the international community and academy according to which, due to the air, sea and land blockade imposed on Gaza and the continuing exercise of an overwhelming degree of control over many aspects of daily civilian life in the territory, Israel *de facto* controls Gaza and should be regarded as an occupying power according to international humanitarian law (IHL).

It should also be noted from the outset that our analysis is based on a specific view of privatization. We have used a restricted definition of the “private military and security company” (PMSC) as a corporate entity which on a compensatory basis provides military and security services\(^3\), irrespective of how the company describes itself. The most important part of this definition is the *provision of services*\(^4\), which means the involvement of human resources, thus excluding companies that produce or supply military and security goods, such as weapons and military hardware or security software, but including those that provide services of operation or maintenance of weapons or security systems by private contractors. In conjunction with the other aspects, this definition aims to distinguish PMSCs from other relevant industries present in complex environments such as [re]construction, supply, and defense or arms industries\(^5\). Furthermore, the study considers a broad definition of private contracting, which includes but goes beyond PMSC employees to encompass freelance contractors and private citizens employed on a contractual basis to perform military and security services. In the context of the oPt, this has meant that the particular policy of the Israel Ministry of Defense of outsourcing certain security responsibilities to settlers [called by some “civilianization”] has been studied and, in particular, subjected to the scrutiny of international law regulations\(^6\). Thus, for us privatization also includes civilianization because we understand the term “private” as opposed to “public” and not only to “military”. At the same time, we are aware that the strict definition of PMSCs has left out of the analysis the activities of a number of private corporations [some of them engaged in the provision of military and security equipment] that are or have been involved directly or indirectly in the occupation of Palestinian territory.

As an occupying power, Israel has replicated its internal policy of security outsourcing in the oPt, that is, a combination of civilianization and privatization: traditionally military-assigned tasks

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2. Please note that we are referring here to the occupied status of the oPt under International humanitarian law, and this does not preclude other qualifications of the situation in the territories under International law.
3. This is the definition included in the *Draft of a possible Convention on PMSCs* drawn up by the UN Working Group on Mercenaries, A/ HRC/15/25, 5 July 2010 [hereinafter, Draft Convention PMSCs]. Please, note that we are proceeding with our own understanding and interpretation of this definition, which may not be that of the UN Working Group on Mercenaries.
4. Military/security services refers to services which involve or assist in the use of force for military or security applications, i.e. services which regularly or in a situation of emergency or armed conflict are attached to traditional organic core functions of military, police and security forces or law enforcement institutions. This means they can be armed or unarmed services.
5. We are aware that this definition may be disputed, as there is not yet a settled definition of PMSCs. As said above, this is just a starting point to studying the issue for the purpose of this report and the Observatory on Private Military Security Companies & Human Rights [see below Section II].
6. It should be said that the phenomenon of civilian self-defense groups is not exclusive to Israel but has been observed in other countries as well.
have been transferred to civilian state organs, civilian communities and private citizens, and private corporations alike. In many aspects, this policy amounts to a military privatization of law-enforcement functions for the maintenance of public order and safety. Section I begins with a brief overview of this policy and continues with a separate analysis of outsourcing dynamics in each of the occupied Palestinian territories and contexts where private activity has been observed, namely, checkpoints, settlements, the Wall, and private and public establishments [escort and protection services]. Due to its relevance, a description of the attempt to privatize prisons and the provision of private security services for Jerusalem’s light-rail train has been included. Furthermore, it should be noted that the training of security guards in Israel has also been outsourced to private companies. This section includes the names of the ‘private security companies’ which have been identified as allegedly operating in the past or present in the different contexts of the oPt. The great majority of PMSCs and contractors working in the oPt are of Israeli nationality. This section does not cover the internal aspects [organizational, financial, ownership, etc.] of each of the companies.

Section II assesses the implications of this outsourcing policy from a humanitarian and human rights perspective, in particular, by means of description of some of the incidents in which PMSCs and other contractors have been involved. The incidents included in this section are preliminary results of the Observatory of Private Military and Security Companies & Human Rights (oPt), a broader NOVACT project aiming to document, systematize and analyze human rights incidents involving private military and security companies (PMSCs) and private security and military personnel [contractors] in different countries and contexts. Incidents covered by the Observatory in the oPt included alleged abuses against the Palestinian population and against PMSC employees and contractors, and amount to human rights violations and infringements of IHL rules.

In contrast to the experience in other countries, particularly Afghanistan, the process of privatization in the oPt has not led to a deregulation of the use and activities of PMSCs and private contractors. Rather, a complex set of Israeli national laws and military orders is in force, regulating the license and the public use and powers of private security companies and contractors. In the first part of Section III we analyze the content of these laws and other relevant Israeli legislation and regulations applicable to PMSCs and settlement civilian security contractors in aspects such as the use of force, discipline and accountability. We note that important rules and procedures for their activities remain classified, uncertain or deficient. The second part of this section is devoted to contrasting the Israeli policy of military and security outsourcing, as an occupying power, and the activities of PMSCs and contractors in occupied territories with the pertinent rules of international law. As indicated at the outset of this section, although there is not yet a specific international treaty on PMSCs, relevant rules for the use and activities of private military and security contractors in the oPt can be extracted from the two bodies of international law applicable in the context of belligerent occupation, mainly international humanitarian law (IHL) and human rights law (IHRL). Since some of these rules require a case-by-case analysis, we explore some issues that raise specific legal

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7 The Observatory of Private Military Security Companies & Human Rights is an international project funded by Oxford Research Group and the International Cooperation and Solidarity Department of the City Council of Barcelona. The Observatory geographical scope is focused on three countries: Colombia, Iraq and the occupied Palestinian territory. NOVACT is working on the expansion of the Observatory to other regions such as Africa. The Observatory’s field work is carried out in cooperation with independent field researchers and local research centers located in these countries. For further information please visit www.novact.org.
controversy and involve important practical implications such as the status of PMSC employees and settlement private guards under IHL [Subsection III.b.i.]. Based on this analysis, Subsection III.b.ii. makes clear that not all that is not prohibited is per se permitted and that IHL places important limits on the ability of Israel as an occupying power to contract out certain activities to PMSCs and private contractors. Then Subsection III.b.iii. briefly describes the two different paradigms that govern the use of force in situations of armed conflict and occupation and highlights some human rights norms that delineate the permissible use of force by private security personnel acting as law-enforcement agents. Finally, Subsection III.b.iv. provides an outline of international rules for the responsibility of states and for holding private military and security contractors accountable for their actions in the oPt.
THE PRIVATIZATION OF SECURITY IN THE OCCUPIED PALESTINIAN TERRITORY
THE ROLE AND IMPACT OF PRIVATE MILITARY AND SECURITY COMPANIES (PMSCs) AND SETTLEMENT CIVILIAN SELF-DEFENSE FORCES ON PALESTINIAN HUMAN RIGHTS

1/
THE DEVELOPMENT OF THE PMSC INDUSTRY

Due to the prolonged situation of occupation and the control exercised over the area, the use and activities of private military and security companies (PMSCs) in the oPt are linked to Israel, as an occupying power, and to the PMSC industry in Israel. Indeed, most of the companies operating in the oPt are contracted, either directly or indirectly, by Israeli authorities and, with some exceptions, have Israel as the country of origin where they are registered or incorporated. In the terms of the Montreux Document, Israel is both the primary contracting state and the home state of most PMSCs working in the oPt, and therefore the development and activities of the industry in the oPt should be studied in connection with the security context in Israel and the process of security outsourcing that has been undertaken there.

It should be noted from the outset that although this report concentrates on the process of military and security privatization undertaken by Israel ad intra, i.e. in its sovereign territory (as delimited by the Green Line) and in occupied areas under its control (in the oPt), Israel is also the home state of a huge industry of PMSCs exporting military and security services abroad and the country of nationality of individuals engaged in private security activities in foreign countries. Yet, from a contracting perspective, and leaving aside the oPt, there are no indications—to the best of our knowledge—of Israel having embraced a policy of military outsourcing beyond its borders (ad extra), which seems to be due to the adoption of a policy of military self-reliance (as explained below) and to its restricted military participation in multinational operations abroad.

a// BACKGROUND: THE PROCESS OF MILITARY AND SECURITY PRIVATIZATION IN ISRAEL

Since its establishment as a state in 1948 Israel has had to deal with several armed conflicts, insurgency, terrorist activity and local resistance deriving from decades of occupation of Palestinian territory. While Israel has enjoyed periods of relative stability, the 1948 Declaration of Emergency has been in force almost permanently, resulting in a state modeled on a rigid concept of security and engaged in a constantly high degree of self-proclaimed military and security activity encompassing military operations, law-enforcement responsibilities, and anti-terrorist and intelligence actions.

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8 As explained below, the state is not the direct employer of PMSCs, but contracting is made through tenders for bids, settlement funding, and subcontracting policies.
9 The Montreux Document – an pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict, 2008. The Montreux Document (MD) is a non-legal binding instrument resulting from an international process launched by the Government of Switzerland and the ICRC. It contains a compilation of relevant international legal obligations and good practices for states in relation to PMSCs. https://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf
In the existing military and security apparatus the Israel Defense Forces (IDF) enjoys a pre- eminent position. Due to ideological and political reasons, the IDF was envisaged and articulated as a central institution in the formation of society and the construction of the State. Upon its establishment, the IDF was granted the authority to carry out all lawful and necessary actions "for the defense of the Jewish State", and the establishment or maintenance of any other armed force was prohibited except under law. However, over the years the IDF's role was expanded beyond strictly military operations for defense of the nation to other national but non-military activities the purpose of which is a national security target, for example, the police or other recognized services such as hospitals and educational facilities. The military in Israel occupies such a prominent role that this has resulted in the presence of soldiers and small military units serving in certain public institutions and areas in Israel, such as the Israel Police and Homeland security.

During the 1950s and 1960s, in addition to the prominent role of the IDF, a sophisticated Israeli defense industry was developed in tandem with the IDF, including arms and technology enterprises. Although not part of the IDF, the military industrial corporations were mostly government-owned and had the IDF as their primary client and raison d'être. By the 1970s and 1980s the operational success of nationally manufactured products and the general growth of the industry were undoubted and motivated the export endeavors of the Israeli defense establishment. Over the years, the military industrial complex became the fastest-growth sector in the country.

Both the IDF and the military-industrial complex have followed a similar policy of self-reliance. In the case of the IDF this has meant the provision of all military-related services in-house, including those of logistical and discretionary nature that by that time were already being outsourced in foreign militaries, such as catering, medical services and transportation. As for industry, even if a dual-policy approach towards defense procurement was followed which included the opportunity to buy certain weapons abroad, efforts were concentrated on acquiring defense knowledge, providing defense services and developing capabilities to produce all weapons and technology systems that IDF operations may require in time of war.

Beside the military-industrial complex, the role of the Israeli police has also been expanded in order to achieve the [self-considered] necessary level of security, particularly in relation to terrorism.

In 1974, following the Yom Kippur War, the Israeli government decided to make the Israel Police responsible for the country's public security and adopted a so-called policy of “dual-purpose police”: a police force that deals with traditional policing roles, i.e. the maintenance of public order in the face of ordinary criminal activity and issues of national security within the state borders, including public security and intelligence activities against attacks and violence.

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13 Security services in Israel include the Israel Defense Forces, the Israel Police, the Israel Prison Service and the General Security Service.
14 On this process, see Seidman, G., "From Nationalization to Privatization: The Case of the IDF", Armed Forces & Society, Vol. 36, No. 4, July 2010.
17 On the Israel concept of security see the foreword.
18 See Control of Products and Service Law, 1957. Order on the Control of Products and Services [Export of Defense Equipment and Defense Know-How], 1986. At the same time a big jump in exports and the Israeli defense industry took place after the 1973 war since Israel needed foreign reserves and also because it had a weapons shortage during the war and realized it needed serious independent production lines.
20 See http://mops.gov.il/English/PolicingENG/Police/History/Pages/default.aspx.
Civilization of security and military functions

Given the policy of self-sufficiency of the IDF and the defense industry as well as the broad mandate of the Israel Police, the first signs of a military and security privatization dynamic in Israel were of little significance during the first decades of their existence. In 1972, the Law on Private Investigators and Security Companies was adopted, defining the requirement for the establishment and operation of private security companies (PSC). However, beyond the use of force in self-defense, the law did not provide exhaustive details regarding the powers of the PSCs or their areas of activity, which would be left to be governed by contractual relations with their clients. In practice, the role of PSCs in the overall security system seemed to be marginal and limited to commercial security in certain private businesses21.

In contrast, a common phenomenon observed since the very beginning of Israel’s existence is the “civilization” of security responsibilities, i.e. the transference of security functions to non-military authorities. Although the concept of civilianization is referred to both in official and academic documents22 as the transfer of IDF tasks to the civilian sector, which may include state organizations, it also encompasses the transfer of military tasks to civilian communities and citizens. We refer here to this second case. Civilization has taken place in several areas, but two policies are particularly relevant here with regard to military and security functions.

The first policy of civilianization took place in the wake of, and even before23, the establishment of Israel as a state within the framework of the so-called “regional defense doctrine”. Under the stipulations of the Local Authorities Law (regulation of Guarding) of 1961, the so-called “frontline (civilian) communities” located along the borders of the state were assigned the task of defending themselves both in times of emergency and others. To this end, guarding units comprising local members of communities and a civilian security coordinator (CSC) were appointed and army equipment was allocated to them under the supervision of the IDF or the Israeli Police and the Border Police24. As a result, the application of the regional defense doctrine was articulated by Israel as an empowerment of civilian armed forces for assisting the “army in defending the borders of the state against invasion by hostile forces during war” while protecting the communities in periods of calm25.

The second policy of civilianization was articulated around the notion later known as the “concept of community policing”. Following the government resolution adapting the dual-purpose police policy in 1974, several organizational and structural changes took place, including the creation of the Israeli Civil Guard (CG) (known as Mishmar Ezrachi, or Mash’az), a volunteer organization for homeland security operating alongside, but not within the Israel Police. In 1975 guidelines were established for its organizational structure through an amendment to the Israel Police Law providing that “in every operation that it is authorized to undertake for the protection of the lives and property of Israel’s citizens from hostile actions, the Israel Police may also use the services of the Civil Guard”26.

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21 Law of Licensing Businesses, 1968, providing regulations related to the safety, order and security of private businesses, under the supervisory authority of the police in issues related to public security.
23 See for example the figure known as “Hashomer” or “watchman” at the beginning of the XX century.
24 For an exhaustive overview of the application of regional defense doctrine, see Yesh Din, The Lawless Zone. The transfer of policing and security powers to the Civilian Security Coordinators in the settlements and outposts, June 2014.
25 Id. at. 10.
By the 1980s, close cooperation between the Israel Police and the Civil Guard led to the creation and integration of special units of Civil Guard (CG) volunteers into regular policing activities, such as patrols, detective work and crime prevention27. During the late 1980s and 1990s subsequent amendments of the Israel Police Law definitively settled the powers and specified the areas in which the Israel Police was authorized to enlist the assistance of CG volunteers, including patrols, detective work, maritime policing and assisting police bomb squads. Consequently, over the years the number of CG personnel radically expanded in Israel, serving as security guards in public and private places and events, and including ideological groups such as the Zoka units deployed in all the country’s police districts for self-qualified terrorist-related activities. In 1998, the CG was incorporated as an integral part of the Israel Police, progressing since then towards a professionalized, though still volunteer, community policing organization assuming a still more active role in maintenance of the concept of “homeland security” in Israel28.

The emergence and consolidation of the private military and security industry

While internationally the end of the Cold War led to a drastic readjustment in the organizational structure of foreign militaries and the emergence of a new private military and security industry29, in Israel a trend towards civilianization and privatization of military and security functions arose, due mainly to major internal events in the second half of the 1980s and early 1990s. The first moves towards military outsourcing arose as a result of the assessment of IDF functions. In particular, the economic crisis in Israel and the pressure on the military to reduce its burden on the national budget prompted initial informal discussions regarding the possibility of opening up military functions to civil industry and the private market30. Materially, however, no specific measures were taken in a systematic manner to consolidate this process. During the 1990s the Israeli government took the fragile security situation arising from after the first Intifada (1987) as grounds for expanding the use of security firms. Private guards, which had been licensed under the 1972 law and were until then restricted to certain limited commercial locations, began to be stationed at public institutions under the operation of new regulations31.

During this period other outsourcing dynamics also began to emerge. For instance, prison privatization first came up for discussion although no definitive action was taken32. Furthermore, in the context of the defense industry, in the early 1990s the vulnerability of the state-owned military industry resulting from its dependency on the IDF became apparent. While the restructuring and privatization of the sector was kept off the agenda, a privately owned military industry emerged as a more flexible and competitive agent both under the IDF’s new procurement preferences and for

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27 Id.
28 Id. at 37.
30 At the beginning of the 1990s the Israeli government appointed a committee (the “Sadan committee”) in order to determine the type of tasks that could be transfer from the army to the market. The committee completed its work in 1993, but no steps have been taken for a formal materialization. During the year 2000, the government adopted a decision, the Government decision 2571 (TM/79), November 30, 2000, according to which “the IDF will list task than can be done by the civilian sector, and their meaning”.
31 Regulating Security in Public Institutions Law, 1998. This law defines detailed regulations regarding the security requirements in public institutions while the police guide and supervise the fulfillment of the regulations; each public institution must appoint a security officer who will ensure public security in the organization. Although the law does not refer specifically to private guards, it seems that private guards would have operated under this implicit authorization. On the security environment during this period, see Gadi Parhan, Ami Pedahzur and Arie Perlige, ‘Coping with terrorism in Jerusalem’. Jerusalem Institute for Israel Studies, 2005, p. 68-80.
32 See below, Subsection I.b.
the international market\textsuperscript{33}. Overall, these events seemed to have introduced the neo-liberal concept of competition and complementarity into the sphere of public functions, prompting a revision of efficiency and capabilities in the military and security fields, thus providing an initial impulse towards private services rather than their definitive materialization.

In the military arena, the process towards privatization of IDF functions began to gather pace from 2000 to 2005, as a result of the combination of diverse motivations and the effects of the second Intifada on overall security structures\textsuperscript{34}. As in other latitudes, initially the outsourcing dynamic began with logistics and non-core military/discretionary services, such as catering, transportation, cleaning and maintenance, and was later on expanded to other areas, such as the construction of military systems, particularly since the initiation in 2003 of the construction of the wall in the West Bank, the greatest military construction work in Israeli history. This process further involved elements of civilianization (in the form of transfer of functions to non-military authorities and state organs), either as a prior step to privatization or directly in areas with a professional component, such as medical services, legal advisory services or computing. Nonetheless, at the time of writing, the exact distribution and combination of civilianization and privatization of military functions is still unclear since the IDF has not issued official statements of its outsourcing policy\textsuperscript{35}.

The outbreak of the Second Intifada of the Palestinians in 2000 was deemed an opportunity for the restructuring of public security in Israel and management of the occupation as a new making-profit sector, providing the definitive impulse towards the private security industry\textsuperscript{36}. In 2005 a new law was enacted regulating the powers of different entities “in order to maintain public security”\textsuperscript{37}. Under the operation of this law, private security personnel saw their powers considerably extended on a similar footing to the police and soldiers, including authorization to carry out body searches, temporary detention and resort to the use of force beyond grounds of self-defense\textsuperscript{38}. Furthermore, the law regulates the provision of security “in order to maintain public security against terrorist activity and violence”, thereby expanding the area of operation of PSC activities beyond ordinary situations of crime and violence to special situations of what is conceptualized by Israel as terrorism.

\textbf{b// PMSCS IN THE OPT: CONTEXTS, ACTIVITIES AND RATIONALE}

As an occupying power, Israel has replicated its internal policy of security outsourcing in the oPt through the adoption of military orders and by means of amendments of applicable internal laws. Consequently, the process of outsourcing military and security functions in the oPt has followed that implemented within Israel in many aspects.

Firstly, it came about mainly from a revision of IDF tasks and consists of a combination of civilianization and privatization: traditionally military-assigned tasks have been transferred to Israeli civilian state organs, civilian communities and private citizens and private corporations alike.

Secondly, the outsourcing policy has essentially consisted of the delegation of functions and

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\textsuperscript{34} See Seidman, G., From Nationalization…, op. cit.; also, Ronen, Y., Israel going private, op. cit, p. 436-7.

\textsuperscript{35} Seidman, G., From Nationalization…, op. cit, p.30.

\textsuperscript{36} Pozo, A., Camino, S., Sabaté, O., Defense, Security and Occupation as a Business, Barcelona, p. 16.


\textsuperscript{38} See Subsection III.a.
powers in the field of law enforcement. In this regard, while most of the outsourced tasks are policing functions traditionally carried out by the Israeli military as the responsible authority for the maintenance of public law and order in the oPt, the role of private security and military personnel as law enforcement agents is increasingly perceived as one of defense against terrorist infiltration (as conceptualized by Israeli authorities) rather than policing against ordinary crime and violence.

Thirdly, most of the PMSCs operating in the oPt are of Israeli nationality and possess a general license as security organizations to operate inside Israel as well. As of August 2012 there were 380 private security companies with a valid license. Only licensed security companies are allowed to participate in the respective tenders for operation in the oPt. According to sources, in Israel there are at least 10 private security companies that specialize in safeguarding and security and are able to attain the strict preconditions required by these tenders.

While the process of privatization in the oPt share common aspects with that inside Israel, it nonetheless possesses particular characteristics and additional motivations arising from the situation of occupation and from the peculiarities of each scenario and context where it takes place. Therefore, for further specification the following section provides a separate analysis of the outsourcing dynamics in each occupied Palestinian territory, namely the West Bank, East Jerusalem and the Gaza Strip. Then, within each occupied territory, a separate description is provided for each context where presence and activities of private contractors and PMSCs have been observed.

I / WEST BANK

In the 1967 armed conflict, Israeli forces occupied all the territories which had constituted Palestine under the former British mandate, namely those known as the West Bank, located to the east of the Green Line (the demarcation line agreed between Israel and Arab forces under the Rhodes Armistice Agreement of 1949). UN Security Council resolutions subsequently declared the occupation of the West Bank a breach of international law. Despite several agreements concluded between Israel and the Palestinian Liberation Organization since 1993, some of them including the transference to Palestinian authorities of certain powers and responsibilities in the West Bank, the International Court of Justice stated in 2004 that these events had not altered the situation and that “all these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying power.” Since then, and as of today, the legal status as an occupied territory of the West Bank has not substantially changed.

1) Checkpoints

Background: The term checkpoint generally refers to posts that control the movements of individuals and the transportation of goods in and out of the occupied Palestinian territory (internal or external.

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39 In any context, basic law enforcement responsibilities include the maintenance of public order and security, prevention and detection of crime, and provision of help and assistance to those in need of it; basic powers include arrest, detention, search and seizure, and use of force and firearms. See De Rover, C. “Police and Security Forces”, International Review of the Red Cross, Nº 835, 30 September 1999; https://www.icrc.org/eng/resources/documents/misc/57jq3h.htm
40 Guard Companies with Valid License (August, 2012), published in October 1, 2012.
41 Zohar Blumenkrantz, A complaint to the state comptroller: suspicion of diversion of a security tender in the amount of NIS 450 million in the continental borders (Hebrew), The Marker, August 5 2012, http://www.themarker.com/consumer/tourism/1.1793915
42 ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004], ICJ Rep 136, para. 78.
43 Most of the information in this section was kindly provided by Who Profits organization.
checkpoints respectively). Before the 1990s there were no permanent border barriers between Israel proper and the oPt. A general crossing permit issued by the Israeli Government enabled Palestinians to enter Israel without any major limitations. The change in the function of the checkpoints started in the period 1991–1993, when the general crossing permit was cancelled and Israel carried out a policy which included long closures of the oPt and the distribution of specific permits under strict conditions. Since then, the permit regime has become a means of political control.

In the years following the Second Intifada and the initiation of the Israeli Separation Project (2001), permit restrictions were enforced by the erection of border checkpoints along the Wall route, which gradually became central sites of the Israeli control mechanism over the movement of people and merchandise between Israel and the oPt. Dozens of checkpoints were established between Israel and the West Bank: checkpoints for pedestrians, vehicles and merchandise, agricultural checkpoints and “life texture” checkpoints. As of 2014, there were 36 to 38 external checkpoints and 87 internal checkpoints within the West Bank, depending on the sources.

The checkpoints built after the reform were designed to look just like international terminals in airports elsewhere in the world. Indeed, official documents of Israeli authorities also use the term “crossings”, in an attempt to conceptualize checkpoints as official border crossings (points of entry into Israel and exit therefrom) and to dilute any resemblance to a military facility typical of occupation. However, despite their similarities in appearance, the Israeli checkpoints substantially differ from other border terminals. As Havkin notes:

“[f]irst of all, they are not located at a recognized border demarcating two sovereign entities. They merely separate an Israeli territory from a territory occupied and governed by Israel. Second, the difference in attitude toward the populations is evident: while Palestinian vehicles are strictly forbidden from circulating in Israel, Israeli vehicles can circulate freely on the roads of the West Bank. Moreover, the checkpoints designed for Palestinians carry out stringent inspection procedures whereas those designed for Israelis are control posts that more resemble highway tollgates. Except in the event of suspicion, Israeli cars are rarely inspected.”

The process of outsourcing in checkpoints began in 2003, when the Israeli government decided to initiate the construction of the Wall, but it started to materialize in January 2006 when the first outsourcing of Sha’ar Efraim checkpoint (next to Tulkarm) and Erez checkpoint (in the north of Gaza Strip) took place. The overall idea of the process was to turn precarious military checkpoints,

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46 See below for information about the background of checkpoints in East Jerusalem and Gaza Strip.
47 The operation of checkpoints between Israel and the area of Judea and Samaria, The state comptroller, June 2010 [Hebrew], http://www.mevaker.gov.il/he/Reports/Report_142/013018/84f6-1e3c21-8447-b151b67c689f/6664.pdf
48 Office for the Coordination of Humanitarian Affairs (OCHA) map, Accessibility for UN at West Bank – Barrier Checkpoints, March 2014.
49 Implementation of the Interim Agreement Law regarding the West Bank and Gaza Strip [Adjudication Powers and other Provisions], Legislative Amendments, 1996, Art. 10 (a). Other terms used include “border checkpoint” and “border crossing” which generally refer to checkpoints located along the Wall, despite the fact that most of them are located outside of Israel’s internationally recognized borders as marked by the Green Line.
erected during the early 1990s as part of a policy of separating Israel from the West Bank and Gaza, into international-standard terminals similar to other official borders in the world. Accordingly, several measures were planned in order to change the management method of the checkpoints, including transferring the de facto management and operation of the checkpoints to private security companies; establishing fixed and organized infrastructure instead of the improvised military facilities that previously existed; and implementing technological equipment in the checkpoints for the "quick passage of merchandise and pedestrians." Overall, the outsourcing policy included both a "civilianization", i.e. transference of certain responsibilities to non-military bodies including the police, and corporate privatization, i.e. the delegation of functions to private security companies. Furthermore, the process also consisted of a comprehensive organizational change, with the establishment of a new civilian (governmental) management body to lead the project: the Crossing Authority, a department in the Ministry of Defense, which was created for "coordinating the establishment of the crossings, their demilitarization and the upgrading of technology installed in them" [emphasis added].

According to some sources, by 2011 most of the 34 border checkpoints had been outsourced to private contractors. Currently, 14 of these 34 checkpoints have been privatized and transferred to the Crossings Authority. Only one border checkpoint, the Karni checkpoint in the Gaza Strip, is under the responsibility of Israel's Airport Authority. The rest of the 22 checkpoints that are defined as the last checkpoints before entrance to Israel, or "border checkpoints", are due to be privatized in the near future.

Activities: The overall role of private security companies and their activities may vary depending on the checkpoint, namely its location, the organizational structure and the supervisory authority in charge. For instance, there are certain checkpoints that function as terminals where the civilian population does not interact with any public authority inside the building, while in others, beside private contractors, both military and police officers still have contact with the population.

Generally, the operators of each privatized checkpoint are composed of three levels of employees: managers [checkpoint manager, security officer and operation manager], who are employees of the Crossings Administration or other public employees; trained armed security guards and trained unarmed inspectors, who are both also employees of private security companies.

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51 Ibid, at 5-6.
52 The Knesset research and information center, 2005, p. 3. The Crossing Authority website (Hebrew), http://www.maavarim.mod.gov.il/Heb/AboutUs/Pages/Principles.aspx.
53 Knesset Research and Information Center 2006, at 5.
55 There are 12 checkpoints in the West Bank: Eyal, Eliyahu, Gilboa, Habik’a, Hotze Shomron, Hashmonaim, Meytar, Maccabim, Metzudot Yehuda, Reihan, Sha’ar Efrain and Tarqumia; and two checkpoints between Gaza and Israel – Erez and Kerem Shalom. Some of the checkpoints serve the Palestinian population [Sha’ar Efrain, Eyal, Maccabim, Eliyahu, Erez, Kerem Shalom], some serve the Israeli population [Hotze Shomron, Metzadot Yehuda] and some serve both [Habik’a, Gilboa, Rihan, Tarqumia, Meytar]. Freedom of Information report of the Ministry of Defense, 2013 (Hebrew), p. 152; The Crossing Authority website (Hebrew), http://www.maavarim.mod.gov.il/Heb/AboutUs/Pages/Principles.aspx.
56 The Knesset Research and Information Center, 2005.
58 Ronen, Y., "Israel Going Private", op. cit. at 441.
59 The Crossings Administration website [Hebrew]; http://www.maavarim.mod.gov.il/Heb/AboutUs/Pages/Principles.aspx; Authorities to Safeguard Public Safety 2005 Law, article 10a. (Hebrew) - According to the law, a checker is one of these: 1. Police officer. 2. Authorized Soldier. 3. A public employee or a person who is not a public employee that was authorized to serve as a security guard in a checkpoint according to the law.
Therefore, there are two main categories of private security contractors operating in checkpoints: 1) security guards, who bear weapons and "secure" the place, including in this category the shift managers that supervise the other security guards; and 2) the inspectors who conduct all the stages of the "security check", handling almost all interaction with the people crossing the checkpoints, and who are also skilled in the operation of scanning systems. According to applicable law, private security guards and inspectors have the right to request identification, produce permits and inspect persons and their baggage. However, in the case of decisions regarding the prohibition of crossing or performance of body searches, the presence of Crossing Authority employees or a member of the State security forces, either military or police, is mandatory.

Rationale: The privatization of checkpoints has been conceptualized in official documents as "demilitarization" and "civilianization" of the so-called border checkpoints. This was because the main criticism regarding the operation of the checkpoints was about the lack of professionalism among the soldiers, the lack of clarity in the procedures and the arbitrariness of checkpoint operation. As a result, Israel’s government decision 43/b provided that soldiers in checkpoints, including the Jerusalem envelope, will be replaced with police officers and civilians and the body responsible for the checkpoints’ operation will no longer be the Israeli Army, but the Crossings Directorate, which became the Crossings Administration in 2010. Regarding the operation of “internal checkpoints”, there is no formal procedure.

The overall stated goal of the privatization project was therefore to "reduce the friction existing at the crossing points and to increase the level of service, without decreasing the level of security screening". The then Head of the Crossings Directorate, Bezalel Traiber, stated his conviction that "it was not a task for soldiers. We need professional individuals to deal with the Palestinians. Civilian guards will receive a salary and therefore will have an interest in doing the job as well as possible". Accordingly, commentators agreed that "[i]n the case of Israeli checkpoints, privatization was not motivated by economic incentive [...] [r]ather, privatization stemmed from a managerial notion that outsourcing would a priori enhance efficiency", since "private security contractors are supposed to supply skilled labor [...] and as a management strategy [outsourcing] should enable the army to concentrate on its “sphere of activity”—combat and training for combat—by delegating the sensitive and quasi-policing task of managing checkpoints to civilian professionals, perceived as more competent than young conscripts. Nevertheless, opinions are still divided as to whether private companies provide better services than the military.
Furthermore, it should be noted here that due to the budget restrictions imposed on the military since the beginning of the 1990s the IDF had its own reasons for the presence of PSCs at the checkpoints. Furthermore, among the requirements for candidates to work as private security contractors it is included that they should have combat experience in the IDF. As a result, students and young people that have just finished their compulsory military service are employed at the checkpoints and sometimes they are still doing military service in the reserve —so at least mentally the security guards feel themselves part of the IDF—which contradicts the “civilianization” concept. Finally, there are also less openly articulated motivations that result from outsourcing military functions, in particular the diffusion of state responsibility for acts of private corporations and employees. Privatization of checkpoints allows public officials and authorities to distance themselves from the actions of private personnel so that in the case of misbehavior the moral credibility of the IDF will be preserved and the State can distance itself from material perpetrators in terms of civil liability. As noted below, the organization of the administrative hierarchy at the checkpoints contributes to the dispersal of authority, which complicates the attribution of responsibilities.

Authority: there is a complex network of state agencies participating in the operation and management of checkpoints, including at least the following: the airport authority controls the international crossings; the harbor authorities control the sea harbors of Israel; the Israel Police controls checkpoints in what is referred to as the “the Jerusalem envelope”; the Israeli army controls the internal and military checkpoints within the West Bank; and the Crossings Authority controls the checkpoints along the Wall apparatus, or “border checkpoints”. Furthermore, the Israel Security Agency (Shin Bet) also performs security functions even though its role regarding checkpoints and coordination with other state agencies still remains unclear.

In principle, the administrative hierarchy and the respective responsibilities of the governmental bodies are regulated by a classified decision of the government security cabinet. However, commentators and observers report that in practice there is a juxtaposition and blurring of functions between these bodies, which makes it difficult to attribute responsibility in cases of abuse.

Companies: The private security companies operating at checkpoints are contractors that provide various subcontracted services in addition to security and surveillance, including cleaning and maintenance. These companies also provide transfers by armored truck, protect various sites (schools, hospitals, shopping and industrial centers, etc.), accompany hikers and school field trips, employ armed guards with various levels of training to protect goods and persons, and carry out consulting and installation of electronic detection and surveillance systems.

As temporary agencies, their “sphere of activity” is employment or the provision of human resources. However, they reduce the definition of employment to a minimum. Except for hiring per se, all the other components of employment such as supervision and physical training are outsourced in a sub-contracting chain: “psycho-technical” tests are administered by specialized centers, training

71 The area of the Wall in Jerusalem and around it.
is provided by a private school working for the Airport Authority, and extra training is given by a specialized firm. Therefore, the temporary agency functions as a “professional employer”, reducing to a minimum any employer/employee relations that involve responsibility and which can be politicized. Furthermore, Israeli security authorities can decide to fire a worker, usually the prerogative of an employer.

The private security companies operating at checkpoints are chosen via tender every few years as suppliers of security and checking services for the Ministry of Defense, and they are in charge of the employment of the two above-mentioned categories of private security contractors. Although all companies participating in the tender must possess a valid license as a security organization granted by the Ministry of Justice, it is the tender and the specifications drafted by the Crossing Administration in cooperation with the Ministry of Defense and the involvement of the police and the General Security Service, the regulatory documents which outline the company’s responsibilities and define the rules, criteria and conditions that the company must comply with in order to supply "the service". The criteria include the price of the service, professionalism, experience, responsibility, and accountability. Yet, tenders are not always made public, and in practice, as is often the case, other criteria play a crucial role in the contracting process; "[t]he combination between large contracts (the tender won by Sheleg Lavan was estimated at 230 million NIS), the closeness of ties between the political elite and the security elite, both of which are heavily involved in the checkpoints, and the opacity justified for reasons of security, foster all sorts of arrangements that hover on the brink of illegality.”

The first official tender for bids for the management of checkpoints was issued in May 2005, choosing initially 5 companies: Mikud Security, Ari Avtaha, Hashomrim guarding and security group (S.B. security), Modi’in Ezrachi and Sheleg Lavan. After the second tender in 2008, only 2 companies were chosen for handling security, Modi’in Ezrachi and Sheleg Lavan. This seems to still be the situation today. Tender requirements included a two-year revenue of NIS 100 million and the employment of at least 500 employees.

2) Settlements and industrial zones

Background: the term “settlement” makes formal reference to Israeli civilian communities built on lands occupied by Israel during the 1967 Six-Day War. From this time to 2012 125 Israeli settlements there were established in the West Bank, also known as “communities” by the Ministry of Interior, and about 100 outposts, i.e. settlements built without official authorization but with the support of the Israeli government. Currently, the settler population in the West Bank is estimated to be upwards of 531,000 individuals. These areas have been declared closed military zones and are regulated by military orders under the authority of the military commander and the army, although the settlements and the settlers are generally subject to Israeli law. There is international consensus about the unlawfulness of Israeli settlements in the oPt, as stated by relevant UN Security Council resolutions and affirmed by the International Court of Justice, which concluded in its Advisory Opinion on the legal status of the West Bank.

73 Following the second invitation to tender in 2008, only two companies were chosen and it is these two companies today that handle security screening and surveillance in all of the checkpoints. Havkin, S. “The reform of Israeli checkpoints”, op. cit, 2011, p. 9.
75 The word “settlement” is also colloquially used to refer to the presence of communities in a particular place, and thus, it is also used to refer to Israeli communities present in the same areas even before 1967.
of 2004 that the settlements have been established in breach of international law76.

In the context of settlements, the outsourcing dynamic has been two-fold. First, security and defense functions in settlements and surrounding areas have been contracted out by the Israeli Ministry of Defense to their own settlers. Originally, the use of defense forces in the settlements was based on a military doctrine called “regional defense,” “which predates the establishment of the State of Israel, when such forces based in Israeli frontline communities were charged with supporting army forces during military confrontations or invasions by foreign armies”77. Since 1971 the application of this doctrine was extended to settlement communities in the West Bank by means of military orders. This meant granting settlements the consideration of ‘key locations’ for military security purposes and regional defense control, and assigning settlers the function of assisting the IDF in its various tasks, including by defending themselves in time of emergency and others78. Accordingly, settlement communities defined as “classified for security purposes” are allowed to have their own guarding forces, which include a “civilian security coordinator” (CSC) and a 12-person emergency unit, even if they have a police station79. In particular, the CSCs and their guarding teams, which are mostly composed of residents of settlements and outposts in the area, operate as “agents” of the Israeli army subject to military law, undergo military training, are equipped with IDF weapons, and are empowered to undertake quasi-policing actions as well as to use force80. However, the CSC is appointed by the settlement authorities, who serve as their employer through funding of the Israeli Ministry of Defense, and see themselves as representing the settlement interest81. Over the years, the “guarding area” in which the CSCs exercise their powers has been extended, by way of military orders, to zones located beyond the municipal boundaries of the settlements, e.g. to include perimeter security roads built outside the borders of the settlement, and currently also include six industrial zones82.

Also in this regard, the IDF and the settlement local councils have collaborated on a number of specific plans to further improve their security. Initiatives include the Project Mivtzar, in which reserve soldiers of the army were replaced by settlement residents, who were trained, equipped and paid by the army as special emergency forces “in charge for dealing with terrorist infiltration and special crisis”83. Furthermore, under the plan concerning “special security areas” 41 settlements, were equipped with advanced technological products, such as surveillance equipment and alert systems, and the CSCs received armored vehicles.

As a result, settlements have gradually been transformed into armed, fortified and equipped communities, and the several organized armed civilian forces—including the CSCs, their paramilitary

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76 ICJ Legal Consequences Construction Wall - Advisory Opinion, op. cit., para. 120.
77 Yesh Din, The Lawless Zone, op. cit., pp. 5, 8–10.
78 Order No. 432 concerning Guarding in Communities (Judea and Samaria), June 1, 1971.
79 For an historical and legal overview of this process see Yesh Din, The Lawless Zone. The transfer of policing and security powers to the Civilian Security Coordinators in the settlements and outposts, June 2004.
81 Ibid, at 4.
82 See Military Order No. 1628, the Order concerning Powers for the Protection of Public Security, dated January 20, 2009. The area of the settlement or the industrial zone is as defined in the Addendum to the Order concerning the Management of Local Councils (Judea and Samaria) [No. 892], 1981 and the area of the settlement as stipulated in the Addendum to the Order concerning the Management of Regional Councils (Judea and Samaria) [No. 1979]. According to Yesh Din “The “guarding areas” of the following settlements annex built areas deviating from their municipal borders, or absorb enclaves of private Palestinian land: Beit El, Einav, Kochav Ya’akov, Carmel, and Anatot. The industrial zones mentioned are Barkan, Karmei Shomron, Ariel, Shahak, Baron, and Mishor Adumim.”, ibid at 19, 15–19.
squads and the rapid response teams or emergency units—have become extremist militias administratively contracted by the settlement authorities and ideologically aligned with the settlement project while working on the army’s behalf and entitled to exercise policing functions under the supervision of the army and with the funding of the Israeli Ministry of Defense.

Furthermore, certain security functions within the settlements and industrial zones have also been progressively outsourced to private security companies (PSCs). This process started during the first years of the 2000s (although the starting date is uncertain) and initially included settlements defined as of “lower security risk”. Then, in April 2008, as part of government policy regarding security in settlements, the IDF decided to transfer the responsibility for protecting settlements categorized as “special situation towns” to private security companies. Similarly, other settlement communities, such as the Maale Adumim or Mishor Adumim (E1, the area surrounding Jerusalem), were placed under the joint control of the Israel Police and private security companies, and about 10 other settlement towns, located on the Israeli side of the Wall, were withdrawn from all military protection. Overall, more than NIS 350 million was invested in securing the settlements in the West Bank.

Overall, it should be noted that, although the interplay between CSC activities and other armed guard units remains far from clear, CSCs function in practice as the military command authorities of the settlements: “they command the guarding squad in routine times, the settlement emergency unit in emergencies, and sometimes also teams from civilian security companies who guard the settlements”. Furthermore, commentators point out that CSCs also act as commanders of soldiers in practice, although they lack the formal authority to do so under military orders.

**Activities**: Relevant military orders and their subsequent amendments have progressively expanded the role of settlement CSCs and their powers, which currently include quasi-policing powers—that amount to law enforcement responsibilities in situations of occupation—such as detention, body and property search, seizure of objects and arrest, as well as the legal authority to use any reasonable means while executing an arrest. In contrast with their broad authority, requirements for identification are less demanding for CSCs than for guards in frontline communities and for

84 The term industrial zone, also known as industrial park, refers to an area planned for the purpose of industrial development. Thus, manufacturing and other kinds of business and factories are present there. In the West bank industrial parks are geographically very close to border checkpoints and managed by Israeli companies which enjoy certain financial advantages such as tax incentives, low labor inspection levels and cheap labor. See Havkin, S. “The reform of Israeli checkpoints”, 2011, op. cit, p. 17; also, Bahour S., “Economic Prison Zones”, Middle East Research and information Project, November 19, 2010; available at http://www.merip.org/mero/mero111910.
85 For convenience, we use here the term “private security company” to refer to those companies performing security functions in the settlements, as this is how they are commonly known and referred to by local sources. Yet, we consider them to qualify as PMSCs for the purposes of this report.
86 Among these settlements were Kiryat Arba, Telern, Adura, and Mevo Dotan. See, The settlements’ security passes to private hands, Shimon Cohen, 27 April 2008, http://www.inn.co.il/News/News.aspx/174352
88 An end to settlement security in the army (Hebrew), Bamahane, December 10, 2004
89 Yesh Din, The Lawless Zone, op. cit., p. 38.
90 Idem
91 See Order concerning Guarding in Communities (Judea and Samaria), 1971, N° 432, 1971; Amendment to Section 3a(c)(3)-(7) of Order no. 1365, Order concerning the Regulation of Guarding in Communities (Amendment No.10) from April 8, 1992. For an analysis, see below Subsection III.a.i., legislation and military orders.
92 By comparison, it is important to note that the guards in Israeli frontline communities enjoy more restricted authorities, both regarding their powers as well as the level of force permitted in their performance; see Powers of a Guard in the Local Authorities established by Order (Amendment No. 4), 2002. In contrast, requirements for identification are more demanding for guards in frontline communities, who must
Israel Police personnel or other officials in Israel enjoying policing rights: they must carry a “guard’s certificate” and an identity card, but military orders do not require them to wear a tag identifying themselves by name93.

Regarding activities of PSCs, they generally provide guarding services at the settlement gates, at private establishments inside the settlements and at control posts located at the entrance to industrial zones. It seems, nevertheless, that PSCs have assumed a more prominent role in the overall security organization and structure of settlements since the IDF started delegating more security responsibilities in certain settlement areas in 200894. For instance, violent incidents have been reported in which private security contractors co-operate shoulder to shoulder with military authorities and the CSCs in operations surrounding settlements95. In contrast, private security contractors that operate control posts at industrial parks have a very limited relationship with military and other state authorities. These companies are sometimes the same ones that manage “border checkpoints” that are geographically very close to them. Nevertheless, regulation of their activities, including training, is less strict than for PSCs at checkpoints, the salary scale of guards is lower, and their profile is also quite different, being mainly constituted by Palestinian citizens of Israel96.

Although for the purpose of this report both are security providers/contractors, a clear distinction should be made between PMSCs and the role of CSCs and guarding teams, which is more political and ideologically aligned with the settlement project. Indeed, CSCs and their guarding teams represent the settlers’ interests and often use their powers to expand the territories of settlements and outposts by protecting illegal construction, facilitating the seizure of land and goods, and denying Palestinian farmers access to their land97. Although the commitment of the coordinators to the settlement philosophy has occasionally led to friction between them and the army, some incidents have also occurred with the connivance of military authorities and soldiers, who have refrained from confronting the CSCs and the settlers, while in other cases it has been negligence in their supervision which has perpetuated their arbitrary performance and criminal activity98.

Rationale: Similarly to the reform of checkpoints, the justification for security outsourcing in the context of settlements has been officially linked to a [economic and strategic] revision of IDF functions, in general, and to the perceived efficiency and professionalism of private agents as compared to regular military personnel, in particular. For instance, the stated aim of the Mivtzar project was to narrow down the army’s needs in recruiting reserve soldiers for the protection of settlements, while in the context of outsourcing to PSCs, the army claimed that those soldiers who have been traditionally posted in settlements [generally in their first weeks of basic training] are not as well-trained as private company security guards. This position, however, was questioned by the Yesha Council Security Officer, Sholomo Vaknin, who stated that “security guard companies will be

93 Section 3a of Order No. 1448, Order concerning the Regulation of Guarding in Communities [Amendment No.15] dated January 12, 1997.
95 See below Section II
96 See Havkin, S. “The reform of Israeli checkpoints”, 2011, op. cit, a 18, mentioning for example that training for PSCs in industrial parks would last 3 days as compared to training for PSCs at checkpoints lasting 21 days. Also, besides their ethnic origin, the age of PSC contractors at industrial parks is higher (at an average of 50, as compared to 30 for guards at checkpoints).
97 See Yesh Din, The Lawless Zone, op. cit., pp. 38-43. Also, see below Section II.
98 Ibid, at 36-38
An Israeli security guard harasses Palestinian shepherds, Gwawis, South Hebron Hills, West Bank, 18.9.2012

An Israeli security guard from the illegal settlement of Mitzpe Yair chases the flock and threatens the Palestinian shepherds of Gwawis. He is holding an M16 rifle, issued to him by the Israeli army, as part of his paid job as a security coordinator. The law states that he is not allowed to take any action outside the settlement’s borders, South Hebron Hills, West Bank, September 18, 2012. While all Israeli settlements in the West Bank are considered illegal under international law, such outposts are considered illegal even under Israeli law.
more limited and less professional.”

Furthermore, there seem to have been additional strategic motives, in particular with regard to certain settlement towns located on the Israeli side of the Wall. Apparently, the official thinking was that the Wall would provide sufficient protection against terrorist infiltration to dispense with a military defense of the settlements.

In addition to the political use of CSCs and guard squads, a less openly articulated justification for security outsourcing at settlements relates to the social consequences of this policy, in particular, easing unemployment problems in the settlements, an issue of growing concern nowadays.

**Authority.** Authority over CSCs and their civilian squad operations is shared by three bodies: 1) CSCs are administratively appointed by the authority of the settlement (local councils, municipalities), which in most cases also serves as the direct employer (administrative authority/employer); 2) the supervision of their activities and operations is entrusted to the IDF (operational authority); and 3) their employment and salary is funded by the Ministry of Defense (governmental authority). Furthermore, several authorities participate in the process for issuing permits for holding an army weapon. The human rights organization *Yesh Din*, which has monitored this phenomenon, concludes that this structure creates a diffusion of responsibility between administrative authorities, on the one hand, and operational and professional authorities, on the other, which prevents proper supervision and control of the appointment, the activities and functioning, as well as the use of weapons by the CSCs and their militias. Moreover, all of this results in a dual accountability scenario, as conflicts of interest may arise between the security needs established by the Ministry of Defense and the army, and the needs of the local authorities in settlements which are the CSCs’ direct employers.

PSCs are generally required to obtain an operational permit granted by a competent military authority in order to provide security in locations in the West Bank. As noted above, however, PSCs working in settlements perform their services under the supervision of CSCs. As for PSCs in industrial parks, they are apparently not closely supervised by any public authority but rather are under the supervision of their direct clients, i.e. companies managing and working at the parks.

**Companies and contractors:** the following companies have been reported to provide military and security services in the context of settlements in the West Bank:

- *Avidar Security Services* provided security services at the entrance post and in establishments inside the settlement of Otniel.
- *Maavarim Civil Engineering* cleared a Jordanian anti-tank minefield in the settlement of Har Adar, in order to allow the expansion of the settlement.
- *Yahav Oranit* operated at the Barkan industrial zone.
- *Modi’in Ezrachi* won the tender to operate in all the settlements under the Mateh Binyamin

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101 This is based on Israeli legislation regarding the regulation of guarding frontline communities inside Israel, which provides that "the state will bear the costs incurred in the implementation of the law". *Local Authorities Law (Regulation of Guarding)*, revised version, 1961, Art. 19 (B).
103 Ibid, pp. 29-33.
104 See below Section II-National regulations and military orders, MO 1401.
regional council, which includes 11 outposts. The company also provides security services to the settlements of Ariel, Oranit, Sha’arei Tikva, Barkan, Yakir, Ma’ale Shomron, Ma’ale Adumim and Kiryat Arba.

- **G4S Israel.** The British-Danish PMSC G4S operates in Israel through its subsidiary Hashmira (part of G4S since 2002), which in turn in 2010 purchased Aminut Moked Artzi, one of the oldest private security companies in Israel. Hashmira has provided security guards at the settlement of Kedumim since 2002 at least, and although it announced that the company would withdraw from operating in the West Bank, several sources have reported that, as of 2011, G4S still offered security guarding services to commercial establishments in the West Bank, including at the settlements of Modi’in Illit, Ma’ale Adumim and Har Ada. Furthermore, Aminut provided security services to several businesses in the Barkan industrial zone.

As of 2013 there are 265 CSCs employed in the West Bank. Certainly, the CSCs are not typical corporate security guards employed by a private security company. However, for the purpose of this report, if we consider their employment relationship they should be regarded as “private security contractors”. In particular, according to a Ministry of Defense instruction of 2010, two types of employment contracts can be used for the CSCs: a contract signed with the executive of the settlement, without employer-employee relations between the coordinator and the Ministry of Defense, i.e. “collective employment”, which is the modality mostly used in practice; and a personal contract signed with the CSCs establishing employer-employee relations between the coordinator and the Ministry (“personal employment”). Regardless of the modality used in practice, both turn the CSCs into private security contractors to the extent that they hold a contractual relationship with a public entity, either the local administration of the settlement with funding of the Ministry of Defense or the Ministry of Defense itself. In contrast, this is not the case of settlement guard team members, who are not formally employed by the settlements but are instead subject to compulsory service and liable to a fine of up to NIS 490 if they refuse to perform guard duty.

### 3) The Wall

**Background:** The decision to construct a “security fence” was first adopted by the Israeli Cabinet in April 2002, but the length, route and construction phases of the fence were articulated in the following months, until the Ministry of Defense published a complete map and planned sections in October 2003. Construction works and the first phase of the plan were completed by July 2003, including some sections built around Jerusalem. As of July 2012, 62% of construction had been completed.

The full planned route of the wall is 709 kilometers long, and although it has been subjected to several amendments, as proposed by the Israel High Court of Justice in litigation resolutions, it still runs...
The Development of the PMSC Industry

The development of the PMSC Industry

in most of its sections through the occupied West Bank, thereby deviating from the Green Line to encompass settlements and industrial zones, while also encircling Palestinian population areas and severely infringing their fundamental human rights.110

On 9 July 2004, the International Court of Justice (ICJ), at the request of the UN General Assembly, delivered its Advisory Opinion stating that the construction of the Wall in the oPt violates international law. The Israeli authorities rejected the decision and continued constructing the Wall. Since then, a number of legal petitions concerning the legality of the Wall and its route have also been submitted by affected Palestinian residents of the area to the Israel High Court of Justice. Since its leading decision in the Beit Sourik case (2004), the practice of the High Court has been in opposition to the ICJ interpretation, arguing that the erection of the “fence” is founded on “genuine security considerations” and, consequently, amounts to a measure of military necessity which is permitted by international law. Yet, the Israeli court has also made clear that this does not equate to a general authorization for any measure regarding the erection of the “security barrier”, such as the requisition of privately-owned lands, the legality of which should be determined in a case-by-case basis in accordance with the principle of proportionality.114

There have been several privatization processes in the context of the construction of the Wall. First, the Wall is the largest military infrastructure project carried out by occupation authorities to date, and thus it has required the participation of a number of construction and engineering companies. Secondly, due to its purpose and location, the Wall is classified by Israel as a military defense system that includes checkpoints, observation systems and adjacent military roads, all of which have implied, in turn, the involvement of a variety of military and security-related subcontractors. According to sources, “[a]s of 2007, 700 different subcontractors, around 60 planning offices, 53 major construction companies, 5 wire-fence companies, 11 civilian security companies, and about 34 producers of surveillance and communications were on the payroll.”

Within this context, security for the project is provided both by civilian companies and IDF forces in the field. Among the civilian companies, there are a range of companies that provide security equipment for military purposes (defense industry), such as those that sell indicative fences, radar systems and electronic surveillance systems. Other companies provide security and guard services to construction contractors building the Wall. For the purpose of this report, only the latter

110 According to Btselem, “[i]n setting the Barrier’s route, Israeli officials almost entirely disregarded the severe infringement of Palestinian human rights. The route was based on irrelevant considerations completely unrelated to the security of Israeli civilians. A major aim in planning the route was de facto annexation of part of the West Bank: when the Barrier is completed, 9.5 percent of the West Bank, containing 60 settlements, will be situated on its western, “Israeli” side. Israeli politicians already consider the Barrier’s route as Israel’s future border.”

111 ICJ Legal Consequences Construction Wall - Advisory Opinion, op. cit.


113 See also, Al-Haq written brief on the implementation of the ICJ Advisory Opinion on the Wall, November 2006, at http://www.alhaq.org/10yrs/images/stories/PDF_Files/The_Wall_in_the_West_Bank_-_Implementation_of_ICJ_Advisory_Opinion_-_November_2006.pdf


115 On the issue of technological equipment with military applications used by Israel, see Pozo, A., Camino, S., Sabaté, O., Defense, Security and Occupation as a Business, Barcelona, p. 16, 2014


117 On these companies see op. cit. note 45, and also, Sadeh, S., “A fence, but not a solution to the Israel-Egypt border”, Haaretz, 25 November, 2012; http://www.haaretz.com/weekend/week-s-end/a-fence-but-not-a-solution-on-the-israel-egypt-border-1.397627

companies, i.e. those that provide private security personnel, have been studied.

**Activities:** While the military bears overall responsibility for the security strategy and operates army posts and corporate-manufactured surveillance systems located along the built Wall, the responsibility for security on the ground during the different phases of its construction has been placed in the hands of construction contractors. Accordingly, while private security contractors are constantly briefed by the military on the security situation, in contractual terms they operate as security sub-contractors protecting personnel and machinery of construction contractors. Events on the ground, such as nonviolent popular resistance movements against the construction of the Wall, have led to the increasing involvement of PSCs in repression of anti-Wall demonstrations while supporting military authorities. Furthermore, it should be noted that PSC contractors operating in certain locations, such as the section of the Wall close to the Gaza Strip, have been faced every day with violence arising from attacks, which clearly goes beyond the scope of their commercially related security activity.

**Rationale:** While in the context of the construction of the Wall, the government policy of contracting services from companies within the defense industry has been publicly justified as responding to economic motives of cutting costs, and therefore quality and technical standards for these companies have been established through the respective tender for bids, the justification for delegating the responsibility for engaging security services to construction contractors has been less openly articulated by the Ministry of Defense. Quite simply, it seems to respond to operational aspects, in particular, that of freeing the military from logistical issues related to the construction on the ground.

**Authority:** As a military defense system, the overall authority for the operation and supervision of the construction of the Wall is the Ministry of Defense. However, daily operational supervision of PSC contractors seems to be in the hands of the construction contractors themselves as direct employers.

**Companies:** The following companies have been reported to provide military and security services in the context of the Wall:

- Momentum S.O.S. provides security guards for the construction and maintenance of the barrier.
- Netz 2 Bitachon guards secured the construction of the Wall and participated in violent repression of anti-Wall demonstrations in the West Bank Palestinian village of Ni’alin.
- Ari Avtaha.

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121 Id.
122 Please, note that we do not consider here those companies providing surveillance products such as intrusion detection fence. In this regard, according to government data: “[t]ree Israeli companies are approved by the IDF to provide intrusion detection fence, having passed its technical requirements through an extensive two year on site experiment. Of these three companies, Magal Security Systems won the contract for the central section [Salem towards Elkana] and Elbit Systems together with the American company, Detektion, won the contract for the northern and southern sections of Jerusalem”. http://www.securityfence.mod.gov.il/Pages/ENG/execution.htm
• S.B. Security Systems (Shmira Ubitahan).
• Modi’in Ezrachi [see above].
• G4S Israel [see above].
• Mikud Security [see above].
• Sheleg Lavan [see above].

4) Prisons

Background: In March 2004, the Israeli Parliament passed amendment 28 of the Prison Ordinance Law (no. 28) regulating the establishment of a prison in the city of Beersheba to be built, managed and operated by a private corporation through a concessionaire agreement with the Israeli Prison Service123.

The amendment set out, inter alia, the procedure for granting and cancelling the permit, the qualifications that should be satisfied by the corporation and its employees, the scope of the powers of the corporation’s employees and the supervisory measures that the state is required to undertake with regard to the activity of the corporation and its employees.

In 2005 a petition was filed to the Israeli Supreme Court challenging the constitutionality of the law on the grounds that transferring imprisonment powers to a private company, together with the for-profit aim of such an entity, violates prisoners’ fundamental right to liberty and dignity. Before the Court ruled on the matter, the Beer Sheva prison was built by the concessionaire Africa Israel Investments124. In November 2009 the Court ruled that the amendment was unconstitutional and should be set aside125. Importantly, the Court based its decision on the constitutional limits imposed on privatization by human rights norms, namely the constitutional rights to personal liberty and dignity, rather than strictly on the constitutional norms prohibiting privatization of core governmental functions126. Following the decision, the State had to pay compensation to the concessionaire company that had already built the Beersheba prison.

Activities: Due to provisional measures taken by the HCJ before it ruled on the case, the concessionaire PSC never arrived to operate the Beer Sheva prison.

The organization WhoProfits has reported that another PSC, G4S Israel, signed a contract with the Israel Prison Authority (IPA) to provide security systems for major IPA facilities, including security equipment and services at the Ofer prison compound in the oPt127. Specifically, the company installed a central command room from which the entire prison facility could be controlled and a circumferential monitoring system on the prison walls. According to sources consulted, G4S, and other PSCs that

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123 Prisons Ordinance Amendment Law [No. 28], 5764- 2004.
126 Id. para 30-39. In particular, the Court’s reasoning is based on two grounds: first, that a private entity with governmental powers represents risks an unjustified use of force and, in particular, that the risk of harm and abuse of powers posed by any form of prison privatization is sufficiently high to classify the privatization as an infringement of prisoners’ rights and to declare this policy void; and secondly, that, irrespective of how incarceration powers could be used in practice and whether a violation of human rights occurs behind prison walls, the very act of authorizing privately employed personnel to use coercive powers such as those granted to prison contractors is illegitimate per se and constitutes itself an objective violation of the inmates’ constitutional rights to personal liberty and dignity, because these rights should be enforced by the State in their entirety (not only “the person’s actual loss of personal liberty for a certain period, but also the manner in which he is deprived of liberty”) in order not to undermine the public purposes and symbolic message of imprisonment.
provide equipment to prisons, limit their role to the provision and installation of the security system and do not allocate private contractor personnel to operate the central command and monitoring system at prisons, which are operated by Israel Prison Service official personnel. Consequently, to the extent that there are no private security personnel working in prisons (or exercising a supervisory function on prison inmates\textsuperscript{128}) the scope of activities of PMSCs in the context of prisons has been described in this section but not monitored and analyzed further in this report.

Rationale: As in other contexts described above, the stated purpose of the prison privatization initiative was a combination of efficiency and economic savings, i.e. to provide better services—improvement of inmates’ prison conditions—at a reduced budgetary cost (making a financial saving due to the lack of investment in prison infrastructure and manpower). Furthermore, during the proceedings before the HCJ, the Israeli government stressed that the amendment constituted a “pilot” test that was expressly limited to one prison, and that it included several mechanisms to guarantee the prison inmates’ rights, including the possibility of taking away the power to manage the prison from the concessionaire in the case of the existence of a real concern of serious violation of inmates’ rights.

Authority: The Israel Prison Service is the state agency responsible for overseeing prisons in Israel. It is under the jurisdiction of the Ministry of Public Security. In the oPt relevant regulations include military orders 254 and 29\textsuperscript{129}.

Companies and contractors: The following companies have been reported to provide security services in the context of Israeli prisons:

- **G4S Israel.** Security services as mentioned above.
- **Africa Israel Investments.** Construction of the Beersheba prison.

5) Escort and protection services:

This is a general service provided by Israeli and foreign PMSCs in the whole territory of the West Bank. It involves the protection of public and private/commercial establishments located in the West Bank, such as major supermarket chains and Israel Police facilities\textsuperscript{130}, as well as escort services of foreign nationals, including US diplomats\textsuperscript{131} and personnel of different Israeli agencies\textsuperscript{132}.

II / EAST JERUSALEM

Palestinian East Jerusalem (EJ) was occupied by Israel in June 1967. In the following years, legislative and administrative actions were taken by Israel to change the status of the City of


\textsuperscript{129} See http://www.nevo.co.il/law_html/Law70/ZAVA-0002.pdf

\textsuperscript{130} This service has been reported as provided by G4S-Israel; see information provided in a letter sent by the PMSC G4S to Business & Human Rights Resource Center, http://business-humanrights.org/en/activists-accuse-g4s-of-providing-equipment-services-to-israeli-checkpoints-settlements-in-occupied-west-bank-and-to-israeli-prisons-detaining-political-prisoners-thus-contributing#c56281

\textsuperscript{131} In the past this service was provided by US PMSCs Dyncorp and [former] Blackwater. See information below on the Gaza Strip section.

\textsuperscript{132} For instance, it has been reported that Avidar security services supplies security and escort services to staff of the Israeli Ministry of Social Affairs and Social services during their activities across the Green line. According to the company’s publications this project includes dozens of security guards and patrol vehicles. See http://www.whoprofits.org/company/avidar-security-services
Jerusalem\textsuperscript{133}, until in 1980 the Israeli Parliament (Knesset) passed a basic law on the status of United Jerusalem as the capital of Israel. As a result, East Jerusalem was formally incorporated into the Municipality of Jerusalem and Israel applied Israeli law to the whole city, denying its status as an occupied/administered territory. The international community, however, has continued to consider Israeli actions and legislation concerning Jerusalem a breach of international law and refuses to recognize any title of sovereignty over it. In 2004 the UN International Court of Justice concluded that East Jerusalem remained an occupied territory and Israel continued to have the status of occupying power\textsuperscript{134}, a qualification that remains unchanged today. However, unlike the West Bank where Israeli military law applies, East Jerusalem falls under Israeli civilian law, and Palestinians are “permanent residents” enjoying, in theory, rights as city residents—with the exception of the right to vote and including many restrictions imposed on them\textsuperscript{135}. In reality, the Palestinians of East Jerusalem suffer from grave human rights violations such as house demolitions, arbitrary detentions and discrimination\textsuperscript{136}.

1) Checkpoints:

Background: In addition to checkpoints established between Israel and the West Bank, the Israeli Separation Project implemented during 2001-2003 led to the establishment of a series of checkpoints in the “Jerusalem envelope” (Otef Yerushalay), i.e. the area of the Wall in and around Jerusalem. The 19 checkpoints in “the Jerusalem envelope”, which are located in the area between occupied East Jerusalem and the West Bank villages and cities, remained in an intermediate state of partial privatization.

Additionally, some checkpoints, like the one in Al-Ram or Ras El-Amud, were inside East Jerusalem proper and not in the “Jerusalem envelope” or on the expanded municipal border of Jerusalem. Al-Ram checkpoint was operated at the beginning of the 2000s by a private security company\textsuperscript{137}.

In March 2005 it was decided to transfer the operation of the Jerusalem checkpoints from the Israeli army to the Israeli Police and not the Crossings Authority. The reason for this was the complicated situation of most of the people going through these checkpoints, who are residents of East Jerusalem, living west or east of the Wall. Despite the declared intention of completing the privatization process of the checkpoints in the near future, the privatization process of Jerusalem checkpoints didn’t include a detailed plan that specified the budget for the process and the timetable for its execution\textsuperscript{138}.

Activities: As a matter of principle, checkpoints in Jerusalem operation in a different manner than in other checkpoints in the oPt, because the authority lies in the hands of the police rather than

\begin{thebibliography}{99}
\item[134] ICJ Legal Consequences Construction Wall - Advisory Opinion, para. 78.
\item[136] For more information see Wadi Hilweh Information Center - Silwan http://silwanic.net
\item[137] Email communication with Eyal Hareuveni, researcher from Yesh Din, June 6, 2015.
\item[138] The State Comptroller, 2010; The Knesset Research and Information Center, 2005.
\end{thebibliography}
the IDF. However, the situation on the ground is that the Jerusalem checkpoints, such as Qalandia, are operated by police officers, border police soldiers and private security employees. In 2007 the Israeli army and the Israeli police signed an agreement of understanding about the division of responsibility between the bodies regarding the checkpoints. According to this agreement, the army allocated hundreds of soldiers for checking purposes subordinated to the police. This subordination is problematic and is not based on a sufficient legal framework. The distribution of roles is still not altogether clear. Police officers and border police officers are the commanders of the checkpoint, handling documentation and checking permits; the military police soldiers conduct the “security checks”; and the private security company employees perform the physical security guarding and provide “security” of the perimeter area of the checkpoint.

Rationale: The alleged motives for outsourcing security functions to PMSCs at checkpoints are closely related to those for privatizing checkpoints in the West Bank area, i.e. professionalization and better services, on the one hand, and a revision of IDF functions, on the other. Additionally, it should be noted that the Israeli government gave priority to the privatization of Jerusalem’s checkpoints on the grounds that they were relatively complex, and therefore considerations of service quality were particularly strong, and due to their symbolism, as they are stationed in the vicinity of the state capital. Nevertheless, as noted above there are also less openly articulated motivations that are linked to the process of checkpoint reform, which also affect those located in East Jerusalem, in particular, those related to the diffusion of responsibility in cases of contractor abuse.

Authority: The responsibility of the Israel Police at the checkpoints is specified in a decision of the Israeli National Security Council of June 20, 1999 and in the law for the regularization of security in public bodies of 1998. The body that is responsible for the checkpoints within the Israel Police is the security unit. The unit is mainly responsible for professional guidance in the field of physical and armed security in the area of the checkpoints; professional guidance in the field of arms smuggling to Israel in vehicles and commercial cargo; “border” control for the people entering and exiting Israel according to the instructions of the Ministry of Interior.

Companies: The PSC that was contracted to perform the above-mentioned security tasks at Jerusalem checkpoints is Modi’in Ezrachi.

2) Settlements:

Background: Since annexation, continued action has been undertaken by the Israeli government to create a demographic and geographic situation which favors its unilateral declaration of sovereignty.

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139 The Knesset Research and Information Center, 2005.
141 Decision of the ministers’ committee of national security 190/b [Hebrew]
142 Ordinate the Security in Public Bodies Law, 1998 [Hebrew]
143 The mission of the security unit in the Israeli police website [Hebrew], http://www.police.gov.il/contentPage.aspx?pid=41&mid=10
144 The Knesset Research and Information Center, 2005
in order to increase the number of Jews and to reduce the number of Palestinians living in the city. Among these actions, the government has funded and assisted in the establishment of several settler enclaves in the heart of Palestinian neighborhoods in East Jerusalem. These settlements “surround the Old City Basin from the south, east and north, and some of them are positioned on main roads leading to the Old City, enabling control of movement along these routes. Also, settlement enclaves have been established in the Muslim and Christian quarters of the Old City, with the objective of surrounding the Temple Mount.”

There are several processes of privatization in the Old City, such as the management of the City of David [an archaeological site located in the Silwan neighborhood] which was transferred to the ELAD Association, an Israeli settler group. Outsourcing of security functions dates back to the beginning of the 1990, when private contractors were employed to guard the home of the then housing minister Ariel Sharon in the Muslim Quarter of the Old City. In 1991 the Jewish organization ELAD fostered the establishment of a settlement in the Silwan neighborhood, and subsequently filed a petition to the Israeli High Court “in which it declared that it would privately fund all security arrangements for the residents and would not seek any such support from the state, ‘not even one police officer’.” Although at the time state’s attorney expressed their opposition to transferring security responsibilities from the Israel Police to PSCs, the initiative was finally embraced. Over the years, the provision of private security for both the housing minister’s new residence and the Jewish residential compounds and neighborhood in the Old City and in East Jerusalem through the agency of the Ministry of Housing and Construction became the default official policy.

According to sources, in the last twenty years the budget for security services in this area has grown significantly: from NIS 7 million in 1991 to NIS 76 million in 2011. In 2010 the budget earmarked for private security guards was NIS 54 million. In 2014 it reached the threshold of NIS 100 million. In 2011 sources mentioned the deployment of 350 to 370 security guards to protect approximately 2,500 Jewish residents in these neighborhoods. As of 2014, it was reported that the Israeli Ministry of Housing employed two private security companies to guard 70 Jewish compounds located within Arab neighborhoods in East Jerusalem at an annual cost of NIS 67 million.

Despite the status and sensitivity of the area, the employment of PSCs in East Jerusalem [EJ] has not been sanctioned by any particular law. In 2005 a public committee [the Orr Committee] was convened to examine the matter of security of the residential compounds in the Old City and EJ, concluding in 2006 with the recommendation that the responsibility for security of these areas

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146 Btselem, http://www.btselem.org/jerusalem
147 Btselem, http://www.btselem.org/jerusalem/settler_enclaves
151 Id.
154 Elhanan Miller, “Supreme Court defends private security in East Jerusalem”, op. cit. Also, ACRI, Deployment of Private Security Guards in East Jerusalem [Excerpts Petition to the High Court], 2011, op. cit.
155 Elhanan Miller, “Supreme Court defends private security in East Jerusalem”, op. cit.
should be returned to the Ministry of Internal Security and to the Israel Police. While the government initially voted in favor of implementing that recommendation, it finally revoked the decision and adopted a quite different resolution. The resolution was never presented to the Israeli Parliament, as is required by its form, leaving the policy of privatization without a firm legal basis.

On 31 October 2011, following continuous human rights abuses by private guards, the Association for Civil Rights in Israel (ACRI) and Palestinian residents of East Jerusalem filed a petition to the Israeli High Court demanding the end of the employment of PSCs on the grounds that the operation of a private security force constitutes an unlawful privatization of core policing responsibilities, disregards the responsibility of the state to provide protection to all residents and violates the basic rights of Palestinians. During the hearings, state representatives stated that the prerogatives of the security companies do not amount to policing and are limited primarily to static defense of residential homes, further arguing that the high average of violent incidents a month in East Jerusalem justified the existence of enhanced state-funded security, and noting that guards are legally and professionally subordinate to the police. During hearings in January 2014, the Court announced that it would uphold government funding for private security companies and decline to discontinue PSC activities in EJ, and advised ACRI to erase the petition. On its part, the State made clear that any complaint against PSCs would be dealt with, in particular, by an arbitration body already existing within the Housing Ministry to deal with complaints against security guards on a case-by-case basis. On 9 January 2014, ACRI asked the Court to erase the petition. Apparently, since the petition was filed, PSCs in EJ are more closely monitored and supervised, and there are many fewer complaints of misuse of power and violations of the rights of Arab residents.

Activities: The contractual role of private security guards is primarily to ensure the protection of Jewish compounds, i.e. static defense of local houses. However, under this main function, they also perform a wide range of activities, including armed escort of settlers, their vehicles and their visitors entering to and exiting from the settlements (mobile security); routine training exercises taking place at night among local houses and often using live ammunition; placement of temporary guard posts and road closures for the passage of settlers, where they stop Palestinians for identity checks and pat-downs, severely limiting their movement, even of children wanting to play near their homes; safety measures for visitors coming to and from the cemetery on the Mount of Olives; and operation of many surveillance cameras directly positioned over Palestinian private dwelling spaces. Furthermore, sources have reported the use of PSCs for forcibly evicting Palestinian families from their houses inside newly established settlements, and also assisting the police in handling peaceful assemblies.

156 ACRI, Deployment of Private Security Guards in East Jerusalem (Excerpts Petition to the High Court), 2011, op. cit., at 2.
158 ACRI, Deployment of Private Security Guards in East Jerusalem (Excerpts Petition to the High Court), 2011, op. cit. Cfr. Medina, B., “Constitutional limits to privatization: The Israeli Supreme Court decision to invalidate prison privatization”, International Journal of Constitutional Law, Vol. 8, 2010, p. 692, noting that “the existing precedents suggested that the Executive Branch may delegate governmental powers to private entities even without explicit legislative authorization”.
159 ACRI, Deployment of Private Security Guards in East Jerusalem (Excerpts Petition to the High Court), 2011, op. cit.
160 Elhanan Miller, "Supreme Court defends private security in East Jerusalem", op. cit.
161 Personal commentary by ACRI’s employee, email correspondence, May 26, 2015.
162 Jerusalem Center for Woman, Monitoring Jerusalem, Issue 8, June 2010, http://www.j-c-w.org/reports/monitoring10june.pdf. It should be noted that use of PSCs to evict people from houses takes place also in Israel.
Rationale: As noted above the initial employment of PSCs in EJ arose as a solution to a particular case, i.e. the protection of the house of the then Minister of Housing, Ariel Sharon, and was later expanded due to the increasing number of Jewish settlements in EJ. Therefore, in contrast to the privatization dynamic in other contexts, the use of private security in EJ was not devised as an official public policy articulated in terms of professionalization and economic efficiency. Rather, looking at the process in hindsight, the reliance on PSCs for settlement protection in East Jerusalem simply constitutes one of the several measures undertaken by Israeli government in order to achieve the two-fold goal of expanding the city’s Jewish population and reducing its Palestinian population, although certainly less openly articulated. Further to the origin of the process of privatization and its lack of statutory sanction, other reasons support this view: firstly, over the years and more recently, several state agencies and representatives have questioned the legitimacy of the government’s position, including the then Attorney-General, the Orr Committee and several housing ministers; the government, however, has largely ignored these recommendations and appeals, and instead it holds that the violence in the area justifies the existence of enhanced state-funded security; secondly, in order to solve this violence, the government has not resorted to public police, which is charged with maintaining public order and ensuring security for all residents, but has chosen to employ PSCs which are not deployed in EJ to protect local residents "to protect the Israeli settlers from the Palestinian residents of these neighborhoods, all of whom carry Israeli ID cards and are by and large considered permanent residents of Israel"\(^\text{164}\); last but not least, while the government argues that guards are legally and professionally subordinate to the police, in practice, private security personnel often use their own discretion, including the use of force, and abuse of their authority, exposing Palestinian residents, including children, to unnecessary daily violence and hostility, a situation which far from reducing violence has tended to increase it dramatically.

Authority: In administrative terms, private security companies operating in areas of East Jerusalem are funded and supervised by the Israeli Ministry of Housing and Construction, but their powers derive from the Ministry of Public Security, as established by The Powers for Maintaining Public Security Law [2005]\(^\text{165}\). This relationship has been questioned by human rights organizations and several housing ministries arguing that the Israel Police and not the ministry ought to be the body invested with the protection of this sensitive area\(^\text{166}\).

In professional and operational terms, the profile and training of security guards and their activities and instructions are supposed to be managed by the Israel Police, although this supervisory role remains unclear and has been reported as being unsatisfactory in practice\(^\text{167}\).

Companies: The following companies have been reported as providing security services in the context of Jewish residential compounds:

- Modiin Ezrachi was first contracted by the ELAD association in 1991 to protect the then newly established settlement in the neighborhood of Silwan, and since then it is the PSC through which the Ministry of Housing provides security services in East Jerusalem\(^\text{168}\).

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\(^\text{164}\) ACRI, Deployment of Private Security Guards in East Jerusalem [Excerpts Petition to the High Court], 2011, op. cit.
\(^\text{165}\) See below Subsection III.a.i.
\(^\text{166}\) Id.
\(^\text{167}\) Id.
\(^\text{168}\) Ibid, at. 2.
• Illit security is the company which trains the guards for the Ministry of Housing.

3) Light rail train:

Background: The Jerusalem Light Rail Train (JLRT) began its operation in 2011. The route crossed the city and passes through the Palestinian neighborhoods where Israeli settlement enclaves are located. Since the commencement of its operations, the Israeli Jerusalem Municipality monitors the stations and, as part of a unit established which includes surveillance and control technological systems, has contracted private security company services for guarding the carriages.

Activities: Private armed security guards provide guarding services in train carriages and on station platforms. Additionally, there is also presence of Israel Border police officers. Violent confrontations involving private contractors constantly occur. In certain periods, they have prevented Palestinians from boarding the train, and cases have also been reported of private guards using pepper spray on Palestinian passengers. Most incidents reported took place in the East Jerusalem neighborhoods.

Rationale: Security on public transport such as trains and buses has been privatized all over Israel. In the particular case of EJ, constant friction among passengers, and incidents of attack and riots occurring as the train passes through the surroundings of East Jerusalem constitute the main justification for employment of private security.

Authority: The Israel Transportation System is authorized to operate in the Jerusalem municipality. The legal basis for the employment of PSCs for public transport is provided by the 1998 Law for the Regulation of Security in Public Bodies.

Companies: According to sources, the company providing security services is Modi’in Ezrachi.

III / GAZA STRIP

The Gaza Strip was formally under Egyptian military administration between 1948 and 1967, and since then has been subjected to military occupation by Israel. Although formally disputed by Israel, the occupied status of the Gaza Strip remained unchanged until September 2005, when the Israeli government completed the unilateral Gaza Disengagement Plan, comprising the dismantling and evacuation of all Israeli settlements and withdrawal of military forces. After the plan was fully
implemented, Israel issued an order declaring the end of its military rule in the Gaza Strip\textsuperscript{177}. However, Israel retained control of Gaza’s air space and territorial waters, the checkpoints between Gaza and Israel, Gaza’s access to electricity, fuel and water, among other essential goods, and Gaza’s registry of population.

In 2006 the Hamas organization won the elections to the governing bodies of the Palestinian Authority, and in 2007 it forcefully took over the administrative and the security apparatus of the Palestinian Authority in the Gaza Strip. Since then, Israel has considered Gaza as a “hostile territory” and imposed a siege on it, introducing severe restrictions on persons’ movement (entry to and exit from Gaza) as well as goods and services. In 2010 the import of certain goods and materials was permitted under supervision but Israel still maintains restrictions on exports as well as control of the above-mentioned areas. For its part, Hamas retains control over the police force, the judicial process and aspects of public education, among other areas\textsuperscript{178}. In 2008, 2012 and 2014 Israel launched military operations against the Gaza Strip, causing thousands of civilian casualties, massive forced internal displacement of the local population and a severe humanitarian crisis\textsuperscript{179}.

Since 2005, academic scholars, NGOs and international organizations and regional bodies have reiterated that, due to the continuing exercise of an overwhelming degree of control over virtually every aspect of daily civilian life in Gaza, Israel controls Gaza and, therefore, it should be regarded as the occupying power, according to IHL\textsuperscript{180}.

**PMSC activities**

The use of PMSCs in Gaza Strip has not been fully explored. There are several companies within the defense industry, both Israeli and foreign, which have been accused of being directly implicated in providing key equipment used by the Israeli military in Gaza bombing campaigns during past conflicts; and some studies also point to the involvement in this of supply companies, such as fuel and financial corporations\textsuperscript{181}. However, although this is a serious matter considering the nature of these companies, the study of their involvement in the occupation is beyond the scope of this study\textsuperscript{182}.

Until September 2005, when Israel completed its unilateral Gaza Disengagement Plan, PMSC activity was observed in three contexts: 1) securing commodity trucks entering Israel from Gaza\textsuperscript{183}; 2) protecting foreign nationals in their visits to the territory, in particular, the employment by US authorities of the US PMSCs Dyncorp Services and Blackwater to protect USAID, diplomats and other US government officials\textsuperscript{184}; and 3) operation of the checkpoints to enter or leave Gaza. Regarding

\textsuperscript{177} See more at: http://www.btselem.org/gaza_strip


\textsuperscript{179} See Palestinian Center for Human Rights [Gaza]; http://www.pchrgaza.org/portal/en/

\textsuperscript{180} Id.

\textsuperscript{181} Id. See also, American Friends Service Committee, policy paper, http://www.afsc.org/sites/afsc.civicactions.net/files/documents/information%20on%20divestments.pdf

\textsuperscript{182} According to the Observatory’s definition of PMSCs (see above Introduction, and below Section II these companies do not amount to PMSCs as they do not provide military and security services involving human capital.

\textsuperscript{183} Ronen, p. 447.

the two first, very little information has been found, except for an incident involving Dyncorp guards that is described in the following section. The use of PMSCs at checkpoints is briefly described below.

The completion of the Disengagement Plan in 2005 had important implications for the analysis of PMSC activity and privatization dynamics. In particular, two scenarios are present here. First, to the extent that the Plan involved the redeployment of all military assets from Gaza, leaving no permanent Israeli military presence in the territory (though military incursions into the territory are constant), PMSCs working with the Israeli military in the area until then ceased to operate there as well. PMSC activity under Israeli control remains limited to the operation of checkpoints, and potentially to their use in military operations conducted in the course of the several armed conflicts that have taken place in 2008, 2012 and 2014. It should be noted that any of the fact-finding missions appointed to investigate these events refer to the involvement of Israeli private military contractors\textsuperscript{185}, and no additional information has been found in this regard. Secondly, as Hamas is the authority within the territory and retains control over the police force and other security aspects, the focus on the analysis of privatization dynamics should also turn to the sensitive issue as to whether Hamas is actually contracting out any security and military functions to private groups and corporations, or permits in any way their operation in the territory under its control\textsuperscript{186}. While not a minor issue, the complexity and the lack of access to reliable information on the matter has led us to leave it for future consideration. However, a comprehensive study should consider the two scenarios presented here.

1) Checkpoints:

Background\textsuperscript{187}: The checkpoints at the entrance to the Gaza Strip were the first to be manned by private contractors. The Erez checkpoint, the biggest checkpoint and the one that was used by Palestinian pedestrians, was among the first to go through comprehensive reform during 2006. Unlike the other checkpoints, “the Erez terminal” was rebuilt as a permanent structure. Several months after the opening of the Erez checkpoint, the State of Israel proclaimed a general closure of the Gaza Strip, accompanied by severe limitations on entrance and exit of merchandize. As a result, the terminal is not active and most of its civilian operators from the company Sheleg Lavan were transferred to work at other checkpoints in the south. During the long periods of closure, there was a decrease in the operation of the other checkpoints for entrance to the Gaza Strip: the Karni checkpoint, which is used for merchandize; the Sufa checkpoint, which is used for construction materials; and the Kerem Shalom checkpoint, which is used for humanitarian purposes\textsuperscript{188}.

The Nahal Oz post is not formally considered as a checkpoint as it is meant to serve as a petrol terminal and not for the passage of individuals. Indeed, the post is operated by a private petrol company, Dor Alon Energy Ltd. However, an attack in 2008 prompted discussion about whether the responsibility for guarding it lay with the company or should be among IDF functions.

There are currently four Gaza checkpoints that remain intermittently open depending on the


\textsuperscript{186} For a brief commentary on the security sector in the Gaza Strip and the role of Hamas, see Al-Shabaka, “Analysis: After Gaza, what price the Palestinian security sector?”, Mo’on News Agency, 10-13 October 2014. Goldstone Inquiry mission’s report (2009), A/HRC/12/48, at. 369, 553, 656, mentioned the presence of guards at official national and international buildings, such as the prison at Al-Saraya neighborhood in Gaza city or the UNRWA locations, though it is not specified whether they were private or public guards.

\textsuperscript{187} For a comprehensive overview on checkpoints’ privatization process, see above Subsection I.b. West Bank/Checkpoints.

\textsuperscript{188} Havkin, S., The privatization of checkpoints, op. cit. 2014.
situation: Erez, Beit Hanoun (Arba-Arba), Kerem Shalom and Rafah.

**Activities:** Private security personnel perform similar activities at other checkpoints in the West Bank (see above). It should be noted, however, that security activities of private personnel at Gaza checkpoints, although carried out in the spirit of law enforcement, may involve more sensitive “security” situations than at other checkpoints because of the tense atmosphere in the area. Indeed, due to the intermittent armed conflicts and their close proximity to military operations during these periods, the provision of security services in the area may even lead private contractors to becoming directly involved in hostilities.

**Rationale:** See information above on checkpoints in the West Bank.

**Companies:**
- *Sheleg Lavan has operated at the Erez checkpoint in Gaza.*
- *The White Snow company was reported to operate at the Erez checkpoint in 2010,* but as of today this information has not been confirmed.

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189 See [http://mondoweiss.net/2013/12/palestinian-sabikha-israeli](http://mondoweiss.net/2013/12/palestinian-sabikha-israeli)

2/ THE IMPACT ON HUMAN RIGHTS

The tasks assigned to private contractors in the oPt may not be the typical activities with which PMSCs are ordinarily associated, i.e. key support of multinational military operations or peace-stability missions in countries such Iraq and Afghanistan. However, the fact is that they operate in an occupied territory not subject to the sovereignty of Israel (and in which international humanitarian law applies), and enjoy a broad authority and powers that amount to law enforcement responsibilities in a situation of occupation.

In any context, law enforcement functions may give rise to sensitive situations of balancing between the maintenance of public order and safety, on the one hand, and respect for individual rights, on the other. Furthermore, because of their duties, including such powers as arrest, detention, searches and seizures and the use of force and firearms, law enforcement officials may also be in a position of potentially violating the human rights of the population under their authority. Indeed, when law enforcement functions are contracted out to PMSCs or other private agents the risk of abuse may increase, as private personnel may not be subject to the same supervision mechanisms and administrative sanctions as public police officers.

When policing powers are delegated by military organs and are exercised in situations of emergency or armed conflict, additional implications emerge. In conflict situations there is a thin line between law enforcement operations and military operations: policing activities by private contractors, even if carried out in the spirit of law enforcement, may lead them to become involved directly in hostilities. Furthermore, the exercise of law enforcement powers in contexts of insurgency, civil unrest, riots, and anti-terrorist operations may also involve a high degree of discretion on assessment of the potential security threat and on how much the use of force should be used to prevent it, which may lead to sacrificing individual rights in favor of general order.

The above mentioned are the very sort of situations in which private contractors have been involved in the oPt. Reports by human rights and news organizations have given account of daily incidents involving private security contractors that reflect, among other things, the existing confusion regarding their rules of engagement, lack of or insufficient supervision, difficulty of identification, broad discretion in the exercise of their powers, and their engagement or complicity in criminal activity, abuse and misconduct against Palestinian civilians.

Taking this into account, and in order to comprehensively assess the impact and implications that the use and activities of PMSCs and other contractors have on human rights, during the second-half of 2014 the International Institute for Nonviolent Action (NOVACT) launched the pilot project Observatory of Private Military Security Companies & Human Rights. The main aim of the Observatory is to document, systematize and analyze human rights incidents involving private military and security companies (PMSCs) and private security and military personnel (contractors). The geographical scope of the Observatory extends beyond the occupation of Palestine to other contexts and countries, and has also a specific temporal, material and personnel scope191. In the particular case of the oPt, the

191 Nowadays, the Observatory’s geographical scope extends to three locations: Colombia, Iraq and the occupied Palestinian territory (oPt). It monitors only “human rights violations” involving PMSCs and their personnel, fraud and corruption scandals as well as other sort of incidents associated to PMSCs clients or PMSC’s contracting processes that do not impact on human rights are excluded from the material scope. Finally, the temporal scope of the Observatory covers incidents allegedly committed from year 2000 on. Methodologically, the project includes the creation of national research teams that monitor, collect and transfer incidents data and context information to the Observatory. For more information, please visit www.novact.org
temporal scope of the Observatory implies the documentation of human rights incidents from 2000 to the present, thus covering particular incidents involving private contractors that may have arisen in the context of the Second Intifada and in armed conflicts between Israel and Palestinian and other armed groups. Furthermore, the material scope of the Observatory extends to human rights incidents, excluding other sorts of incident, such as fraud and corruption scandals, but including incidents involving actions of the company against its employees. Finally, the Observatory’s definition of private military and security contractors permits the documentation of incidents involving PMSC employees and Civilian Security Coordinators as settlement (and army) contractors.

The implementation of the Observatory in the oPt included a one-week methodology seminar in December 2014 at the Ramallah headquarters of the Palestinian Center for Human Rights (PCHR), the organization which will carry out the field work for documentation and verification of incidents. Furthermore, the Israeli women’s organization Who Profits cooperates in gathering information on companies within the PMSC sector and conducts research on the contexts where they operate, in particular at checkpoints and in settlements, and also on their regulation under national law.

Currently, the Observatory’s monitoring work has just begun and only preliminary results can be offered here. Nevertheless, the considerations and incidents listed below serve by way of example to show: 1) the sort of situations in which PMSCs and other private contractors have been involved in the oPt; 2) the monitoring and supervisory mechanisms needed for these agents; and 3) the grave consequences that privatization is having on the rights of oPt residents. Although we are aware that every situation of occupation has its own particularities, the following account of incidents also permits us to extract certain lessons on the implications that the use of PMSCs and other private security contractors may have in other contexts of occupation, even when acting as law enforcement agents.

1) Incidents have been reported in all of the contexts where PMSCs and contractors operate. They are more frequent in the context of settlements, both in the West Bank and East Jerusalem, and during demonstrations against the Wall. The following are relevant examples (victims’ names and the alleged author’s affiliation have deliberately been omitted):

**Checkpoints:** “September 2007. Reikhan Barta’a checkpoint. An elderly Palestinian woman (78 years old) died on her way to the hospital after having been delayed by the PSC’s employees operating the checkpoint for approximately 3 hours. Her son tried to rush her to the hospital in Jenin but he was stopped by checkpoint’s employees.”

**Settlements:**
1) “April 2007. Settlement of Givat Havot, Hebron [West Bank] A security guard protecting settlement beats a 16 year old Palestinian when he was shepherding with his father and brother on the land near the settlement. He was later arrested along with his father as the security guard alleged that they threw stones at him and that he was forced to open fire into the air in self-

defense. Father and son were detained at the Gush Etzion Interrogation Centre (Bethlehem)193.
3) “June, 2010. Silwan neighborhood / Bir Ayoub neighborhood, East Jerusalem. Israeli settlers and armed guards, together with a large force of Israeli police and special units, clashed with young Palestinian residents in the Bir Ayoub neighborhood of Silwan using live fire and stun grenades against them. During the incident, settlement guards assaulted photographer while he was trying to film the events. Also, a 29-year-old resident was shot in the leg/foot on his way to evening prayers by guards; never questioned by police, the resident was nevertheless recognized by the National Insurance Institute as a terror victim.195”

Wall:
1) “February, 2005. Village of Bitunya, Ramallah and Al-Bira governorate. A private security guard shot and killed a 14-year-old boy by gunfire who was throwing stones at an Israeli vehicle driven by private security guards at the barrier”196.
2) “July, 2005. Village of Beit Liqya, Ramallah and al-Bireh Governar. A 15/17-year-old boy was shot dead by the private security guard protecting the construction of Wall. Apparently, the incident occurred in the context of a demonstration against the Wall. The child was shot in the chest by using live ammunition. Other children tried to approach their friend to evacuate him, and were met with more gun fire as soldiers shot in their direction. Over an hour later a Red Crescent ambulance was allowed access to him – by which point he had bled to death”197.
3) “May 2007. Fence near the West Bank settlement of Efrat. Four security guards protecting the Wall fired at a group of five journalists who tried to approach people demonstrating against the fence near the settlement of Efrat. Fifteen minutes after the incident army and police forces arrived at the area. According to sources, it was a peaceful demonstration One of the journalists reported that security guards did not warn them first, but just opened fire. Journalists managed to escape the incident unharmed; but stated that they were also verbally intimidated and threaten
by private guards. According to military sources, Defense Ministry security guard fired one shot in the air”, and “a guard was slightly injured by stones hurled at him and two protestors were arrested”\(^{198}\).

**Escort services:** October 2003. Village of Beit Hanoun in the Gaza Strip. Three employees of foreign PMSC were killed and another injured in a bombing attack against a US diplomat’s vehicle-convoy there were shepherding and protecting. According to sources victims were contractors but considered in-house-members of the US (security) embassy team on mission in Gaza”\(^{199}\)

**Light rail train:**

1) "October 2014. North of the Old City in Jerusalem. A guard in the light train service in al-Sheikh Jarrah area, north of the Old City in Jerusalem, opened fire at a Palestinian civilian (20) whose car went off track towards the train park and hit a group of people there. As a result, he sustained three bullet wounds and was moved to “Shaare Zedek” hospital in Jerusalem. At midnight, the aforementioned was announced dead.”\(^{200}\) According to investigations conducted by PCHR, the young man was driving his car in the al-Sheikh Jarrah neighborhood. After he had passed road (1), his car went off track in the train park near the traffic lights and hit a group of people there. The driver got out of his car to see what had happened but an Israeli guard shot him in the abdomen from a close distance. The afore-mentioned civilian was transported by a Star of David ambulance. Later that night, medical sources pronounced him dead. It should be noted that the accident resulted in the death of an Israeli child and injuries to eight Israelis.

2) "May 2015. Train station located north of the Old City of East Jerusalem. An Israeli guard at the light rail opened fire at Palestinian young (35) man while being present in the rail in the “French Hill”, north of the old city in East Jerusalem. As a result, the Palestinian sustained a bullet wound to the leg, due to which he was taken to Hadasa Hospital to receive medical treatment.”\(^{201}\) According to investigations conducted by PCHR, Israeli forces claimed that the guard opened fire to prevent the Palestinian’s attempted stabbing. On the following day, during a hearing held by the Israeli Magistrates Court in Jerusalem, it was found out that the Palestinian youth did not intend to stab anybody and did not have any sharp tools, but was only holding his belt in his hand after he was searched. Besides, there was no reason to fire at and wound him. As he was interrogated, it was also found that the rail guards had attacked him the previous day and he went to the railway on Monday only to identify them. He denied the guards’ claims about his attempted stabbing. At the time of writing the victim is at the Hadasa Hospital receiving medication and the hearing was held in absentia.

2) While most of the documented incidents related to alleged abuses against the local (Palestinian) population, including women and children, a series of incidents have also been reported against PMSC employees and contractors, particularly concerning questionable hiring procedures, poor working

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\(^{200}\) Investigations conducted by PCHR for the Observatory, June 2015.

\(^{201}\) Investigations conducted by PCHR for the Observatory, June 2015.
conditions and other labor rights in the context of checkpoints. As an illustration:

- "2008. Regarding provision of security services at checkpoints. APSC’s employee was allegedly arbitrary dismissed for having participated in a labor conflict against the company. According to sources, ‘The Union representative of the some dozens of employees involved was called in by the manager who asked him to sign a document forbidding him, among other things, from talking to the media. […] the document was held to be so confidential that the employee […] did not even have the right to show it to his attorney. The fact that he had consulted a lawyer prompted an inquiry, and indirectly, his dismissal’"202.

- "2009. Regarding provision of security services at checkpoints. After an accumulation of complaints, three private security companies selected under governmental tender to operate checkpoints were summoned for an audit set up by the governmental commission in charge of issuing permits to the security companies suspected of having violated their employees’ rights. The commission was finally convinced that their employment methods complied with the law"203.

3) Reported incidents involve the deprivation or impact violation of several (fundamental) human rights [and may also amount to violations of IHL], including the right to life, freedom from cruel, inhuman or degrading treatment, non-discrimination, the right to liberty, the right to peaceful assembly, the right to privacy, the right to private property, medical assistance, and labor rights. In addition to the incidents mentioned above and below, the following should be highlighted:

- Settlements in the West Bank: CSCs do not report the actions of illegal constructions expanding the settlements to the IDF, and even in practice defend the criminal seizure of Palestinian land adjacent to settlements and outposts they protect. Events have also been reported of illegal confiscation of goods, such as goats, from Palestinian farmers and shepherds204.

- Settlements in East Jerusalem: PSCs are employed to protect one national-ethnic group from another, i.e. Israeli settlers from the Palestinian residents of neighborhoods of Jerusalem; considering that all of them are permanent legal residents of Israel, this constitutes a discriminatory policy205. Furthermore, in contrast to the massive presence and broad authority of private security personnel in the area, the role of the Israel Police has become secondary in these Palestinian neighborhoods, failing to ensure public security for all residents206. Indeed, due to the insufficient supervision, private security guards often overstep their powers, using violent means against local residents, including the use of live ammunition; limiting their freedom of movement, including that of children, in order to protect settlers passing through the area; and invading their privacy by positioning cameras facing their private spaces207.

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204 See Yesh Din, The Lawless Zone, op. cit., pp. 37-38, 42.

205 See ACRI, Deployment of Private Security Guards in East Jerusalem [Excerpts Petition to the High Court], op. cit., p. 1, 3.


207 ACRI, Deployment of Private Security Guards in East Jerusalem [Excerpts Petition to the High Court], op. cit., p. 4-5. Emily Mulder, “Israel
Last but not least, the condition and rights of the population of East Jerusalem as “protected persons” under international humanitarian law is disregarded208.

4) Many incidents involve the use of armed force. In this regard, wide discretion in the use of reasonable means of force, abuse of powers and confusion regarding the applicable rules of engagement is observed. The following incidents are illustrative:

- “August, 2007. Jerusalem Old City. A 29 years-old Israeli Arab national grabbed a pistol from a private security guard in Jerusalem’s Old City and ran away. During the chase he was allegedly shot and killed by another private security guard in response. Ten other persons were also injured by shots fired. The incident was captured on video by the security cameras that monitor the streets and alleyways of the area. Witnesses and the video reported that [the person] was fired several times while lying death on the floor, an action that is technically considered as a “kill confirmation procedure”, i.e. a procedure entailing shooting from a short distance to ensure that the potential perpetrator is dead. However, the police conducted a criminal investigation concluding that the security personnel acted professionally and in accordance with the procedures; later on, criminal charges against the guards were dismissed by the Jerusalem Magistrate’s Court. In subsequent proceedings filing by the family of [the person] against the National Insurance Institute (NII) the Haifa Labor Court ruled that the NII failed to prove the incident was indeed terrorism and, therefore, the state agency was compelled to resume making monthly payments to the widow and her family.”209.

- “April 2005. Settlement of Petza’el. The Civilian Security Coordinator (CSC) of the settlement shot and killed a Palestinian who approached the hothouses of the settlement in order to relieve himself. Following the incident the CSC was convicted of negligent manslaughter and sentenced to 200 hours’ community service.”210.

- “December 2012. Settlement of Carmei Tzur. The CSC the attacked farmers from the village of Beit Ummar who were attempting to farm a plot under their ownership situated approximately one kilometer from the settlement.”211.

- “June 2009. Erez checkpoint, Gaza Strip. An unarmed individual (later found to be an Israeli national, apparently mentally unstable) arrived at the checkpoint, 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. The use of force was questioned as the person was running away from Israel and therefore, he did not constitute a

208 See article 47 of the IV Geneva Convention (1949): “Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.” (emphasis added)


211 Sources: 1) Yesh Din, The Lawless Zone, op. cit., p. 41.
direct threat. According to IDF and the Defense Ministry, ‘while the incident was undoubtedly irregular, an initial probe shows that the force’s actions were impeccable. Certain sources, however, reported that other military authorities suggested that the “the shooting was aimed at avoiding the potential kidnap of an Israeli citizen by Palestinian forces”, known as the Hannibal Procedure’ 212.

5) There is a lack of clear supervision of private security personnel and difficulty has also been reported when distinguishing private personnel from other armed agents. These two factors complicate the process of monitoring, reporting of incidents, and ultimately the ability to prosecute them. In particular, failures in supervision and distinction are observed, to a greater or lesser extent, in every context where private contractors operate, whether they are placed under the authority of the army or the police:

- **Settlements in East Jerusalem**: Supervision by the Israel Police of PSC guards has been reported by human rights organizations as extremely deficient 213, and constantly denounced by Palestinian residents 214. Furthermore, ACRI points out that private “security personnel do not wear uniforms that differentiate them from entirely private security personnel operating in the neighborhood, and despite the clear obligation established by law, they do not wear identification tags with their names on them. Thus, the ability to prosecute a rogue security guard and bring him to justice is extremely limited” 215.

- **Settlements in the West Bank**: In this context, activities of PSC employees and guard teams are supervised by the CSCs, which in turn are ostensibly supervised by the IDF. In practice, however, Yesh Din remarks that “[t]he diffusion of responsibility between the three authorities involved in the employment of the CSCs (Ministry of Defense, regional defense officers, and the settlements’ authorities) prevents the supervision and control of the appointment and ongoing functioning of the CSCs and the members of the guarding squads” 216. Additionally, military orders granting settlement guards policing powers only require them to carry a “guard’s certificate” and an identity card that may be shown upon demand, but not to wear specific uniforms or a tag identifying them by name 217.

- **Checkpoints**: In simple terms, private security employees at checkpoints are, in the first instance, under the supervision of a private manager (also a PSC employee); at a second level, they are under the supervision of a Crossing Authority employee (who directly represents the State and regulates every aspect of the operation at checkpoints); and at a third level, they are under the control of the staff of one of the several public authorities responsible for activity at checkpoints, either a military officer, police, border police, or harbor-airport authority, depending on the location and operation of the checkpoint. However, rather than facilitating

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213 ACRI, Deployment of Private Security Guards in East Jerusalem (Excerpts Petition to the High Court), op. cit., p. 3.

214 See the work of Wadi Hilweh Information Center – Silwan, http://silwanic.net/

215 ACRI, Deployment of Private Security Guards in East Jerusalem (Excerpts Petition to the High Court), op. cit., p. 3.

216 Yesh Din, The Lawless Zone, op. cit., p. 29.

control, the multitude of authorities intervening in the operation of checkpoints and the complex division of responsibility and authority among them has in practice complicated the identification of the bodies and procedures for supervision of private security guards [who are not subject to public supervisory mechanisms], and has also tended to disperse and dilute responsibility for their actions\textsuperscript{218}. Furthermore, at checkpoints it is also hard to distinguish between private security employees and other checkpoint personnel because the uniform of the soldiers, the police officers, the border control police officers and the private company employees look similar to each other. In particular, according to the women’s organization Machsom Watch “the security guards are wearing security uniform without identification mostly and it’s hard to distinguish them from other civilians in the checkpoints. Sometimes they wear an identification badge, but it is rare”\textsuperscript{219}.

\textsuperscript{218} Havkin, S. “The reform of Israeli checkpoints”, op. cit, pp. 11-13; Havkin, S., The privatization of checkpoints, op. cit. 2014.

\textsuperscript{219} Interview with Machsom Watch’s personnel, conducted by Who Profits, February 5, 2015.
3/ LEGAL FRAMEWORK

There are several laws in Israeli legislation which are relevant for PMSC activities in the oPt to the extent that they regulate the license and the public use and powers of private security companies (national legislation).\(^ {220} \) In addition, as a central aspect for maintaining public order and safety, security issues in the West Bank have been regulated by means of military orders, which have the force of law. Some of these orders have formally replicated Israeli legislation outsourcing security functions in Israel, thereby allowing private security companies and private citizens, such as settlers, to perform security and law enforcement functions in the Palestinian occupied territory (military orders). In the first part of this section we analyze the content of these laws and other relevant Israeli laws and regulations applicable to PMSCs and settlement civilian security contractors concerning the use of force, discipline and accountability.

Furthermore, since a situation of occupation triggers the application of international law, in the second part of this section we further explore some pertinent rules for the use and activities of PMSCs in the context of occupation and international armed conflict, as contained in the two main bodies of applicable international law, i.e. international humanitarian law (IHL) and human rights law (IHRL).

a// NATIONAL LAW

I/ LEGISLATION ON PMSCs

The Law on Private Investigators and Security Services (1972)\(^ {222} \): general framework

This law defines the requirements for the establishment and operation of private security companies in Israel and working as a private investigator. Although the law does not provide a definition of the term PSC, it defines guard services as including standard security services for protection of persons and property, and the installation and maintenance of alarm systems and other security equipment (Art. 1). With regard to the oPt, this law constitutes the general framework for PSC activities in the West Bank, East Jerusalem and Gaza Strip checkpoints to the extent that only licensed security companies are allowed to participate in government tenders for selecting companies to operate in specific contexts in the oPt. As noted in Section I, these tenders (and the contracts resulting from them) required additional conditions for PSCs and precise criteria regarding the skills of the security guards, and thus they also constitute a relevant administrative framework for PSC operations. However, the content of the tenders remains classified unless a Freedom of Information Act is submitted, and sometimes even then\(^ {223} \).

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\(^{220}\) As noted in previous section, no formal legislation has been adopted for PSCs activities in East Jerusalem, which theoretically operate under the guidelines of a government’s decision and the general Israel legislation on security organizations (1972) and Powers for Maintaining Public Security (2005).

\(^{221}\) Please, note that settlements’ Civilian Security Coordinators (CSCs) are considered “private security contractors” for the purpose of this report.

\(^{222}\) Depending of the source also called Law of private investigators and guard services.

\(^{223}\) This was, for instance, the case for the tender for bids in the process for prisons’ privatization. In January 2005 the Association for Civil Rights in Israel (ACRI) submitted a petition to the Tel-Aviv District Court (sitting as the Court for Administrative Matters) demanding that full
Application for a license is a statutory requirement, both for the company and for each guard working for the company, and for the executives and managers who organize security activities. Everyone should be in possession of this license in order to work as a security guard (Art. 18). However, while according to the law a person may be licensed to act as a private investigator if they fulfill specific requirements, there is no such requirement specified for private security guards.

The licensing process is managed by a committee, initially appointed by the Israeli Minister of Justice and currently by the Public Security Minister, who ultimately will grant the licenses or may also reject them on the grounds of public security, the personal history or the behavior of the applicant (Art. 19 A). The law also provides a disciplinary process which may ultimately result in the suspension and disqualification of a license. However, this process only applies to private investigators—also regulated under the law—and not to PSCs, which are not subject to any ethical code or regulations.

The license is subject to annual renewal, which may also be rejected on disciplinary grounds (as regards private investigators, Art. 29). Finally, operating without a license is punishable by one year imprisonment or a symbolic fine (Art. 30).

The licensing law also requires the deposit of a bank guarantee or another sort of guarantee, a process regulated by the Ministry of Justice (art. 19. A.1). In 2010 the law was amended making the licensing of PSCs conditional upon providing a bank guarantee or other guarantee or insurance for the company and its employees against claims for damages by victims of acts or omissions on the part of corporation employees.

As of August 2012, there were 375 PSCs licensed under this law. As a regulatory framework, however, the law is very unsatisfactory and, in practice, has no real effects on the work of private security companies.

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224 See Art. 4 and Chapter VI of the law. A private investigator must 1) be a citizen or permanent resident of Israel; 2) be an adult (apparently, at least 18 years old); 3) have completed 12 years of schooling; 4) have 3 years of experience in the field of investigation; 5) have passed an exam in accordance to the regulations of professional ethics as defined to the Minister of Justice; 6) the committee set under the law may reject granting the license because of the investigator’s background, or disciplinary record.

225 In subsequent amendments to the law, the Israeli Cabinet transferred the Justice Minister’s authority over guard services to the Public Security Minister. See Weekly Cabinet meeting, Communication by the Cabinet’s Secretariat, December 11, 2011, http://mfa.gov.il/MFA/PressRoom/2011/Pages/Cabinet_communique_11-Dec-2011.aspx

226 The disciplinary process for private investigators takes place in front of a special commission for infringements of the law of “professional ethics regulations” to be adopted by the Ministry of Justice. The disciplinary process is compatible with a criminal process.

227 Private Investigators and Guard Services Law (Bank guarantee or other guarantee or insurance). 1972, amendment of November 22, 2010.

228 Guard Companies with Valid License (August, 2012), published in October 1, 2012. [in file with the author].
The Powers for Maintaining Public Security Law (2005)\(^{229}\): legislation for PSCs at checkpoints and East Jerusalem

This law constitutes one of the main legal grounds for outsourcing security functions and the use of force to PSCs within Israel and East Jerusalem, and in the particular context of checkpoints in the oPt. Until 2005, private security services in Israel were provided on a contractual non-statutory basis\(^{230}\), and PSCs had no legal authority to demand identification, conduct body searches and proceed with the detention of individuals. This law conditionally grants these “powers” with the exception of some sorts of detention\(^{231}\), including by using reasonable force “in order to maintain public security against terrorist activity and violence” [Art. 1]. Therefore, as well as broadening their operational powers, this law further expands the operational scope of PSCs regarding special situations of terrorist violence rather than ordinary situations of criminal violence.

In this regard, private security personnel may have similar, though not identical, powers to those of soldiers, police and public officers, who are also addressed under the law\(^{232}\), if so designated by the Minister of Internal Security (Art. 7). In practice, nonetheless, rather than designating specific individual persons to whom authorizations are granted, governmental policy has been to designate specific locations where these powers can be used, in particular, public and private transport services, shopping malls and entertainment spaces, hospitals, banks, gas and petrol stations, police stations and areas under government jurisdiction, etc. [see Art. 3].

The requirements for those exercising these powers include: 1) being a citizen or permanent resident of Israel; 2) having a medical certificate; 3) possessing a personal guard license under the 1972 law or a weapons permit; 4) not being disqualified by reason of their past record, which would not apply with regard to acts committed as a “combatant”; 5) having completed 12 years of schooling, and having military experience; and 6) passing a specific security training course adapted to the specific location, including professional certification by the training institution that there is no reason of public security or criminal record to preclude work as a private guard (Art. 8). Nevertheless, security training of private guards has also been outsourced to private companies\(^{233}\). Finally, in this regard, Article 1 of the law also provides that the use of the powers should be exercised “in a place and form that guarantee maximum protection of human dignity, privacy and rights”.

Although the law primarily concerns the maintenance of public security within Israel, it also extends its scope to security activity at checkpoints through the amendment of the 1996 Law on Implementation of the Interim Agreement regarding the West Bank and Gaza Strip\(^{234}\). However, designation lies with the Ministry of Defense and the powers of PSC personnel are more limited than those authorized within Israel. In particular, private security personnel may demand identification and search the property and vehicles of persons passing through the checkpoints, but in order to conduct body searches the supervision and monitoring of the public authority responsible of the

\(^{229}\) Also called Law of Authorizations for Ensuring Public Security.

\(^{230}\) See however, the Licensing Businesses Law (1968) which regulate public health, order and security of private businesses, and the Regulating Security in Public Institutions Law (1998), which seem to have been used for the use of private security services in practice.

\(^{231}\) Detention by PSC personnel is only allowed until the arrival of the police but is restricted on the sole ground of suspicion that a person may commit an offence, article 6.

\(^{232}\) There are some differences in the law between these three agents. Some of the powers were only given to soldiers and policemen.

\(^{233}\) See above Subsection I. b. West Bank/checkpoints/companies.

checkpoint, i.e. the soldier, police or public officer, is required. Likewise, refusal of passage of an individual is conditional upon the authorization of a public authority. The Ministers of Internal Security and Defense enjoy the prerogative of making further restrictions on PSC functions. In short, the content of the law in this regard means, in theory, that private security personnel conduct routine security management tasks while any incident or altercation will prompt the presence and direction of the responsible public authority in charge of the checkpoint. As noted in Section II above, however, incidents and confrontation have often occurred in practice where public authority and supervision have been diffused.

II / MILITARY ORDERS

a) Settlements (West Bank)\(^{235}\);

No. 432 Order concerning Guarding in Communities (Judea and Samaria), 1971\(^{236}\)

This order replicates Israeli legislation on guarding front line communities within Israel\(^{237}\) in settlements and outposts in the West Bank, and initially in the Gaza Strip as well. Basically, it articulates a policy of self-defense by allowing the military authority to outsource security responsibilities in the settlement to the settlers themselves, defining the role of settlement civilian guards and the functions and powers of the Civilian Security Coordinators (CSCs), who act as supervisors of the guard teams. According to its content, a guard is a permanent resident of the settlement who guards the settlement “on behalf of the army”. The guard, who should be a male between 18 and 60 years old, is required to carry out guard duties for up to six hours per week, and is liable to a fine if he refuses to perform any of these duties. A guard has to carry a guard certificate and to present it to any relevant person as required.

The CSC is appointed and their salary paid by the settlement but with funds coming from the Ministry of Defense. They are supposed to be supervised and accountable to the IDF.

While according to the order the main role of the CSC is to regulate and inspect guarding functions and supervising the guard squads, several amendments to the Order have progressively expanded the original powers of CSCs. At the present time, CSCs are responsible for all aspects of security in settlements and outposts, including the supervision of the private security companies in the settlements.

Amendments

1992 (MO 1365)\(^ {238}\) granted guards quasi-policing powers, including those of detention, body search, seizure of an object, and arrest\(^ {239}\), as well as the legal authority to use “any reasonable means

\(^{235}\) Information in this section is extracted from Yesh Din, The Lawless Zone, op. cit. Please, consider accessing the document of this report for further details.

\(^{236}\) This Order was issued on June 1, 1971 and signed by Brigadier-General Raphael Vardi, Commander of the Judea and Samaria Area.

\(^{237}\) Local Authority Law (Regulation of Guarding) 1961. See Subsection I.a. above.

\(^{238}\) Amendment to Section 3(a)(2)-(7) of Order No. 1365, Order concerning the Regulation of Guarding in Communities (Amendment No. 10) from April 8, 1992. In: Communiqués, Orders and Appointments, Booklet No. 137, April 1992, Legal Advisor for the Judea and Samaria Area.

\(^{239}\) See Yesh-Din, The Lawless zone, op. cit., p.13:
- To require any person to accompany the guard to the police station or to remain on the scene pending the arrival of a police officer or soldier;
- To search of a person’s body, property, or vehicle if the guard has “reasonable suspicion” that the person is carrying a knife, firearm, or
to execute the arrest” if they have “reasonable suspicion” or “reasonable grounds to assume” that this action will prevent danger to human life.

By comparison, guards in frontline communities have more restricted authority, both regarding their powers and the level of force permitted in their performance. In contrast, requirements for identification are more stringent for frontline community guards, who must visibly wear a tag identifying him and his position, while in the case of settlement guards they must carry a guard certificate and an identity card, but military orders do not require them to wear a tag identifying themselves by name.

1997 (MO 1448) requires the guards to carry a guard certificate and an identity card, but it does not require them to wear a tag identifying themselves by name, as required of Israel Police personnel (including Border Police) or other officials enjoying policing rights in Israel.

2002 (MO 1516) makes permanent guards in settlements subject to the Military Justice Law (1955), to the extent that, although they are not soldiers, they do work on the army’s behalf (Art. 2.b.f). This policy is sanctioned according to Art. 8.3 of the Military Justice Law.

2009 (MO 1643) redefined the boundaries of the area in which guards enjoy their powers, i.e. the “guarding area” of guards in settlements and at outposts, extending it beyond the original municipal boundaries of the settlements or, that is, to an area that “is not an area of a community”. In this latter regard, the order further established that security guards enjoy the same powers as those granted within the municipal boundaries of settlements.

b) Private security companies

No. 1401 Order concerning security services (1993)

This requires a permit by a competent (military) authority in order to arrange and contract security services in the West Bank, thereby making the provision of security services conditional upon the existence of an operational permit, in a similar approach to the Israeli legislation on guard services (1972). Indeed, the definition of security services is identical to that of the 1972 law and includes services of protection of persons and property as well as the installation and maintenance of alarm systems and other security equipment. Operating without a permit or violating the terms of the authorization given by the military commander is punishable with a three-year prison sentence or a fine of NIS 250,000, or both (Art. 5). Furthermore, the order formally recognizes the validity of explosives, and if the search “is required in order to prevent danger to human life;”

- To seize an object if the guard has “reasonable grounds to assume” that the said object was or will be used to commit an offense or is liable to serve as evidence in a legal proceeding;
- To arrest a person without an arrest warrant, if the arrest is intended to assist a soldier or police officer or if the individual is committing – or the guard has “reasonable grounds to assume” that the person has “just” committed – an offense incurring a penalty of over three years’ imprisonment, provided that the said person previously refused to accompany the guard to the police station or to remain on the scene pending the arrival of a police officer or soldier.”

241 Art. 2 in the full and revised version of the Local Authorities Law (Regulation of Guarding), 1961.

242 Section 2b(f) of Order No.1516, Order concerning the Regulation of Communities (Amendment No. 17) dated September 19, 2002, in: Communiqués, Orders and Appointments, Booklet No. 191, Legal Advisor for the Judea and Samaria Area.

243 Section 3a of Order No. 1448, Order concerning the Regulation of Guarding in Communities (Amendment No.15) dated January 12, 1997.

244 Section 3a of Order No. 1448, Order concerning the Regulation of Guarding in Communities (Amendment No.15) dated January 12, 1997, in: Communiqués, Orders and Appointments, Booklet No. 172, Legal Advisor for the Judea and Samaria Area.

245 Order issued on September 22, 1993 and signed by Nehemia Tamari, Commander of Armed Forces of the Judea and Samaria Area.
similar permits to provide security services issued prior to the Order, in particular, under Military Order No. 65 (1967).


This order replicates Israeli legislation on Powers for Maintaining Public Security (2005), i.e. checkpoints, in Israeli settlements in the West Bank, regulating the powers of “civilian” security guards in the area of settlements and industrial zones. In combination with the provisions of the Law of 2005 and the military orders that define the boundaries of an area of a settlement or an industrial zone, security guards are authorized to apply the powers granted under this order in “the area of the community”, i.e. the municipal area of the settlements or the boundaries of an Israeli industrial zone in the West Bank.

c) Checkpoints

No. 1665 Order regarding the Arrangement of Authorities in Checkpoints (2010)

This organizes security responsibilities at checkpoints. It provides that there should be a manager at the checkpoint, who should be a public officer chosen by the military. The order further specifies the different kinds of checkpoints: 1) “Terminal” – a point that integrates the crossing of commodities, vehicles and pedestrians from Palestine to Israel and vice versa; 2) “Back to back pallet” – a pallet located near a checkpoint which enables the transfer of commodities from car to car under inspection, control and supervision, from one side of the checkpoint to another; 3) “Security checkpoint for Palestinians” – a checkpoint with a full checking capability, which is located at a checkpoint on roads between Israel and the oPt and enables checking and passage of Palestinian vehicles and pedestrians; 4) “Security checkpoint for Israelis” – the same as 3) but just for Israelis; 5) “Operational/agricultural gate” – a passing point which enables controlled military or agricultural movement of pedestrians, vehicles and armored vehicles. The gate is part of a checkpoint and opens when necessary.

III / RULES FOR THE USE OF FORCE - RULES OF ENGAGEMENT

Rules of engagement (RoE) are rules of behavior addressed to military forces and individuals regarding the use of force and the employment of certain capabilities. They define the circumstances, conditions, degree and manner in which force, or actions which might be construed as provocative, may be applied. Some countries such as the United States differentiate between RoE, applied to military operations abroad, and rules for the use of force (RUF), applicable in domestic operations, although this is not a settled practice and RoE may be used in both contexts. A summarized version of the applicable RoE for a particular mission or operation may be issued to all personnel in the form

247 See 2005 Addendum to the Order concerning the Management of Local Councils (Judea and Samaria) (No. 892), 1981 and the area of the settlement as stipulated in the Addendum to the Order concerning the Management of Regional Councils (Judea and Samaria) (No. 1979).
of an “RoE card”. Therefore, RoE can be articulated for forces and individuals participating in police operations that take place during armed conflicts, as is the case in situations of occupation.

RoE should not be confused with national or international prescriptions authorizing or prohibiting the use of force in particular circumstances [self-defense, conduct of hostilities in armed conflicts, law enforcement operations]. Rather, the RoE delineate the amount of force and provide protocols and techniques for using force and firearms in these circumstances in order to comply with the prescriptions. For instance, recourse to “escalation of force” techniques [warning shots, shouting, etc.] is a RoE that should be used in policing operations because national and international rules for police operations demand that lethal force be used only as a last resort in order to protect life [a non-derogable human right] and when less-than-lethal measures are unavailable.

The use of force in self-defense is regulated under national law, while the use of force in combat operations during armed conflict is governed by international humanitarian law [conduct of hostilities paradigm] and rules for the use of force in law enforcement operations derived from human rights law.

Israeli criminal law prescribes the use of force in self-defense in Article 34J of the 1977 Penal Code. Furthermore, Article 75 of the Israeli Criminal Procedure Law, 1996 (powers of enforcement and arrests), allows any person to detain another until arrival of a police officer, including through non-injurious use of force, if the other person is suspected of having carried out an offence of violence, a crime, a theft or an offence which caused significant damage to property. Such detention may not last more than three hours. Initially, these were the powers under which private security personnel operated in Israel. However, over the years the laws mentioned above have gradually extended these powers to a policing role [arrest, detention, reasonable means of force in order to prevent infiltration and terrorist attacks], including for their activities in the oPt.

Police action within Israel is governed by criminal law, which in turn should comply with human rights law. Specific procedures delineating the degree of force and the use of firearms by police officers, i.e. RoE, remain classified in many aspects but their content has been articulated and thus disclosed through judicial review; in particular, according to jurisprudence of the Israeli High Court of Justice, lethal force can only be used as a last resort, when there are no other means by which to neutralize a serious threat, and even then, as a rule, there is an obligation to take measures to ensure the reasonable use of force, with an expectation to minimize physical injury as much as possible. Human rights organizations have denounced on some occasions that public statements by the Minister of Public Security regarding the course of action to be followed in cases of terrorist attacks do not reflect the law and would lead to confusing police agencies regarding the applicable laws.

Since private security personnel are not part of the police, these procedures do not apply to them as a matter of law. However, to the extent that they operate as law enforcement agents, it may be expected that they should apply the same rules as police forces undertaking the same activities.

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250 No person shall bear criminal responsibility for an act that was immediately necessary in order to repel an unlawful attack, which posed real danger to his own or another person’s life, freedom, bodily welfare or property; however, a person is not acting in self-defense when his own wrongful conduct caused the attack, the possibility of such a development having been foreseen by himself.


Soldiers trying to pacify an aggressive Civilian Security Coordinator of the Israeli settlement of Shilo who had interrupted the harvest during the olive harvest in the West Bank village of Sinjil, Ramallah district, October 19, 2009.
At the same time, however, since they operate in an occupied territory, in principle, the IDF military commander of an area may also decide the rules of engagement of the private security employees and settlement guards.

The content of the above-mentioned legislation and military orders regulating the powers of private security employees and settlement guards seem to indicate a law enforcement (policing RoE) approach, by allowing private guards only to “use of reasonable force”253, or by requiring of CSCs that a lawful arrest be executed through the “use any reasonable means”254. However, there is still grounds for discussion as to whether certain activities delegated to private security contractors in the oPt, particularly at checkpoints but also in settlements and at construction sites along the Wall, may lead them to becoming involved in military operations in certain circumstances, even if the activities are performed in the spirit of law enforcement255. As explained in the following section, this is a problematic aspect of PMSC activities in times of armed conflict and occupation. However, this issue will not be dealt with here, as it requires a casuistic approach regarding the diverse activities of private contractors and the particular circumstances in which they perform them.

For practical purposes, it is sufficient to mention two separate events related to this issue: firstly, the ruling of the Israeli Supreme Court in the Targeted Killing case (2006), when it remarked that even in military actions that are governed by the laws of armed conflict, such as targeting members of terrorist organizations, human rights standards relating to the use of force apply, and indeed may limit the means and degree of force permitted, so that if less injurious means than lethal attack are available military forces should preferably recourse to them256; and secondly, in 2010, following Operation Cast Lead in Gaza and several recommendations by international and human rights groups, the IDF for the first time published a comprehensive document defining rules of engagement for the military during combat in areas of civilian population. Among them commanders are now instructed to fire a few warning shells on entering areas that may still be inhabited by civilians. They are also told to exercise judgment and use more accurate weapons or lower-impact weapons257.

From this it follows that if military forces are limited in this way, law enforcement [private] agents that may be involved in such situations while performing a policing role must also abide by this standard of conduct. However, the last attack on Gaza in 2014 under the name “Operation Protective Edge” demonstrated that these rules of engagement were simply worthless.

Additionally, there are concerns about the lack of public disclosure and the lack of clarity on measures taken to control and limit the circumstances in which private contractors may resort to force in their activities in the oPt. In particular, the uncertainty affects both the content of the

253 The provision concerning the “use of reasonable force” is included in the 2005 Public security Law in regard to private guards in checkpoints, which also include a general provision stating that the use of powers under the Law would be “in a location and means which will guarantee maximum protection of human dignity, privacy and rights”, Article 1, 2005 Law.

254 Military orders authorize CSCs in settlements to “arrest a person without an arrest warrant, if the arrest is intended to assist a soldier or police officer or if the individual is committing – or the guard has “reasonable grounds to assume” that the person has “just” committed – an offense incurring a penalty of over three years’ imprisonment, provided that the said person previously refused to accompany the guard to the police station or to remain on the scene pending the arrival of a police officer or soldier.” In order to execute the arrest, CSCs are allowed to “use any reasonable means”. See Amendment to Section 3a(c)(2)-(7) of Order No. 1365, Order concerning the Regulation of Guarding in Communities [Amendment No.10] from April 8, 1992.

255 See about this discussion, Cameron, L., Chetail, V., Privatizing war: Private Military and Security Companies Under Public International Law, Cambridge University Press, 2013, p. 431-454.Briefly, see also below Subsection III.b.i.


protocols for the use of reasonable force and firearms by private contractors and also the training courses in which such rules must be included.

In principle, private security personnel are instructed on RoE and other tasks through training courses for the specific activity that they are contracted to perform. In Israel security guards are required to undergo training courses in order to start working or to be accepted for a job anywhere. These training courses are conducted by training institutes according to a training plan determined by each body that they are designed to serve as security guards. Accordingly, PMSC employees operating in the oPt are trained according to instructions set out by the Israel Police, while others undergo military training according to rules defined by the IDF. Additionally, in some cases, the required training level and the procedures according to which private security contractors will operate are also sometimes defined in the document of tender for bids. That being said, however, the content of the training plan is not subject to public scrutiny and, furthermore, the training courses for private guards have been outsourced to private companies. Although the training facility must receive an authorization of the Ministry of Internal Security, and there is a procedure for the Israel Police to qualify training institutes, this delegation adds more uncertainty regarding how private security guards are ultimately trained and in particular the content of RoE included in the training programs.

Regarding settlement CSCs and guards, in principle they also must undergo military training in the framework of a CSC course as a condition for employment, and must apply and receive special permission for bearing IDF weapons. However, the human rights organization Yesh Din notes that none of the relevant bodies involved in the employment of CSCs and guards has prepared a document of routine standing orders summarizing the procedures and commands relating to the work of the CSCs and guard squads, including aspects of their training and supervision. Furthermore, orders concerning the issuing of IDF weapons do not include provisions for the use of army weapons but are limited to providing that CSCs must obey “all the army commands”. As a result, beyond the scope of the general guidelines provided by the military orders granting their powers (as mentioned above) and the operational command of the army in the field, RoE for settlement CSCs and guard teams, including rules on the use of force and firearms, remain uncertain or are classified information.

**IV / COMMAND, SUPERVISION AND DISCIPLINE**

Command of private security personnel, either PMSC employees or CSCs and their guard teams, depends on the authority in charge. Accordingly, the work of private security guards in East Jerusalem is to be managed by the Israel Police, while activities of CSCs and their teams in settlements in the West Bank are subject to the supervision and professional guidance of the IDF and regional defense commander. At checkpoints, while the Crossing Authority is the state agency responsible for operational aspects, there is a lack of clarity regarding the specific supervision of private security personnel due to the complex network of state agencies participating in the operation and management of checkpoints. As regards private guards working on the Wall, their supervision is also uncertain because they are subcontracted by construction contractors and the Israeli military does not apparently intervene except for specific operational aspects. Overall, as described in Section II above, supervision over PMSC employees and CSCs and guard teams has been extremely deficient, emphasizing the need for establishing specific supervision bodies.

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Regarding mechanisms in place to file complaints and investigate and discipline PMSCs, the 1972 law provides a disciplinary process before a special commission for infringements of the law of “professional ethics regulations” (to be adopted by the Ministry of Justice). The disciplinary process, which is compatible with a criminal process, may result in suspension and disqualification for a license. However, as noted above, the law explicitly refers only to “private investigators” and does not apply to private guards. Furthermore, this process does not seem to be available against the company itself, and it is also unclear whether the scope of the process would extend to allegations concerning activities in the oPt.

Under Israeli law, there are supervision and disciplinary procedures that are meant to prevent public security officers from using unnecessary or disproportionate force or negligent behavior and allow filing complaints against them. However, to the extent that PSC employees do not act under any official capacity they are not subject to such official disciplinary mechanisms. Currently, there is no such mechanism for complaints against PSCs, except for criminal offences that are treated by the police. Some sources mention that contracts with the police (who manage checkpoints and are supposed to supervise guards in settlements in the Jerusalem area) allow the police to take measures against PSCs when a PSC employee acts outside their powers. However, human rights organizations report that it is unclear “which body is authorized to handle complaints about improper security guard behavior, which body will examine these complaints, and according to what rules and norms the delinquent should be judged.”

Similarly, sources report that no rules have been established regarding IDF supervision of the appointment, operations and use of weapons by CSCs and guard squads in settlements in the West Bank. Formally, a mechanism for examining complaints concerning instances in which CSCs overstepped their powers was established by the Interministerial Team for Law Enforcement in the Territories in the Ministry of Justice and by the Department of the Legal Advisor for the Judea and Samaria Division. The IDF Spokesperson’s position is that supervision of CSC work, which is within the purview of the brigade commander and the head of regional defense is carried out by means of reports, exercises, and ongoing in-service training. Nonetheless, NGOs reporting on CSC activities claim that the diffusion of responsibility arising from the several public bodies that intervene in the employment of CSCs and their guard teams prevents proper supervision in practice.

**IV / ACCOUNTABILITY**

Under Israeli law, PMSC employees are subject to criminal law. Specifically, offenses committed by PMSC employees in the oPt are punishable under the 1977 Penal Code if the employee is an Israeli citizen or resident at the time of the commission and the offense is punishable by more than three months’ imprisonment. Additionally, the penal code is applicable to offenses committed outside Israel which Israel has an obligation to prosecute under international treaties, for instance, grave...
breaches of the 1949 Geneva Conventions\textsuperscript{270}. Nonetheless, the category of war crimes and other international crimes have not been explicitly incorporated into the criminal code, a legal gap which is problematic in terms of effective prosecution\textsuperscript{271}.

In contrast to PMSC personnel, Civilian Security Coordinators in settlements are subject to Military Justice Law, though they will be prosecuted in Israeli civil courts\textsuperscript{272} for any offense relating to matters placed under their responsibility. It is doubtful, however, whether this includes allegation of violations of the laws of war, as they are not officially empowered with responsibilities in military operations but with law enforcement duties. Currently, uncertainty remains in many aspects. Yesh Din has noted that not one single instance of such prosecution has taken place to date\textsuperscript{273}.

As regards individual and corporate liability under general tort law, the main legal basis for claims against PMSC and their employees is found in the 1972 Law on Private Investigators and Security Services (Amendment Act, 2010), which makes the licensing of PSCs conditional upon providing a bank guarantee (no less than NIS 6,000,000) or insurance for the company and its employees against third party claims for damages (no less than NIS 4,000,000) and for professional liability (no less than NIS 2,000,000)\textsuperscript{274}. According to the amendment, realization of the bank guarantee or the payment of insurance benefits will be determined by a court of law and executed subsequently by the committee established under the law\textsuperscript{275}. The amendment also provides for other out of court settlement mechanisms such as settlement agreement between the victim and the company or a court arbitration decision\textsuperscript{276}.

There are concerns regarding judicial mechanisms for dealing with labor conflicts arising between private security companies and their employees. As noted in Section II, these conflicts have mainly taken place in the context of checkpoints for arbitrary dismissal and other violations of employee labor rights\textsuperscript{277}. In this regard, commentators point out that security arguments and confidentiality measures used by defense institutions and sanctioned by the National Labor Court contribute to hampering PMSC employee individual rights such as the right to consult a lawyer and the right to organize within a labor union\textsuperscript{278}.

Finally, with regard to state liability, it seems that the fact that the state is not the direct employer of PMSC personnel and CSCSs, together with the operation of certain immunity clauses included through amendment to the Israeli Civil Tort Law (Liability of the State, 1952)\textsuperscript{279} may pose problems and prevent claims for the liability of the State both for the conduct of private military and security personnel against third persons and for claims from PMSC employees and CSCSs. Indeed, regarding this last point, a special clause was included in the agreements between the Ministry of Defense and the settlement authorities employing CSCSs, providing that the CSC “will not be considered an employee of the ministry, and no employer-employee relations or other relations of employment will pertain

\textsuperscript{270} Ibid, art. 16.
\textsuperscript{271} See Yesh Din, \textit{Lacuna: war crimes in Israeli Law and court-martial rulings}, July 2013.
\textsuperscript{272} Israelis committing criminal offences in the West Bank will always be prosecuted in civilian courts in Israel.
\textsuperscript{273} Yesh Din, \textit{The Lawless Zone}, op. cit, pp. 14-15.
\textsuperscript{274} See art. 19. A.1 of the 1972 law, and art. 5 of the Amendment act, 2010.
\textsuperscript{275} Ibid, Art. 6 A).
\textsuperscript{276} Art. 6. B).
\textsuperscript{277} Havkin, S. “The reform of Israeli checkpoints”, 2011, op. cit, pp. 17, 24-25.
\textsuperscript{278} Ibid, p. 25.
\textsuperscript{279} See 2005 Amendment to the Civil Tort Law (Liability of the State, 1952), article 5.a.1), according to which the State is immune to liability for torts caused in the West Bank arising from IDF action “including other defense forces of the State of Israel operating in the area”. See Ronen, Y., “Israel Going Private”, op. cit., p. 452 suggesting that this provision gives room to exempt State from liability for acts of private security personnel in checkpoints in the West Bank.
b// INTERNATIONAL LAW

between him and the ministry”. According to Yesh Din, “the inclusion of this clause has led to the rejection of claims for compensation submitted by CSCs to the Ministry of Defense”.280

Despite the transnational dimension of their activities, PMSCs as such are not subjected to a specific international treaty regulating their activities. Indeed, there is no international consensus on how to legally define PMSCs or on the need to draft a binding treaty on the matter.281 Although an international debate hosted at the UN is still ongoing, meanwhile international rules governing PMSC activity should be extracted from different bodies of law depending on the context where PMSCs operate and the nature of the activities that they have been contracted to perform. Since, as explained above, the situation in the West Bank, East Jerusalem and the Gaza Strip remains qualified as belligerent occupation, this section concentrates on the international legal framework regulating this matter.

International law governing situations of occupation is primarily found in the framework of international humanitarian law (IHL) on international armed conflicts. Applicable humanitarian law is made up of two sets of rules: 1) the laws regulating the conduct of hostilities in international armed conflict, which according to the Israeli Supreme Court applied to the conflicts between Israel and terrorist groups operating from the West Bank and Gaza;282 and 2) the laws of military occupation, regulating inter alia the administration, the maintenance of public law and order, and the protection of the population in the occupied territory. IHL of military occupation can be found in the 1907 Hague Regulations (Articles 42-56 IV Convention), the four 1949 Geneva Conventions (IGC; IIGC; IIIGC; and IVGC), the 1977 Additional Protocol I (API), and customary law including rules of distinction, proportionality and precautions in attacks. Israel is party to the four Geneva Conventions, and although it has contested the formal application of IV Geneva Convention to the OPT it has nevertheless acceded to applying it de facto for humanitarian reasons of protection of the population.283 Furthermore, Israel has not ratified the API but some of its provisions apply as customary law, as has been confirmed by the Israeli Supreme Court.284

Additionally, there is a broad consensus that in situations of occupation international human rights law is also applicable due to the existence of a sufficient control over the territory.285 This has been confirmed by the jurisprudence of the International Court of Justice, including its Advisory Opinion in the Wall case (2004), when it specifically stated that both humanitarian law and human

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280 Yesh Din, The Lawless Zone, op. cit., p. 29.
281 On this issue see sessions of the UN Human Rights Council’s mandated Open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies, http://www.ohchr.org/EN/HRBodies/HRC/WGMilitary/Pages/DEIWGMilitaryIndex.aspx
282 Israeli Supreme Court, Targeted killing case, op. cit., para. 18, 21.
286 See the particular situation in the OPT, Al Haq, The Applicability of Human Rights Law to Occupied Territories: The Case of the Occupied Palestinian Territories, Ramallah, 2003.
rights law apply to the Palestinian occupied territory. Furthermore, while the official position of the State of Israel is the non-applicability of human rights law in the occupied territories, the Israel High Court of Justice, without categorically settling the issue, has tended to favor the application of international human rights law. At the international level, general human rights treaties to which Israel is party include the two international covenants of 1966. In this regard, the Human Rights Committee (HRC) already noted in 1999 that Israel bears responsibility for implementation of the International Covenant on Civil and Political Rights (ICCPR) within Israel, and in the Occupied Territories in the West Bank and Gaza, to the extent that these are territories over which Israel has effective control. The HRC reiterated this position in its last country report of 2014.

While these two bodies of law apply simultaneously in situations of armed conflict and occupation, IHL constitutes lex specialis and prevails over any other general law, including human rights law. Notwithstanding this general rule, the interplay of these two bodies of law remains relevant to the extent that in those matters not covered by IHL, general law, that is human rights law, should apply in order to enhance protection. In this regard, in its Advisory Opinion in the Wall case the ICJ indicates three possible situations of interaction between IHL and HRL: 1) “some rights may be exclusively matters of international humanitarian law”; 2) “others may be exclusively matters of human rights law”; and 3) “yet others may be matters of both these branches of international law”.

As we will see below, this is particularly important for determining the rules for the use of force by private military and contractors in the oPt, as IHL does not contain detailed provisions regarding the way in which law enforcement operations should be conducted.

That being said, when assessing how IHL and HRL regulate the use and activities of PMSCs and other private civilian contractors in situations of occupation, some preliminary considerations should be mentioned.

First, there is the question of whether and to what extent these two legal frameworks apply to PMSC activities. In this regard, PMSCs, as companies, are not bound per se to respect IHL, which is binding only on parties to a conflict and individuals, not to corporate entities. From this it follows, nevertheless, that PMSC employees, as individuals, and states party to a conflict having a relationship with PMSCs, are bound to apply and respect IHL. In a similar vein, HRL only imposed direct obligations on states, and therefore, human rights norms are only binding on individuals and corporations through their incorporation in national law. Even so, human rights bodies have held that the outsourcing of certain core activities to private entities does not absolve states (parties) of their human rights responsibilities; in this regard, states bear an obligation of “due diligence” with respect to private agents and entities such as PMSCs. In short, this means that there are a set of rules that apply to states in their relationships with PMSCs as well as to PMSCs by means of their


288 Marab et al. v. The IDF Commander in the West Bank, HCJ 3239/02, 57(2) PD [Reports of the Israeli High Court of Justice], p. 349 (2003); also, Marabeh v. Prime Minister of Israel, HCJ 7957/04, 106(2) PD 201, 20-21 [2005] (Isr.), stating that “[…] we shall assume – without deciding the matter – that the international conventions on human rights apply in the area”.

289 See UN Doc. CCPR/C/78/638 (2003); also, Concluding Observations on Israel, UN Doc. CCPR/79/Add.93, para 10 [1999].

290 UN Doc. CCPR/C/19/CO/4, November 21, 2014, para 5.

291 ICJ The Wall Opinion, para. 106.

employees, and therefore that PMSCs do not operate in a legal vacuum. This leads us to a second preliminary consideration, the nature of the rules themselves.

The determination of international rules applicable to PMSC activity is difficult to decide on a general basis. While there are humanitarian provisions of universal application (protection of human life, prohibition of torture, etc.), the pertinence of other rules addressing state obligations may depend on the nature of the relationship between the state and PMSCs, i.e. whether the state is a contracting state, territorial state, home state, the state of nationality of PMSC employees, etc., and the functions being performed by PMSCs. Furthermore, the rules governing rights and, to a lesser extent, obligations of PMSC employees significantly depend on their “status” under IHL, a matter which must be determined on a case-by-case basis, in particular, according to the nature and circumstances of the functions in which they are involved.

This indetermination is increased by the fact that, despite the existence of a significant body of treaty and customary IHL relating to occupation, there remain some unresolved issues, such as which paradigm applies to the use of force by PMSCs according to the circumstances (conduct of hostilities paradigm vs. law enforcement paradigm), again to be determined on a case-by-case basis. Moreover, due to the scope of IHL, there is a lack of specificity concerning a number of issues that are not addressed by its regulations, such as the question of the license and training of PMSCs, contracts, potential immunity clauses and remedies for victims, which should be considered by recourse to HRL and other branches of international and national law.

All this may suggest that specific binding regulations for PMSC activities would be advisable, at least for the sake of clarity and uniformity in some aspects, but for the time being this is still under discussion. Meanwhile, several international initiatives have been launched in order to “provide guidance on a number of thorny legal and practical points [concerning PMSCs] on the basis of international law”, such as the Montreux Document on pertinent obligations for states regarding PMSCs (2008)293, or even as an attempt to formally regulate the use and activities of PMSCs, such as the Draft Convention on PMSCs elaborated by the UN Working Group on Mercenaries (2010)294. Furthermore, in 2010 the International Code of Conduct for Private Security Providers (ICoC) was drawn up, a soft-law instrument developed as a complement to the Montreux Document and containing a set of standards for security companies to respect human rights and humanitarian law295. Although extremely pertinent, these regulatory efforts have not yet become binding, and therefore only partial consideration has been given to them in this section. Furthermore, Israel is not a signatory state of the Montreux Document, and only three Israeli companies have endorsed the ICoC296, none of them operating in the oPt, to our knowledge.

As many of the questions concerning the international regulation of PMSC activities require a casuistic approach, we focus our analysis on some of the issues that raise special legal controversy but involve important practical implications for the activities of private military and security contractors in the oPt, namely i) the status of PMSC personnel and settlement Civilian Security Coordinators (who are considered private contractors according to the personal scope of the Observatory on

295 http://icoc-psp.org/. See also the Draft Charter for the Oversight Mechanism of the ICoC, and the ICoC Association (ICoCA) established in 2013, http://www.icoca.ch/
296 These companies are Caliber 3, Equator Special Projects, and FourTroop Ltd.
Private Military and Security Companies & Human Rights)\textsuperscript{297}; ii) the limits imposed by IHL on Israel as the occupying power to contract PMSCs and settlement CSCs in the oPt; iii) approximate rules for the use of force for PMSC employees as law enforcement agents; and iv) some notes on the issue of accountability. Without attempting to provide definitive answers, this analysis aims to provide a transparent description of the legal regime applicable to PMSCs and contractors under IHL/HRL in the oPt, and the obligations and implications of their use for Israel as the occupying power.

I / THE STATUS OF PMSCS EMPLOYEES AND SETTLEMENT CIVILIAN SECURITY COORDINATORS UNDER IHL

The status of private military and security contractors is a pivotal question for accurately determining the rights and duties of these agents under IHL, and the obligations and implications for states employing them. Human rights organizations reporting on the activities of private security contractors in the oPt have constantly expressed the need for more certainty in the definition of the status of these agents under Israeli legislation\textsuperscript{298}. As has been noted above, the determination of the status is not absolute but depends on the nature of contractors’ activities and the circumstances in which they are involved while performing them. Thus, for the sake of clarity, we provide here a summary of their activities in the oPt, separating those of PMSC employees and those of CSCs and their guard squads. In particular, PMSC employees have been tasked with:

1. Armed and unarmed security services at checkpoints;
2. Guarding services for construction crews working on the Wall;
3. Protection of settlement enclaves [the scope of activities vary in the settlements of the West Bank and East Jerusalem], including the protection of settlers, their compounds, their movements and activities, either legal or illegal, such as support in the seizure of Arab houses (East Jerusalem);
4. Escort services for foreign nationals and guarding private and public establishments.
5. Training security personnel [though this task does not take place in the oPt but in training schools and institutions located within Israel].

For their part, West Bank settlement CSCs are in charge of inspecting all operational aspects of settlement guarding, in particular the training and supervision of their guard teams, but they have also assumed in practice other aspects of security, such as the supervision of PMSC employees, if they have been posted to the settlement, the authority to provide weapons to settlement residents other than guards, and inspection of the security fence surrounding the settlement.

IHL is developed around the core humanitarian principle of distinction between combatants and civilians, and indeed the application of many rules depends on whether a person is a combatant or a civilian\textsuperscript{299}. Although at first sight the discussion of the status may seem theoretical it however has important implications for the activities of private security personnel in the oPt. For instance, the status of a private contractor affects their ability to use force in the context of hostilities, and also delimits their treatment by the adversary in the conflict: combatants have the right to take part in hostilities [combatant privilege] and may be targeted in those hostilities, whereas civilians are

\textsuperscript{297} See above Section II
\textsuperscript{298} Yesh Din, The Lawless Zone, op. cit., Recommendations, p. 50.
\textsuperscript{299} Note that we refer here to IHL of international armed conflicts, as this is the regime applicable in the OPT, and therefore, we leave the question of the status of fighters and armed groups in non-international armed conflicts outside of the analysis. Cfr. however, with regard to the armed conflict in Gaza, Casey-Maslen, S., The War Report – 2012", Oxford University Press, 2013, p. 110.
entitled to immunity from attack "unless and for such time they take a direct part in hostilities.  

Therefore, as a combatant, a private contractor 1) can participate in combat operations and conduct lawful acts of war such as killing adversary combatants, 2) will enjoy prisoner-of-war-status in case of detention, and 3) will be immune from prosecution for such lawful acts. In this regard, it is extremely important that combatants distinguish themselves from the civilian population. In contrast, as a civilian, a private contractor 1) is expected to refrain from directly participating in hostilities, for their own benefit to avoid being attacked, in order not to prejudice other civilians; 2) must only resort to force on grounds of self-defense or other grounds prescribed by national law, such as is the case for law enforcement officials, and 3) can be prosecuted merely for participating in hostilities. Furthermore, the status of a person also impacts on state obligations under IHL and, in particular, as we will see below (Subsection III.b.ii.), affects the liberty of states to contract private security personnel for certain activities.

IHL provisions define "civilian" in a negative manner, i.e. those who are not considered combatants should be considered civilians, even in the case of doubt as to whether a person is a combatant or a civilian. Therefore, the first question is whether PMSC employees, on the one hand, and settlement CSCs and guard teams, on the other, fall under the humanitarian definition of combatant. In simple terms, a combatant is a member of the armed forces. However, based on practice, IHL articulates the term "combatant" so as to include members of the armed forces sensu stricto and members of other armed groups belonging to a party to the [international armed] conflict. In this regard, through operation of Article 4.A of the III Geneva Convention the definition and status of combatant is linked to that of a prisoner of war [PoW] which in turn is linked to: 1) membership of armed forces party to the conflict, or 2) membership to a military or volunteer force belonging to a party to the conflict provided that some specific criteria are met.

Members of the armed forces of a party to the conflict and members of militias or volunteer corps forming part of such armed forces

With regard to the first case, membership implies that a person has been officially incorporated into a state’s armed forces—either as a member of the armed forces or as a member of a militia or voluntary corps forming part of the armed forces—which is a matter that should be determined mainly according to national law. IHL only provides that when states incorporate police forces or other paramilitary forces into their armed forces this should be communicated to the opposing side. This is the case for the Israeli police forces deployed in the West Bank, which are "regarded as under the command of the Commander of the IDF forces in the Area" and have "the powers given to any soldier under the security legislation".

As regards PMSC personnel, State practice indicates that, due to several reasons and in particular to the very rationale of privatization itself, only in rare cases PMSC employees become part of the

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300 See art. 53.3 Additional Protocol I. The principle of distinction is considered international customary law, therefore, binding to States which, as Israel, have not ratified API as treaty law.

301 See below Subsection III.b.iii.

302 Art. 50.1 API.

303 See as a whole articles 4.A.1] and 2] of the IIIIGC, and article 43 API. Since Israel is not party in API we have limited the analysis to the article 4 of IIIIGC.

304 Art. 43 API.

305 Articles 1 and 4-5 of Order regarding Security Provisions [Consolidated Version] [Judea and Samaria] (No. 1651); available at http://nolegalfrontiers.org/en/military-orders/mil01
armed forces\textsuperscript{306}. In the case of the oPt this seems to be confirmed for several reasons: first, the motivation underlying privatization in contexts such as the checkpoints was precisely to demilitarize their operation removing military personnel from this function in order, \textit{inter alia}, to reduce friction between soldiers and the Palestinian civilian population. Accordingly, it would make no sense to incorporate private security personnel into the armed forces, but rather the aim of government policy is the opposite: to distance themselves from the actions of private personnel so that in cases of misbehavior the moral credibility of the IDF will be preserved and the State will be able to distance itself from the material perpetrators\textsuperscript{307}. Secondly, in many of the contexts where private contractors operate the Israel Ministry of Defense is not the direct employer of the PMSCs, but rather the financial backer for the private companies (constructors of the Wall) and other private entities (settlements and private settler organizations) contracting them. This indicates that there is no official intention on the part of the Ministry of Defense to enlist private contractors in the IDF, and indeed in practice it does not treat them as such.

The case of settlement CSCs and guard squads requires further analysis, in particular, as to whether they can be subsumed into the category of ‘militias or volunteer corps’ which form part of the armed forces. This is a controversial issue.

On the one hand, there are several elements that indicate a high degree of integration and relationship between CSCs and their guard teams and the IDF: 1) they are agents of the Israeli army in that they are subject to the Military Justice Law and hold quasi-policing powers in the field of law enforcement; 2) they undergo military training and are under the supervision and guidance of the military command. Indeed, in practice, CSCs have sometimes been seen as hierarchically above some soldiers and military personnel deployed in the settlement area, and sources have reported that soldiers consider CSCs “an active force on the ground in terms of the war room and in terms of routine functioning”\textsuperscript{308}; 3) guard teams in the settlements are presented as volunteer forces as they do not receive a salary, but their recruitment bears a certain resemblance to official conscription because, according to military laws in place, a resident of a settlement who refuses to perform guard duty is liable to a fine\textsuperscript{309}; and 4) according to the IDF “[t]he essence of [the CSC] role is to defend the communities against terrorist attacks directed against the citizens of the communities”\textsuperscript{310}, and the Israeli Supreme Court has considered “dealing with this danger” (i.e. operations against terrorist attacks) as governed by the laws of international armed conflict.

On the other hand, notwithstanding their proximity to the Israeli armed forces, CSCs and their guard teams have always been treated by the IDF as civilian defense forces, autonomous from them, and indeed the official position of the IDF is that the guard system in the communities is a mechanism of self-defense with limited powers so that “immediately on the arrival of IDF and police forces in the area, the role of the civilian defense forces ends and the security responsibility for attending to the security threat passes to the army forces”\textsuperscript{311}. Maybe most importantly the case of official incorporation into the armed forces seems to have been ruled out by the military order that brought the CSCs and their guards under the scope of the Military Justice Law. In particular, the

\textsuperscript{306} For an excellent overview see Cameron, L., Chetail, V., Privatizing war, op. cit., pp. 390-392.
\textsuperscript{307} Yesh Din, \textit{The Lawless Zone}, op. cit., p. 10; citing a testimony of a sergeant to the organization Breaking the Silence, (December 2010).
\textsuperscript{308} Yesh Din, \textit{The Lawless Zone}, op. cit., p. 10; citing a testimony of a sergeant to the organization Breaking the Silence, (December 2010).
\textsuperscript{309} Military Order No. 432 (1971)
\textsuperscript{310} Yesh Din, \textit{The Lawless Zone}, op. cit., p. 52, citing the IDF Spokesperson response to Yesh Din Draft report.
military order explicitly referred to Article 8.3 of the law which establishes the applicability of the law to a person “who is not a soldier but who is working on the army’s behalf” (emphasis added). To this end, the CSCs and settlement guards are required to sign a declaration on their appointment stating that they are aware that they work “on the army’s behalf,” are subject to the Military Justice Law and accept the “authority of the IDF and its authorized institutions”312.

Certainly, the fact that CSCs and guard teams act on the army’s behalf excludes a priori that they ‘form part’ of the Israeli army. However, a careful analysis should be conducted to assess whether the lack of incorporation is coherent with the role that settlement guard teams play in practice and the treatment given to them, to determine the extent to which non-incorporation is merely artificial. As argued by some scholars with regard to PMSCs, if states treat PMSC personnel for all practical purposes other than incorporation as if they were members of their armed forces, “international law would not necessarily give effect to a lack of incorporation by domestic law destined only to avoid the consequences of incorporation under international law”313. In this regard, it should be noted that, as compared to PMSC personnel deployed in the settlements, the roles of the CSCs is much more political, ideologically aligned with the settlement project, and often used as a means, under the so-called security pretext, to expand the territories of settlements and outposts. Therefore, the argument of an interested lack of incorporation should not be underestimated.

Members of other militias and members of other volunteer corps belonging to a party to the conflict

Turning to the second case, i.e. whether PMSC employees and settlement guard squads fall into the category of members of another armed group (other than the armed forces), in particular, militias or volunteer forces belonging to a party to the conflict (Article 4.A.2) of III GC). Although this inquiry may at first seem redundant, at least regarding settlement guard teams, to the extent that if they are not a ‘militia’ forming part of the IDF they cannot be any other sort of ‘militia’, the answer is not so categorical. These second grounds for combatant status were included precisely to allow groups— independent of state armed forces (Art. 4.A.1 III GC) but nonetheless belonging “to a party to the conflict” (Art. 4.A.2 III GC)—to enjoy prisoner of war status. This provision was drafted with resistance movements in mind, in particular partisans during World Word II, but its wording is explicit in that militias and other volunteer corps include but are not limited to resistance movements in an occupied territory314. The essential criterion is therefore that militias “belong to a party to the conflict”. In this regard, the ICRC commentary on Article 4.A.2 III GC notes that, historically, the relationship between a militia group and a state was established based on the requirement of express authorization by the “sovereign”, usually in writing, for the acts of the militia purporting to act on its behalf. Over the years, however, the commentary adds, this condition became no longer essential and a de facto relationship or tacit agreement between the state party and the group is considered sufficient. In our case, it seems clear that settlement CSCs and their guard teams may well be considered a group belonging to Israel as a party to the conflict: CSCs are appointed by settlement authorities but their

312 Yesh Din, The Lawless Zone, op. cit., p. 14, citing Appendices H, J, and L to OSO 07/01 Guarding in Communities; letter from Major Zohar Halevy, Head of the Public Contacts Desk in the IDF Spokesperson, to Noa Cohen, Yesh Din Information Coordinator, dated October 13, 2011.
313 Cameron, L., Chetail, V., Privatizing war, op. cit., p. 392.
314 Art 4.2.A.2 provides: “Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even of this territory is occupied,...” [Emphasis added]. See, however, on the contrary Cameron, L., Chetail, V., Privatizing war, op. cit., p. 407, arguing that the purpose of Article 4.A.2) was to not allow the creation and use of private military forces by parties in a conflict, although referring to PMSCs and not considering the particular case of settlements’ CSCs and guarding teams.
employment is funded by the Israeli Ministry of Defense and their powers are authorized by law and exercised under the supervision of the military commander and on the IDF’s behalf. That being said, in order for a militia belonging to a party to the conflict to be granted combatant and PoW status, Article 4.A.2 requires they must fulfill the following conditions:

“a) That of being commanded by a person responsible for his subordinates;
   b) That of having a fixed distinctive sign recognizable at a distance;
   c) That of carrying arms openly;
   d) That of conducting their operations in accordance with the laws and customs of war.”

While it may be said that CSCs and their guard teams generally fulfill, at least in theory, conditions a) and c), however, that of having a fixed distinctive sign was promised by Israeli authorities but never formalized as a requirement in a military order, and this is indeed the practice on the ground. Instead, they are only required to carry a guard certificate and an identification card, and therefore they do not comply with the humanitarian obligation to distinguish themselves from the civilian population. As the above criteria are accumulative, this is sufficient to exclude their categorization as militia and volunteer corps.

It is important to note that it is uncertain whether CSCs and their guard teams meet requirement d). On the one hand, despite undergoing military training and being subject to military laws, the sort of activities that they are in charge of, that is, defending settlements against grave and immediate security threats, is considered as a self-defense function by IDF authorities—or as policing/law enforcement functions by NGOs—rather than a combat function, and as such, CSCs would be in principle instructed to conduct their activities according to Israeli public law (rules of self-defense and law enforcement) rather than IHL hostilities rules. Furthermore, as noted in the previous section (national law) there is a legal gap regarding the rules of engagement for CSCs and guard squads, in particular, whether they should follow IDF rules of engagement, or have a more permissive code, and who is monitoring, if anyone, their conduct during any kind of engagement with anyone they identify as “hostile”. As a result, there is insufficient normative determination to conclude whether CSCs and their guard squads conduct their operations in accordance with the laws and customs of war.

As regards PMSC personnel, the potential they have to meet all the requirements laid down in Art. 4.A.2 should be considered exceptional, although precise details on this matter would require a company-by-company analysis. In broad terms, however, some companies operating in the oPt, such as those subcontracted by construction contractors building the Wall or those protecting private establishments in the West Bank generally may lack a responsible command structure. Others simply

315 Id. 14-15, according to which “Attorney Shai Nitzan, Deputy Attorney General [Special Assignments], [...] promised that the CSCs would be required to wear identifying uniforms (vests and caps) bearing the legend “civilian security coordinator”, though not identification tags”, as it is required for other officials in Israel enjoying policing rights.
316 Section 3a of Order No. 1448, see above National laws.
317 The IDF’s official position regarding the self-defense function of CSCs was made clear in its response to the NGO Yesh Din report on the issue, namely: “Contrary to the allegation in the draft report, it should be emphasized that the existence of a guarding system in the communities is not tantamount to the “privatization” of security powers or the delegation of law enforcement powers to civilians. The Order concerning the Regulation of Guarding was designed to create an additional layer of security to that provided by the IDF, by means of a mechanism enabling the residents of the Israeli communities in the Judea and Samaria Area to defend their lives against grave and immediate security threats. This is achieved by granting limited powers within a predetermined geographical nucleus and subject to the supervision and professional guidance of the military commander”; Yesh Din, The Lawless Zone, op. cit., p. 53.
318 See below Subsection III.b.iii., the discussion on the rules for the use of force. Scholars have reasonably pointed out that the use of force in self-defense when exercised in the context of armed conflict should be interpreted under IHL, and in this regard, to be validly invoked by private contractors the act in self-defense must lack a belligerent nexus, since the purpose of the use of self-defense is not to support one party to the conflict against another. See Cameron, L., Chetail, V., Privatizing war, op. cit., p. 462.
do not belong to a party to the conflict, as the introductory paragraph of Art. 4.A.2) requires, since they do not provide services to IDF forces: for instance, companies providing escort services for foreign nationals, those protecting private establishments, or those subcontracted by construction contractors. Furthermore, while PMSCs operating at certain checkpoints exposed to a high level of violent activity, such as those at entrances to and exits from the Gaza Strip, could certainly qualify as combatants under Art. 4.A.2, to the extent that Israeli jurisprudence has considered terrorist attacks by Palestinian organizations as falling within the armed conflict paradigm. However, the operation of checkpoints is considered by the Israeli military as a law enforcement function similar to those of a police force, and therefore conducted according to Israeli criminal law and basic principles of Israeli public law, rather than according to the laws of war. As a result, on a general basis PMSCs operating at checkpoints do not meet requirement d).

Civilians

In short, the abovementioned analysis means that there is a possible but limited legal basis for qualifying PMSC personnel and settlement CSCs and guard teams as combatants, which, according to an IHL interpretation means that they should be considered civilians. This conclusion, although persuasive on legal grounds, is not without controversy and is not fully satisfactory in practice. First of all, if according to applicable security legislation in the West Bank police officers have the same powers and status as soldiers in the “area”, it is at least problematic that PMSC employees and settlement guard forces that are doing quasi-policing work fall into the category of civilians under IHL. Furthermore, the civilian role of settlement CSCs and guard teams is far from clear, particularly during periods of armed conflict. This is so because the employment of CSCs and guard squads is still justified in military orders and documents through allusion to the military doctrine of “regional defense”, which was initially envisaged and articulated for a wartime scenario (i.e. assistance to the army in defending the borders of the state against invasion by hostile forces). Accordingly, CSCs and guard teams are regarded by the IDF as an active auxiliary force on the ground, which is equipped and empowered with authority to carry out a security and law enforcement role in ordinary situations, but which are also sufficiently capable of providing the initial operational response in times of armed conflict. This dual role, together with the fact that they are armed and instructed by the IDF and their activities are organized on a systematic basis under a program funded by the Israeli Ministry of Defense, has definitively blurred their status as civilians.

319 Supreme Court, Targeted killing case, op. cit., para. 18, 21. Therefore, this means that in the particular case of these checkpoints, PMSCs could meet criteria a) to c), as they generally do, and also d) because, due to the nature of the threat, they could conduct the activity according to the laws of war. Of course, an alternative position could be that they are civilians participating in hostilities in the specific occasions in which the conduct attacks against terrorism or terrorists. However, the fact that they are employed and serve in their security functions in a systematic organized basis gives room for qualifying them as combatants.

320 I do not consider here the issue of PMSCs’ employees in the OPT qualify as mercenaries, as the strict definition set forth by API and UN Mercenary Convention rules out this possibility, at least for the sole reason of their Israeli nationality; see Art. 47.2.d) API. Regarding the separate category of “unlawful combatants”, the issue has arisen in Israeli jurisprudence (Targeted killing case) with regards to the status of the Palestinian terrorists, and might equally be explored with respect of private security contractors. Nevertheless this requires a separate study and, for convenience, has been left of out of this analysis.


322 Id. Also, see, for instance, the testimony of a sergeant in the Judea and Samaria Division [2006-2008] to the organization Breaking the Silence, December 2010: “A nearby civil military coordinator is one of the forces we alert first, since in the final analysis they are the people on the ground and they function in a way as our eyes in the field, and that’s how they are regarded. So I call the civil military coordinator and tell him to go to the site of the incident and he gets their first, with his weapon, so he can secure the scene. Sometimes he keeps the arena sterile until another force arrives... They are an active force on the ground in terms of the war room and in terms of routine functioning.”
That being said, the possibility of civilians working for the military, even on a contract basis, while retaining their civilian status, has long been envisaged in IHL and is currently contemplated in Art. 4.2.4 of III GV323, which attributes prisoner of war status to:

“Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.”324

In the context of the oPt, it may be alleged that the notions of “members of labor units or of services responsible for the welfare of the armed forces” and of “supply contractors” can be perfectly well extended to certain contractors providing non-discretionary services such as catering and logistics in military bases of the IDF, to civilians working for the Israeli war-industry, and also to construction contractors working on the Wall. Furthermore, to the extent that the list given in Art. 4.2.4 is only by way of indication (as is shown by the expression “such as”), and the text could therefore cover other categories of person or services who follow the armed forces in similar conditions325, it can also be contended that CSCs and their guard teams may fall into this civilian category, since literally they act on behalf of the IDF without actually being members thereof and have been required to sign a declaration on their appointment and carry a guard certificate.

However, the extension by default of this civilian status to all PMSC personnel and to CSCs and to settlement guard teams is not fully satisfactory. Admittedly, some contractors may qualify as supply contractors or members of labor units, but many others do not. The functions of PMSCs and CSCs in the oPt are much broader than that of supply contractors and laborers of armed forces. Additionally, there are many other private contractors that do not work for the Israeli armed forces and, therefore, would not be labeled under the status of civilians accompanying the armed forces, for instance, those providing security services to construction contractors, those protecting foreign nationals, and those contracted by settlements under the authorization of the Israeli Ministry of Housing to protect settlements in East Jerusalem. Furthermore, the drafting of Article 4.2.4 was aimed to extend protection of prisoner of war status to civilians performing a non-combatant role in the armed forces but it did not intend to make room for the creation and use of private forces326. The definition of “mercenary” in the 1977 Additional Protocol I clearly confirms that combatant and P.o.W. status shall not be granted to such private forces327.

That being said, apart from the possibility that some types of contractor may be in the category of “civilians accompanying armed forces without being members thereof”, other private military and security contractors should be considered under the general status of civilians. There are implications that civilian status may have for PMSCs and CSC activities, because as civilians they do not have the right to participate directly in hostilities. This raises the highly controversial issue of what constitutes direct participation in hostilities (DPH) and of whether the nature and the contexts in which PMSCs

323 This provision is an up-to-date version of Article 81 of the 1929 Convention, which in turn was based on Article 13 of the Hague Regulations.
324 See the article in conjunction with art. 50.I. which sees these persons as falling under the category of civilians.
326 Idem.
327 Art. 47 of API.
and CSCs exercise their activities in the oPt may amount to DPH.

At a practical level, DPH means that PMSC employees and settlement guard personnel would lose civilian immunity from attack “for such time as” they continue to participate. On a regulatory level, DPH is not strictly prohibited under IHL and does not make PMSCs combatants, but rather they are “simply” regarded as civilians directly participating in hostilities and, therefore, subject to attack. However, it is important to note that if DPH takes place on a regular and institutionalized basis, this would definitively question the suitability of civilian status for these agents since it would compromise the capacity of IHL to protect other civilians. Furthermore, it would raise doubts as to whether the contracting state is complying in good faith[328] with its obligations under IHL to the extent that 1) states party to an international armed conflict shall endeavor, to the extent feasible, to remove civilians under their control from the vicinity of military objectives[329]; and 2) if a state wishes to employ PMSCs or their own citizens for DPH it should be either to incorporate them into the armed forces or grant them a specific status as militias.

The determination of whether private contractors are directly participating in hostilities would involve a case-by-case analysis, which will not be dealt with here. It is sufficient to point out the following guidelines and considerations of particular aspects on which IHL is constructed.

First, there is the issue that the concept of DPH has not been altogether settled but only described in interpretative terms as “acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces”[330]. Currently, the ICRC position as supported by scholarly doctrine is that DPH includes more than just combat and active military operations while, at the same time, must not be so broadly defined as to include the entire war effort, and therefore “there should be a clear distinction between direct participation in hostilities and participation in the war effort”[331]. Applying this discussion to the functions and the nature of the activities of PMSCs and CSCs in the oPt leads us to a similar conclusion to when considering the application of the term supply contractors and related ones, in particular that while certain support activities of PMSCs may not amount to DPH, while others may. For example, considering the activities of PMSC personnel at checkpoints, one may contend that the mere action of a security guard in body searching a person may not amount to DPH. However, detaining an adversary combatant, or in the case of a terrorist attack taking place against the checkpoint, the action of the PMSC employees to repel the attack even in assistance of army or police officials, may well be qualified as an “act of war”.

Secondly, IHL does not distinguish between offensive attacks and defensive attacks. Therefore, even when a private contractor is employed for a non-combat or defensive role, for instance, to secure a checkpoint, they may still risk becoming involved, even on an involuntary basis, and directly participating in hostilities under certain circumstances. In this regard, other considerations should be mentioned:

a) Whether the attacker is a party to the conflict. While repelling attacks by ordinary criminals is not qualified as DPH, engagement in fighting with resistance movements and fighters would, even if

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328 The principle that states must exercise their rights and comply with their obligations under international law in good faith is established in the principle pacta sunt servanda set forth by the Vienna Conventions on the Law of Treaties (1969), Art. 26: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith”.


330 ICRC Commentary, para. 1679, Article 51.3. API.

331 ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009.
they have been outlawed and criminalized by the occupying power under military law, as is the case in the West Bank. While armed groups operating from the Gaza Strip have been considered by Israel as a “hostile enemy”, they have been qualified as “unlawful combatants” under Israeli jurisprudence and are not considered regular forces to a party to the armed conflict.

b) Whether the protected site and person is a military objective. According to Article 58 of API, measures should be taken by states party to the conflict to remove civilians under their control from the vicinity of military objectives. However, the concept of military objective is dynamic depending on the circumstances, and should be determined according to nature, location, and use. In this regard, particular consideration should be given to settlements, the Wall, and certain checkpoints as military objectives.

c) The nature of the operation in which the activity is involved. Here a distinction should be drawn between military operations, where rules for the conduct of hostilities apply, and law enforcement operations, mainly regulated under human rights laws (see Subsection III.b.iii. below). As civilians, private contractors must refrain from participating in military operations, and should be trained to distinguish between police operations and military operations. As noted above, however, the term “military operation” does not equate with but is broader than combat operations. Therefore, while it is generally understood that PMSCs and settlement guard forces are tasked with law enforcement functions similar to those of the police, several factors, such as the degree and conditions for the use of force, should be considered in order to avoid them stepping into a military operation.

d) The capacity in which the private contractor is acting. While PMSC employees and CSCs may not be considered combatants they may nevertheless be categorized as “state agents” for the purpose of IHL. A private contractor would be closer to DPH if contracted by or acting on behalf of the army than when working for a private company or client. With regard to this last point, nevertheless, subcontracting dynamics may also be taken into account.

To sum up, despite all the uncertainties and casuistic analysis involved in the determination of the status of PMSC employees and settlement guard forces, it has to be concluded that, on a general basis, they fall into the category of civilians under IHL. As noted above, this conclusion although persuasive on legal grounds is, however, not without controversy and is not fully satisfactory in practice. In any case, for them as individuals, civilian status influences the exercise of their activities, as they should refrain from DPH. Additionally, their civilian status further impacts on the state’s liberty to contract them for certain activities. We turn now to this issue.

II / LIMITS TO OUTSOURCING: OBLIGATIONS OF ISRAEL AS AN OCCUPYING POWER

As has been noted above, IHL allows national military forces to employ certain classes of civilian, such as supply contractors and labor units (civilians accompanying armed forces). However, due to the nature of their policing activities, most PMSCs and settlement security contractors do not qualify as the sort of civilians falling under this permissible rule. In contrast, the status of civilians of these agents and the fact that they are not members of the Israeli armed forces may prevent Israel,
as an occupying power, from contracting them to carry out certain activities. This is so because although IHL does not explicitly prohibit the use of PMSCs it nevertheless contains provisions which can be interpreted as imposing certain limits on the state’s liberty to contract out certain activities to PMSCs.

The first of these limitations flows from IHL provisions requiring state authorities and specifically their armed forces to carry out certain activities, in particular, the command of prisoner of war camps and civilian places of internment and military requisitions. Secondly, certain implicit limitations also arise from the scope of the obligation of the occupying power to maintain public law and order in the occupied territory. Finally, restrictions on the state’s liberty to contract out certain activities to PMSCs should be considered in conjunction with the civilian status of PMSCs and the fact that they should not directly participate in hostilities.

1) Activities reserved to armed forces and state authorities

Command of prisoner of war camps and civilian places of internment

Article 39 of the III Geneva Convention stipulates that “[e]very prisoner of war camp shall be put under the immediate authority of a responsible commissioned officer belonging to the regular armed forces of the Detaining Power”. Article 99 of the IV Geneva Convention imposes a similar restriction regarding places of internment of civilians stating that they “shall be put under the authority of a responsible officer chosen from the armed forces or the regular civil administration of the detaining power”.

The scope of these provisions is clearly limited to P.o.W. camps and civilian places of internment in times of armed conflict. However, this means that even if a state has privatized national prison facilities or allowed it in their legislation, this policy cannot be extended to prison facilities qualified as P.o.W. camps and civilian places of internment. Therefore, while the occupying power may operate privatized prisons in its national territory, it is not allowed to delegate the command of P.o.W. camps and civilian internment camps to PMSCs in the occupied territory.

It is understood, however, that these provisions do not amount to a blanket prohibition on the use of private contractors but only impose limits on the degree of outsourcing. In particular, the Montreux Document’s commentary on this provision states that “while certain administrative tasks can be outsourced, overall responsibility must rest with the State authorities”. While it is not altogether settled which “certain administrative tasks” in camps fall within the permissible limit of outsourcing, the scholarly view is that PMSCs cannot be administrators of camps but may be contracted to build or maintain them to the extent that the employment by the military of construction and logistic contractors is allowed under IHL.

In the context of PMSC activities in the oPt, the question of the limits of outsourcing arose after the government approved the 2004 legislative amendment to privatize prisons in Israel. As the

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334 The provision was specifically envisaged as a reinforcement of a previous provision inserted in the 1929 Geneva Convention on Prisoners of War, which established that P.O.W. camps were to be placed “under the authority of a responsible officer”; due to its simplicity, this provision allowed for a margin of discretion that “led to considerable abuse of the provision when disciplinary powers were delegated to non-commissioned officers and even to prisoners of war” during the Second World War. See Pictet, J. (ed.), The Geneva Convention of 12 August 1949: Commentary (GCIII), Geneva:ICRC, 1960. Available on the ICRC’s website, https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleUNID=CD565F60636F74H8C12583CD0051ADC9

335 Montreux Document, op. cit, p. 32

amendment concerned the privatization of one prison in the Israeli city of Beersheba, not located in an occupied territory, no IHL arguments arose during the case brought before the IHCJ. Rather, the focus of the case concentrated on the constitutional limits to outsourcing, and the court reasoning for concluding on its unconstitutionality was based on a constitutional–human rights approach337.

However, humanitarian provisions and in particular the provisions mentioned above are still relevant (if we consider the powers granted to the private concessionaire under the Israeli legislative amendment338 as extending beyond the permissible rule, as explained above).

Firstly, according to Article 76 of IV GC, “any sentence of imprisonment must be served in the occupied territory itself”. This provision is based on the fundamental principle forbidding deportations laid down in Article 49 of the Convention. However, in a clear violation of these rules, many Palestinian security detainees and prisoners are held in Israeli prisons339 because the Israeli policy has been that after their conviction in military courts in the West Bank they are deported from the occupied territories to serve their sentences in prisons situated in Israel. Based on the fundamental principle that a state must not use PMSCs or any other agent or entity to carry out acts that are prohibited for itself under international law but retain their international obligations even if they contract PMSCs to perform certain activities340, it flows that contracting PMSCs to run Israeli prisons that host unlawfully deported Palestinian prisoners contributes to a violation of IHL, and accordingly should be considered prohibited as well.

Secondly, even in a hypothetical way (as the privatization initiative was declared unconstitutional by the IHCJ), the question arises as to whether outsourcing to PMSCs authority for administering Israeli prisons which host Palestinian security detainees and prisoners would also be forbidden under Article 39 III GC and Article 99 IV GC to the extent that these prisons function as de facto prisoner of war camps and civilian internment centers but are not located in the occupied territory. In principle, it is clear that the said provisions were not envisaged for such a scenario, and indeed, as has been noted above, they do not impose any limits on privatizing ordinary national prisons. However, a teleological interpretation of these provisions militates in their favor: the provisions were introduced in order to prevent abuses such as those that arose after delegation of disciplinary powers to non-commissioned officers during War World II, and thus their historical purpose was to protect prisoners and detainees against abuse. Fundamental guarantees of prisoners and detainees are protected under several other provisions in the Geneva Conventions341, and this protection remains in force until their release or after the end of hostilities. Therefore, the purpose of their protection must prevail over other requirements, such as the geographical location of the camp where they are detained, particularly when their transfer is not justified by humanitarian considerations but constitutes an unlawful deportation. The protection of inmates’ human rights was the main argument in the Israeli High Court’s reasoning for declaring the unconstitutionality of the prison privatization. A parallel humanitarian argument also arises from IHL.

Requisitions

337 See Subsection I.b.i.4.
338 See in this regard the court reasoning, Deliberations, paragraphs 12-13.
339 According to Btselem, “at the end of February 2015, 5,609 Palestinian security detainees and prisoners were held in Israeli prisons, 361 of them from the Gaza Strip”, http://www.btselem.org/statistics/detainees_and_prisoners
341 See for instance art. 83 IV GC.
Another action that IHL reserves to state military forces and authorities is the seizure of private property in an occupied territory. The general principle under IHL is that private property should be respected and protected and can only be affected for reasons of absolute military necessity. In this regard, Article 52 of the Hague Regulations provides one of these exceptions:

"Requisitions in kind and services shall not be demanded from the municipalities or inhabitants except for the need of the army of occupation. [...] Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied".

The provision aims to prevent pillage (whether by soldiers, military agents or others) and thus included the requirements that requisitions and services shall not be demanded except for the need of the army of occupation and subject to the authorization of the military commander of the occupied area. Since the demand of such requisitions should only come on the authority of the military commander, and for the needs of the occupying army, it is understood that PMSCs are not allowed to order requisitions by themselves or for their needs. Furthermore, to the extent that requisitions can exclusively serve the needs of the army of occupation, even if PMSCs are contracted by the army, they may not benefit from requisitioned goods and services (to the extent that they do not belong to the army of occupation). The International Military Tribunal at Nuremberg held in the Krupp Trial case that requisitions by a private firm constitute pillage, even if those requisitions "are authorized and actively supported by... governmental and military agencies". Commentators conclude that PMSCs "should be self-sustaining. If armed forces do requisition goods, they must do so themselves and should not pass on requisitioned items to PMSCs".

IHL limitations regarding requisitions of private property are particularly relevant with regard to the activities of CSCs and PMSCs in the context of settlements. There are many settlements in the West Bank established almost entirely on private Palestinian land. Furthermore, it is undisputed that settlements have always sought to expand the areas under their control, including by means of seizing private lands and springs or by incorporating roads that connect settlements and outposts while crossing private Palestinian land, thus imposing serious restrictions for Palestinian landowners to access and farm their lands (as failure to farm lands leads to the loss of land rights). Although there is not a settled list as to which articles and goods may be requisitioned, both the Israeli Supreme Court and the International Court of Justice have concurred in that the taking of land is included within the scope of Article 52 of the 1907 Hague Regulations. In this regard, in some cases military and judicial orders have validated requisitions of private land (in the form of temporary

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342 See articles 28, 46 and 47 of the 1907 Hague Regulations; and article 53 of the Fourth Geneva Convention.
343 See also art. 53 of the 1907 Hague regulations.
344 Cameron, L., Chetail, V., Privatizing war, op. cit., pp. 88-89.
346 Cameron, L., Chetail, V., Privatizing war, op. cit., p. 90.
347 Please note, that the practice by Israeli settlers of moving and occupying houses in Palestinian neighborhoods of East Jerusalem is leaving out of this analysis, because no military authority intervene in the control of the area, as Israel denies the status of East Jerusalem as occupied territory. As noted above, PMSCs that protect settlers in East Jerusalem are placed under the supervision of Israeli police, and contracted by settlers with the authorization of the Israel Ministry of Housing.
348 For an account of the settlements constructed or established on private Palestinian land, see B’Tselem, Land Grab – Israel’s Settlement Policy in the West Bank, 2002; and By Haok and by Crook: Israeli Settlement Policy in the West Bank, July 2010; Yesh Din, Dispossession and Exploitation – Israel’s Policy in the Jordan Valley and Northern Dead Sea, May 2011; The Road to Dispossession, A Case Study – The Outpost of Adei Ad, February 2013; The Lawless Zone, op. cit.
use of land) for the establishment of settlements under a plea of military necessity, while in others no authorization or validation existed, or the seizure of private lands was contrary to military and judicial orders. Therefore, in these cases, to the extent that the requisition of private land is not justified for the needs of the IDF and hence is not authorized by the military commander of the area, a settlement’s seizure of lands constitutes an illegal action and a criminal war act of pillage under IHL.

For many years, Israeli military authorities have tended to ignore the theft of lands in order to avoid conflict with settlements, to such an extent that the Israeli Supreme Court has recently recognized that the action of state authorities in enforcing law is unsatisfactory, improper, and bordering illegality. NGOs further remark that state authorities “have not merely been negligent in this aspect of law enforcement but have actually participated in criminal actions by act and omission”. The allocation of funds by the Ministry of Defense for the employment of CSCs to protect the settlement area and outposts is part of this participation. Indeed, although not part of their policing powers, actions by CSCs for protecting the settlements and outposts have included attacks on Palestinian farmers who want to farm their lands (even when it is situated outside the guarding area of the settlement), apprehension of shepherds and arbitrary confiscation of goods such as goats. While this material cooperation by CSCs in the ideology and practical expansion of settlements has led to friction between the coordinators and the army on several occasions, and even to disciplinary steps in some cases, according to Yesh Din, “the IDF does not require CSCs to report actions involving illegal construction in the settlements or the criminal seizure of land adjacent to settlements and outposts”. In this regard, while performing their policing powers, CSCs are actually assisting settlers in a criminal activity in gross violation of IHL, which may lead to charges of complicity. Furthermore, to the extent that they carried out their duties on behalf of the Israel army, Article 29 of the IV Geneva Convention would apply and the actions of the CSCs would be considered actions of “agents” of the occupying power, which entail the international responsibility of the State.

2) The maintenance of public law and order

Under a regime of occupation the occupying power is allowed to take the necessary measures to guarantee the security of the occupying forces but it is also responsible for maintaining law and order in the occupied territory. In particular, Article 43 of the 1907 Hague Regulations requires the occupant to “take all measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country”. This obligation may comprise several actions such as the administration of justice, the introduction of certain legislation, and the conduct of police operations. In the exercise of these powers the occupant must find a balance between the preservation of its own security and the security and welfare of the occupied population.

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352 As noted by Yesh Din, The Lawless Zone, op. cit, pp. 36-37 the statements appear in paras. 11, 12, 1nd 16 of the ruling of Supreme Court President Asher Grunis, HCJ 7891/07, Peace Now for Israel Educational Enterprises et al. v Minister of Defense et al., dated November 18, 2013.
353 Yesh Din, The Lawless Zone, op. cit, p. 36.
354 ib., at 38
In the context of the prolonged occupation of Palestinian territory, tension has often arisen between the obligation to maintain local order and laws and the need to adapt local laws and infrastructure according to the evolving needs of the occupied population. We will not deal here with outsourcing trends in areas such as the judicial system or supply services. However, the enactment of legislation for outsourcing security functions, including military orders, and the delegation of policing/law enforcement functions to PMSCs and settlers should be assessed under this general framework.

With regard to the authority to legislate, Article 64.2 of IV Geneva Convention further provides that despite the general rule that local laws shall remain in force (paragraph 1):

“[t]he Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.”

Accordingly, the legislative power of the occupant is limited to three matters: 1) the application of the Convention: it may promulgate provisions in accordance with its obligations under the Convention in a number of spheres, such as child welfare, labor, food, hygiene and public health, etc.; 2) the maintenance of the “orderly government of the territory”: it has a right to enact provisions for law enforcement; and, 3) its own protection and safety: it may promulgate provisions to protect the members and property of the occupying forces or administration as well as the Occupying Power itself, thereby covering “all civilian and military organizations which an Occupying Power normally maintains in occupied territory” in addition to the establishments and lines of communication used by them.

The ICRC commentary indicates that the legislative capacities of the occupying power are very extensive and complex, but that these varied measures must not under any circumstances serve as a means of oppressing the occupied population. Accordingly, the legislative jurisdiction of the occupying power must be exercised in accordance with numerous safeguards set forth in other provisions of the IV Geneva Convention.

In the context of the oPt, the enactment of legislation to enhance protection of checkpoints (i.e. contracting PMSCs for guard services) may fall under the capacity of Israel as an occupying power to the extent that it constitutes a legislative measure to ensure the control and security of a military/civilian establishment, legally established and used by it. Legislation privatizing checkpoints is therefore not prohibited under IHL unless it exceeds the limits imposed on an occupying power’s valid legislation: it cannot be used or implemented in a manner that affects the fundamental rights of protected persons or contravenes the benefits afforded to them under the IV Geneva Convention.

Therefore, the discussion in this context will turn to the issue of the way in which private security

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355 Articles “Application of the Hague Regulations by the Israeli HCJ”, and use of corporations for providing fuel in Gaza.
356 Commentary of the Geneva Conventions IV, p. 337.
357 Idem.
358 Regarding the establishment of checkpoints, see Art. 27 “Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war”. The ICRC commentary suggests that while the article operates as a general provision and the various security measures which states might take are not specified, restrictions of movement may be included among them.
359 See art. 47 IV GC.
contractors exercise the powers granted to them and the obligation of an occupying power to oversee them in order to ensure respect and prevent violations of IHL.\footnote{360}

In contrast, the promulgation of military orders allowing PMSCs and CSCs and their guard teams to protect settlements (partially known as the application of the "regional defense doctrine") is in conflict with the above-mentioned provisions of IHL. Since early hearings before the Israeli Supreme Court in the 1970s regarding the seizure of private Palestinian lands for the establishment of settlements, the Israeli government’s position has been to justify the application of this security doctrine in terms of the security importance of establishing settlements in the West Bank, and previously in the Gaza Strip, for military strategy and operations.\footnote{361} In the light of the parameters of Article 64.2 of IV GC, Israel’s position means that legislation arising from the application of the regional defense doctrine is essential to ensure its protection and security as the occupying power, on the one hand, and that of the members and property of the occupying forces or administration, on the other, to the extent of the important contribution of civilian settlements for the regional defense system. Although the Israel Supreme Court has ruled in certain cases that a military order cannot be used to seize private Palestinian land for the purpose of establishing a settlement, it has nevertheless supported the implementation of the regional defense doctrine in the West Bank:

"in terms of pure security considerations, it cannot be doubted that the presence in an administered territory of settlements - even ‘civilian’ ones - of the citizens of the administering power contributes considerably to the security situation in that area and facilitates the army’s performance of its functions."\footnote{362}

Under an IHL perspective, however, this position fails to place legislation replicating the regional defense doctrine in the oPt in a more comprehensive humanitarian approach, i.e. that military orders cannot only be used to seize Palestinian land but also they can serve as a means to deprive protected persons of other benefits of humanitarian protection.\footnote{363} In this regard, the establishment and maintenance of settlements violates several other safeguards afforded to protected persons, and most importantly the rule against the transference by the occupying power of its own population into the occupied territory [Article 49.6 IV Geneva Convention].\footnote{364} Therefore, to the extent that settlements are unlawful under IHL, legislation allowing PMSC guarding and the employment of CSCs and guard teams at settlements contributes to a grave violation of IHL. Furthermore, this prohibition has expanding effects with regard to the possibility of the occupying power delegating policing powers for this purpose: contracting PMSCs or settlers for protecting illegal settlements in the West Bank is also implicitly prohibited under IHL.

\textit{Mutatis mutandi}, this argument also applies to the use of PMSCs in settlements in East Jerusalem (if legislation is finally formalized by the Israeli government): the extension of occupant national laws

\footnote{360}{See below Subsections III.b.iii. rules and III.b.iv.}
\footnote{361}{See Yesh Din, \textit{The Lawless Zone}, op. cit, Chapter 1, pp. 8-9, citing the following statements by the State and IDF authorities during a hearing before the Israeli Supreme Court, respectively: “all the Israeli settlements in the territories administered by the IDF constitute part of the IDF’s regional defense system […] and are classified at the highest ranking in the framework of the said regional defense system, as reflected in the allocation of staff positions and means”; “the regional defense settlements are armed, fortified, and properly equipped for their task, which is to defend the area in which they live and reside, and their location on the ground is determined with consideration to their contribution to regional control and to assisting the IDF in its various tasks”.

\footnote{362}{Ibid, citing HCJ 606/78 and 610/78, Suliman Tawfiq Ayoub et al. and Jamil Arsam Mataugh et al. v Minister of Defense, ruling from 1979.}
\footnote{363}{Article 47 IV GC.}
\footnote{364}{Article 49, paragraph 6 of the IV Geneva Convention. According to ICRC commentary “Such transfers worsened the economic situation of the native population and endangered their separate existence as a race”.

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into an occupied territory is unlawful to the extent that it contributes to a violation of Article 49.6 of IV GC. Furthermore, regarding the de facto outsourcing of policing functions to PMSCs by the Israeli Ministry of Housing, Article 47 IV GC additionally militates in favor of its prohibition, to the extent that Palestinian residents in East Jerusalem are not being treated as protected persons and are subject to constant violations of their rights as such by PMSC personnel:

“Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention[...] by any annexation by the latter of the whole or part of the occupied territory.”

3) Direct participation in hostilities (DPH)

As noted above, direct participation in hostilities by individual civilians is not strictly prohibited but merely discouraged under IHL to the extent that, in doing so and during the time this participation lasts, they may be lawfully attacked by parties to the conflict and, furthermore, it may put at risk the humanitarian protection afforded to other civilians [due to the blurring of the principle of distinction]. From a regulatory perspective, this has been interpreted as a voluntary restriction, i.e. not an obligation, for contracting states to not contract out services that would cause PMSC employees to participate directly in hostilities365. Although a majority view is emerging in this regard suggesting that this would imply a limit on states to refrain from contracting out the conduct of offensive military operations, the problem is that even purely defensive services such as guarding may result in DPH under certain circumstances. Thus, although highly pertinent, this recommendation has no straightforward implementation in practice, due to the indetermination of the very concept of DPH and the fact that even purely defensive services such as guarding may result in DPH under certain circumstances. Therefore, even a well-intentioned statutory determination of a list of services that can or cannot be performed by PMSCs will only be of partial utility in practical-regulatory terms.

Furthermore, a closer examination of certain humanitarian provisions suggests the existence of a legally binding basis for restricting the ability of states to contract PMSCs and other civilian contractors even for defensive/protection purposes in specific circumstances related to the conduction of military operations. In particular, Article 51.7 of Additional Protocol I366 provides:

“the presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.” [emphasis added]

Certainly, part of this provision serves to develop and reinforce similar provisions contained in the Geneva Conventions concerning the prohibition of placing and using civilians to protect military objectives from attack [human shields]. In this regard, “the term “movements” in particular is a new one; this is intended to cover cases where the civilian population moves of its own accord.”367 Furthermore, in contrast with Article 28 IV GC, this provision affords measures of protection to the

365 See Montreux document, op. cit., at p. 3, explanatory comments with regard to Good Practices 1, 24, and 53.
366 This rule applies as customary law to Israel;
whole of the civilian population, and is not limited to “protected persons”, a concept which excludes nationals of a party to the conflict or occupying power368 (which is the case of most PMSC employees and CSCs operating in the oPt). Nevertheless, regulatory problems will persist if using this provision as a legal basis for prohibiting the contracting of PMSCs to defend military objectives, as it does not solve the difficulty arising from the dynamic nature of military objectives in practice.

On the other hand, the reference made in the provision with regard to the prohibition of using the presence or movements of civilians and their direction by parties to the conflict in order to shield or favour military operations is of particular relevance for the activities of CSCs in settlements in the oPt. The ICRC commentary indicates that “the second sentence concerns cases where the movement of the population takes place in accordance with instructions from the competent authorities, and is particularly concerned with movements ordered by an Occupying Power”369. In our opinion, this is clearly the case of the establishment of settlements in the West Bank and the rationale behind the employment of CSCs for guarding them, as illustrated by the following statements of State and IDF officials justifying the extension of the regional defense doctrine to settlements:

"During times of calm these settlements serve mainly for the purpose of presence and control of vital areas, for the undertaking of observations, and so forth. The importance of these settlements increases particularly in times of war, when regular army forces are generally transferred from their bases for the purpose of operational employment, and the said settlements constitute the primary component of security presence and control in the areas in which they are situated"370

"the regional defense settlements are armed, fortified, and properly equipped for their task, which is to defend the area in which they live and reside, and their location on the ground is determined with consideration to their contribution to regional control and to assisting the IDF in its various tasks. […]in wartime the force on the base leaves to perform mobile and assault functions, while the civilian settlement remains intact and, since it is properly armed and equipped, it controls its surroundings for the purpose of observation and protecting the adjacent transportation routes in order to prevent enemy seizure thereof"371

"The CSCs are sufficiently capable of providing the initial operational response, and the guarding squads are also at a very high standard. A terrorist must pass numerous hurdles before reaching a settlement, but if this happens, the civilians are capable of coping with him until the army force arrives"372.

An IDF sergeant further explains:

"A nearby civil military coordinator is one of the forces we alert first, since in the final analysis they are the people on the ground and they function in a way as our eyes in the field, and that’s how they are regarded. So I call the civil military coordinator and tell him to go to the site of the incident and he gets their first, with his weapon, so he can secure the scene. Sometimes he keeps the arena sterile until another force arrives... They are an

368 Idem. See also, art. 4 IV GC.
369 ICRC commentary (1988), art. 51.
370 Yesh Din, The Lawless Zone, op. cit, p.9
active force on the ground in terms of the war room and in terms of routine functioning.\footnote{373}{Idem.}

These testimonies reflect that CSCs and their guard squads play a dual role: while in the absence of armed conflict, their functions focus on the protection of settlements and surrounding areas, thus assisting the IDF forces in the function of law enforcement, in times of armed conflict they are envisaged as an active civilian force with the function of assisting regular armed forces for initial operational response, and therefore actively participating in military activities linked to combat. Consequently, while CSCs and their guard teams may routinely function as policing forces, and thus it may be argued that they are merely civilians contributing to the war effort, they are nevertheless used in emergency situations, such as in times of war, to assist and facilitate military operations of the IDF in the oPt. Therefore, we must conclude that the policy of contracting settlers for this purpose is in conflict with the rule of IHL that prohibits the use of civilians to shield and favor military operations.

\section*{III / RULES FOR THE USE OF FORCE}

Under international law, the use of force in situations of armed conflict and occupation is governed by different sets of rules: the rules for the armed forces in combat \textit{(conduct of hostilities paradigm)} which come from IHL, and the rules for law enforcement operations in order to maintain or restore public law and order \textit{(law enforcement paradigm)}, which derive essentially from HRL. Additionally, in a situation of armed conflict a private contractor may use force in self-defense, which is a concept derived from national law.

The content of these two paradigms differs considerably and the humanitarian implications of applying one or the other should be taken into account, in particular: 1) the Conduct of Hostilities paradigm \textit{(CoH)} permits deprivation of life by allowing lawful killing of targets such as enemy combatants and civilians participating in hostilities. Attacks and “shoot-to-kill” procedures are therefore permitted in these cases although humanitarian principles of military necessity, precaution in attacks and proportionality must also be applied\footnote{374}{See ICRC Expert Meeting, \textit{The use of force in Armed Conflicts. Interplay between the conduct of hostilities and law enforcement paradigms}, November 2013.}; 2) under the law enforcement paradigm, the intentional use of lethal force is only permitted in defense of life. Thus, “escalation of force” techniques and “capture rather than kill” procedures must be used by law enforcement officials against suspected persons and threats, and it is only if these measures are not possible that a law enforcement killing will be legal\footnote{375}{Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, A/HRC/14/24/Add.6, May 28, 2010, para. 74.}. Additionally, the resort to lethal force must satisfy the principles of proportionality and necessity under human rights law, as interpreted by human rights bodies and courts, which tolerates less incidental loss of life than humanitarian law.

Since a situation of occupation does not preclude the existence of armed hostilities, military operations and law enforcement operations coexist and the two paradigms may apply simultaneously. Indeed, this is the scenario where private contractors operate in the oPt: PMSCs and settlement guards have been empowered to engage in several tasks in the field of law enforcement, such as arrest, detention, search and seizure, and use of force and firearms. However, they perform these
powers in close proximity to military operations during periods of armed conflict and may confront a terrorist attack while performing their law enforcement activities. In those cases where the delegation of functions is not prohibited or contravenes international law, it is nevertheless essential that Israel ensure that the use of force by PMSCs is consistent with international law and is exercised in a manner that 1) does not affect the rights of protected persons living under occupation, and 2) does not lead them to becoming involved in DPH.

IHL does not contain detailed provisions on the use of force in law enforcement operations beyond that civilians who do not directly participate in hostilities should not be summarily executed or tortured\(^{376}\), and the regime for the treatment of civilian detainees. Such actions are regulated by domestic law, which in turn should comply with human rights law, as a *lex specialis* applicable in times of armed conflict and occupation. In this regard, states do not only have an obligation to ensure and respect human rights but also have an obligation to exercise due diligence to protect human rights from the acts of private persons, including PMSCs.

Under HRL the fundamental principles related to law enforcement operations are those related to the right to life [protection against arbitrary deprivation of life], and the right to liberty and security [protection against arbitrary arrest and detention, and prohibition of torture or inhuman or degrading treatment of detainees]. In addition to human rights treaties to which Israel is party, which define the scope of these rights, and the jurisprudence of international bodies and courts that have interpreted the extent of states’ obligations and the admissible derogations of these rights, human rights normative standards regarding the conduct of law enforcement operations have been translated in a specific manner into soft-law instruments such as the UN Code of Conduct for Law Enforcement Officials (1979) and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990)\(^{377}\). The broad definition of the term "law enforcement officials" in these instruments can be interpreted as encompassing PMSC personnel exercising such police powers\(^{378}\).

The human right to life is a non-derogable right which should be respected and protected even in situations of public emergency and armed conflict. Human rights bodies have noted that due to its paramount importance, the protection of life obligates states to take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces\(^{379}\). As the concept of arbitrary killing is based on principles of proportionality and necessity, in the due diligence scenario this means that strict regulation should be adopted for private law enforcement agents regarding authorization to use arms, protocols for the use of such arms, and guidance delineating when the use of force is necessary. Furthermore, in order to be effective, states should ensure that companies equips their personnel with non-lethal weapons and that regulation is complemented by proper training for private contractors in the use of firearms and less-than-lethal measures. Finally, regulatory frameworks should take into account the possibility of incidents of use of force, and ensure that reporting and investigation procedures are in place in order to make assessments.

Human rights norms on deprivation of liberty protect against any form of arbitrary detention and arrest, including during preventive or administrative detention for security reasons that usually take place in periods of armed conflict and occupation, and should be taken in connection with

\(^{376}\) See Art. 3 common to the four GC, and articles 52.1) and 2), and 50.1 AP I.

\(^{377}\) See also the International Code of Conduct for Private Security Providers (ICoC).


\(^{379}\) See Human Rights Council, "General Comment No 6: The Right to Life [article 6]", Sixteen Session, 30 April1982, para. 3.
specific humanitarian provisions. While in contrast to the right to life the right to liberty can be subject to certain derogations in emergency situations such as armed conflict. However, permissible derogations must be motivated and accompanied by appropriate safeguards in order to be lawful. Furthermore, arbitrary arrest includes cases when a person is arrested without a legal basis or contrary to procedures prescribed under domestic law. It is not enough that deprivation of liberty is provided for by domestic law, for instance on the basis of special security legislation, but must not be manifestly disproportionate, unjust or unpredictable.

**IV / ACCOUNTABILITY**

It is not disputed that private military and security contractors, as individuals, bear criminal responsibility under international law for their perpetration and participation in international crimes, such as war crimes, genocide and crimes against humanity. International criminal law does not pose any problem with regard to the corporate affiliation of an individual, and while war crimes provisions in particular require a nexus between the act and the armed conflict, they nevertheless apply irrespective of the civilian or combatant status of the individual. By way of example, it should be recalled here that illegal settlements constitute a violation of IHL that amount to a war crime under international criminal law, and that protecting settlements or otherwise participating in the crime may give rise to individual responsibilities in addition to charges of complicity by PMSCs themselves. PMSC employees and their directors, together with Civilian Security Coordinators and their guard teams, should be aware of the diverse forms of participation in international crimes established under international law when accepting and executing their mandate or powers.

As noted above in this section, offenses committed by private security personnel in the oPt are punishable under the 1977 Penal Code, including war crimes in the form of grave breaches of 1949 Geneva Conventions, although it does not contain a specific category of war crimes or other international crimes. Domestic prosecution in Israeli courts remains the primary avenue for prosecuting private contractors, as Israel is obliged under the Geneva Conventions to do so. In addition, grave breaches of IHL may be prosecuted by other states by virtue of universal jurisdiction, which is established as an obligation under the Geneva Conventions. Furthermore, in the light of the recent accession of Palestine to the Rome Statute of the International Criminal Court on 2 January 2015 and according to the principle of complementarity, the possibility of prosecuting acts committed by private contractors in the oPt is now on the radar of this international criminal
tribunal (though subject to the criteria and conditions for the exercise of its jurisdiction, including temporal jurisdiction and the gravity of the crime, among other factors\(^{390}\)).

As regards the responsibility of Israel as an occupying power for acts of PMSCs and settlement guard teams in the oPt, the basic rule on attribution of responsibility is codified in Article 29 IV Geneva Convention, according to which:

"[t]he Party to the conflict in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred".

The ICRC commentary explains that the term "agent" is broader than the definition in the Fourth Hague Convention according to which the responsibility of the state could only be involved by "persons forming part of its armed forces"; in particular, the term agent "must be understood as embracing everyone who is in the service of a Contracting Party, no matter in what way or in what capacity. It included civil servants, judges, members of the armed forces, members of para-military police organizations, etc. […] On the other hand it embodies an essential reservation; for the word “agent” limits the scope of the provision to those persons alone who owe allegiance to the Power concerned"\(^{391}\).

This provision is clearly relevant with regard to settlement Civilian Security Coordinators and guard teams to the extent that they act de iure and de facto as members of para-military police organizations, holding police powers and being subject to Military Justice Law, and performed their activities ostensibly under the supervision of the army, which they must obey. Apparently, this qualification may be problematic in the sense that they are appointed and employed by the settlements and, furthermore, in practice they exercise their powers supporting the territorial interest of the settlements in a manner that frequently violates the military orders and thus clashes with their function as representatives of the law and public order. However, the ICRC commentary is categorical in this regard: "no matter in what way or in what capacity" the agent is serving the contracting party provided that they are loyal to it. As noted above in this section, upon their appointment CSCs and their guard squads are required to sign an express declaration in this regard, stating that they are aware that they work "on the army's behalf", are subject to military law and accept the authority of the IDF and its authorized institutions; therefore, the fact that the State of Israel is not their direct employer does not change the fact that they act in an official capacity as army agents and are officially incorporated into the state structure by means of Military Justice Law (though not at the same administrative level as soldiers), and thus, state responsibility is not precluded by the lack of a contractual relationship\(^{392}\). Furthermore, the commentary further indicates that the abuse of power

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\(^{390}\) According to article 11(2) of the Rome State the Court "may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State"; which in the case of Palestine means the possibility for the Court to investigate only acts committed after April 1, 2015. It is well-known, however, that in addition to the ratification of the ICC Statute, Palestine also submitted an ad hoc declaration via art. 12(3) of the Statute "for the purpose of identifying, prosecuting and judging authors and accomplices of crimes within the jurisdiction of the Court committed in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014". This gives the Court retroactive jurisdiction to investigate situations that occurred prior to the entry into force of the treaty for that state, i.e. April 1, 2015, in particular, actions undertaken under Operation Protective Edge in Gaza last summer.

\(^{391}\) ICRC Commentary, art. 29, p. 212

\(^{392}\) There is old and recent jurisprudence supporting the view that civil militias may be equated with state agents and even with state armed forces. See Charles S. Stephens and Bowman Stephens (USA) v. United Mexican States (1927), IV RIAA 265. Also, Blake v. Guatemala, Inter-American Court of Human Rights, Series C, No. 36, 24 January 1998, para. 75-6.
by the agent does not absolve the state of its responsibility, to the extent that the agent is acting in an official capacity to perform the unlawful act, and therefore it does not seem to prevent their qualification as an agent of the state:

“The position is just the same whether the agent has disregarded the Convention's provisions on the orders, or with the approval, of his superiors or has, on the contrary, exceeded his powers, but made use of his official standing to carry out the unlawful act. In both cases the State bears responsibility internationally in accordance with the general principles of law”393.

With regard the possibility of qualifying PMSC as state agents in the sense of Article 29 IV GC, the analysis is more difficult, at least on a general basis, due to the wide range of their activities and the different contexts in which they operate. Furthermore, tentatively the probability that they fall into this category, although not impossible, seems to be lower than in the case of settlement contractors because their insertion into the state apparatus and their subordination to the state is less clear394. However, the basic rule on state responsibility in Article 29 IV GC should also be interpreted in the light of the International Law Commission Articles on State Responsibility (ILC's ASR) which have acquired high authority as a source of international law. In this regard, in addition to state responsibility for official acts of their organs and agents (Article 4), this instrument provides two other grounds for attributing responsibility; in particular, states are responsible: 1) for acts of private persons and entities that exercise delegated governmental authority (Article 5); and 2) for acts of private persons or groups acting on the instructions of or under the direction and control of a state (Article 8). It is therefore clear that attribution of state responsibility is not exclusively dependent on the incorporation of PMSCs into the state structure or their integration into the armed forces; private agents may also engage the responsibility of states. Indeed, the ILC commentary on the ASR has considered private security guard companies as falling in the category of “entities” of Article 5395, and the Israeli High Court of Justice referred expressly to police and army powers as elements of governmental authority396.

393 Idem.
394 For an analysis of the qualification of PMSC as state organs and agents, see Cameron, L. & Chetail, V., Privatizing War, op. cit, pp. 136-164.
395 Commentary on Article 5, ILC-ASR with Commentaries, p. 43, paragraph 7.
396 HCJ, Prison Privatization Case, op. cit. Paragraph 24; also, Opinion of Justice E. Arbel, para. 2; Justice A. Procaccia, para. 52.
As an occupying power, Israel has engaged in a process of outsourcing of military and security functions in the oPt, coupling the already sensitive situation of a protracted occupation with the multi-dimension phenomenon of privatization. This process has accelerated since the Second Intifada and has accompanied other security policies, such as the construction of the Wall. Although the outsourcing dynamics have included the transference of functions to non-military authorities and other state organs like the police and the Crossing Authority ("civilianization"), private security companies and contractors are also essential agents within this policy. The presence of PMSCs is now visible in a number of contexts in the oPt, from checkpoints (at the entrance to Gaza), industrial zones and settlement enclaves in the West Bank and East Jerusalem to private establishments and at construction sites along the Wall. Furthermore, while their activities comprise the typical tasks of escort and protection services, in many contexts they also have an important component of law enforcement which includes the exercise of policing powers such as the use of force, searches and seizures, and the conduct of arrests and detentions.

Additionally, one particular aspect of the outsourcing dynamic in the oPt has been the delegation of security functions to private citizens within the settlement areas and outposts in the West Bank (another sort of "civilianization"): though not corporate agents, settlement civilian security coordinators (CSCs) and their guard teams amount to auxiliary military forces armed, instructed and authorized to act on behalf of the Israeli army with funding from the Israeli Ministry of Defense in order to defend settlements against terrorist infiltration and other self-qualified threats. Although the use of civilian self-defense forces is not a new phenomenon, in the oPt this policy has a particular political motivation. Though part of the broader trend to outsource law enforcement functions, a clear distinction is visible between private security companies operating at checkpoints, industrial zones, settlement gates, etc., and the role of CSCs, which is more political, aligned ideologically with the settlement project, and often used as a means, under the so-called security pretext, to expanding the territories of settlements and outposts. Overall, this also means that the powers and supervision of settlement guard forces are less regulated than for private security companies and the impact of their activities on Palestinian lives is much more immediate, harming their rights to property and life.

Furthermore, while the organization and powers of private military and security companies and contractors have been regulated by a set of national laws and military orders, several aspects of their activities remain uncertain and insufficiently supervised, generating a negative impact on the life of the Palestinian population that comes into contact with them. Preliminary results of the Observatory on Private Military and Security Companies & Human Rights show that incidents have been reported in every one of the contexts where PMSCs and contractors operate, and are certainly superior in number in the context of settlements and at nonviolent demonstrations against the Wall. Furthermore, many incidents involve the use of armed force
in a manner that reflects a wide discretion in interpreting the existence of a potential threat, abuse of power, and confusion regarding the applicable rules of engagement. Even in contexts such as checkpoints, where the operation of private contractors is more bureaucratic and standardized, there is an unclear hierarchy and blurred supervision of contractors and their activities, which has tended to disperse and dilute responsibility for their actions. Additionally, there is difficulty in practice indistingushing between private security personnel and other armed operators, such as police officers and other civilian authorities, particularly in sensitive areas such as East Jerusalem where disturbances and civilian unrest often take place. As noted in Sections II and III, this does not only make the process of identification and reporting of incidents more difficult, but ultimately is also an obstacle to instituting complaint and discipline procedures, which are not clearly established under national law. Furthermore, their lack of distinction sits badly with the conclusion outlined in Section III (status) that private military and security contractors operating in the oPt are generally civilians under IHL and, accordingly, must be distinguished from combatants and armed groups. In this regard, the humanitarian principle of distinction is particularly important in situations of occupation where all armed individuals operate in the same scenario but are expected to apply different rules and procedures for the use of force.

Section III has made clear that the conclusion reached about the qualification of settlement guard teams and some PMSCs as civilians under IHL is neither clear-cut nor fully satisfactory in the light of their role in practice, and should be further clarified by Israeli authorities in military orders. The civilian status of PMSCs operating in the oPt and the fact that they are not members of the Israeli armed forces has also been explored in Section III as one of the criteria for delineating the ability of Israel as an occupying power to contract out certain activities in the oPt. As explained, the fact that IHL allows national military forces to employ certain classes of civilians, such as supply contractors, and in particular that it makes no mention of the possibility of delegating law enforcement powers to private agents does not give the occupying power a blanket permission to privatize any function at will. Firstly, there are certain roles and tasks the performance of which is reserved under IHL to armed forces and state authorities, such as the command of prisoner of war camps and civilian places of internment and military requisitions. Based on the pertinent rules, we have argued that a potential attempt to contracting PMSCs to run Israeli prisons that house unlawful deported Palestinian prisoners is prohibited under IHL, and that the allocation of military funds for the employment of settlement CSCs that materially cooperate with and assist settlers in the unauthorized seizures of Palestinian lands and acts of pillage is illegal and amounts to a state’s failure to comply with IHL.

Secondly, Subsection III.b.ii. (limits to outsourcing) has explored the limitations to contracting that arise from the scope of the humanitarian obligation of the occupying power to maintain public law and order in the occupied territory. In this regard, it is argued that the operation of international law introduces important red lines against a complete transposition of Israeli national legislation on public security to the oPt, as a territory outside its sovereignty and having occupied status. In particular, while Israel has the right to protect its citizens from
attacks, in the oPt it has a right to preserve its own security, which must be balanced with its
duty to ensure the security and welfare of the occupied population. Accordingly, as an occu-
pying power Israel can adopt measures to enhance overall security in the occupied territories.
However, it must ensure that such measures respect humanitarian rules and, in particular, do
not reduce the level of protection for protected persons as required by IHL. Final considera-
tions should be separated for each of the contexts in which private contractors operate in the
oPt:

1. In the case of checkpoints, this report argues that legislation privatizing checkpoints
is not prohibited under IHL unless it exceeds the limits imposed on an occupying
power’s valid legislation: it cannot be used or implemented in a manner that affects
the fundamental rights of protected persons or contravenes the benefits afforded to
them under the IV Geneva Convention. Therefore, the discussion about privatization in
this context turns to the issue of the way in which private security contractors exer-
cise the powers granted to them (including the use of force) and the obligation of the
occupying power to properly train and oversee them in order to ensure respect and
prevent violations of IHL and HRL.

2. The dynamics of privatization in settlements is radically different. While the policy of
employing Civilian Security Coordinators and their guard teams is presented in terms
of military necessity and self-defense of settlement communities, the fact is that the
delegation of these powers contributes to perpetuating a grave violation of IHL and
is prohibited per se. Israel cannot use private police, either settlers’ guard teams or
PMSCs, to protect illegal settlements or to allow their expansion in the West Bank. The
same argument applies to the use of PMSCs in East Jerusalem settlement enclaves:
although Israel does not treat Palestinian residents as protected persons, the status
of East Jerusalem remains one of “occupied territory” and the extension of national
laws with the aim of allowing PMSCs to protect these settlements materially supports
a violation of international law and is also unlawful.

3. Finally, regarding the construction and maintenance of the Wall, Israel is using PM-
SCs to sustain an action that is in contravention of international law, as concluded
by the UN International Court of Justice in its Advisory Opinion (2004). Consequently,
although not fully explored in this report, the same conclusion as for settlements
applies mutatis mutandi: the employment through subcontracting policies of PMSCs
to protect construction sites and operations on the Wall support the commission of
serious violations of human rights and should also be considered in conflict with in-
ternational law.

That being said, in those cases where the delegation of functions is not prohibited or con-
travenes international law, that is at checkpoints and for escort and protection services, it is
nevertheless essential that Israel ensure that the use of force by PMSCs is consistent with
international law and is exercised in a manner that 1) does not affect the rights of protected
persons living under occupation, and 2) does not lead private contractors to become involved
in direct participation in hostilities. Subsection III.b.iii. (rules for the use of force) notes that, as
law enforcement agents, private contractors at checkpoints are expected to apply the same
human rights rules and escalation of force procedures as police officers exercising the same
activities, and emphasizes that Israel holds a human rights due diligence duty with regard
to their actions, which includes, *inter alia*, the adoption and proper implementation of strict
regulations regarding the use of force and firearms and grounds and conditions for detention,
as well as adequate supervision and training for contractors exercising these powers.

The report closes by highlighting the consequences in terms of accountability that can
result from the use and activities of PMSCs and civilian contractors. In particular, we main-
tain that the fact that Israel is not the direct employer of private security contractors in the
oPt does not prevent it from engaging in international responsibility if they commit violations
of international law. First, due to the characteristics and mandate of settlement guard con-
tракtors, they are to be considered ‘military agents’ acting on behalf of the IDF, and as such,
responsibility for their actions will be attributed to Israel according to the provisions of the IV
Geneva Convention. Secondly, with regard to actions of PMSCs, recognized rules for attribution
of responsibility provide other grounds for the responsibility of Israel, in particular, if it is con-
sidered that the powers of PMSCs in the oPt constitute an exercise of governmental authority.
Finally, the fact that IHL also binds individuals makes it possible for private military and secu-
rity contractors to bear criminal responsibility under international law for the perpetration of
and participation in violations of IHL. In this regard, PMSC employees and their directors, as
well as settlement Civilian Security Coordinators and their guard teams should be aware of the
diverse forms of participation in international crimes established under international law when
accepting and executing their mandate or powers.

As a whole, the content of this report reinforces the claim for an international binding re-
gulation of private military and security companies:

• The situation on the ground demands a specific regulatory framework for the activi-
ties of PMSCs and private contractors. Existing IHL and HRL provide pertinent stan-
dards governing activities of PMSC personnel and the responsibilities of states that
hire them. However, in practice they need to be extended in order to properly control
the broad sphere of activities of private agents because crucial legal issues for such
control, such as the determination of the legal status of contractors and its implica-
tions remain extremely casuistic and require a consensual approach. Furthermore,
an international binding instrument is essential to agree on concrete guidelines to
determine which services may or may not be performed by PMSCs. The concept of
“direct participation in hostilities” is useful but of limited utility in practice and, mo-
\moreover, needs to be complemented with reference to other rules also providing limits
on states’ liberty to contract out services to PMSCs. This is a matter of principle and
its practical implementation requires a global and comprehensive discussion at the
international level.

• National regulations concerning the private security industry and its transnational ac-
tivities abroad need to share common elements. Efforts should be made for uniformity
of criteria regarding the license and authorization of PMSCs in order to consolidate a
common understanding of the permissible role and red lines for the industry world-
This also includes discussions for establishing common sets of rules of engagement for private contractors according to the area of their activities, and oversight mechanisms that specify rigorous reporting requirements, clear supervision authorities and investigation procedures. This is still a pending issue that requires an international approach. As illustrated by preliminary results of the Observatory on Private Military and Security Companies & Human Rights in the oPt, the provision of private security services in the context of law enforcement and occupation also shows a wide discretion in the use of reasonable means of force, confusion regarding the applicable RoE and a lack of supervision that complicates the process of monitoring, reporting of incidents, and, ultimately, the ability to prosecute them.
About NOVACT-International Institute for Nonviolent Action

NOVACT-International Institute for Nonviolent Action promotes international peace-building actions in conflict situations. The Institute has been created through the collective effort of those active in international civil society to contribute to a peaceful, just and dignified world.

Understanding nonviolence as a transformation strategy, NOVACT strives to achieve a society based on human security and real democracy, free of armed conflicts and violence in all of its dimensions.

In cooperation with its international advisory committee and its network—composed of experts, human rights defenders and civil society organizations in the Middle East, North Africa, Europe and America—NOVACT supports non-violent movements which are working for social change and developing civilian peace intervention mechanisms to protect vulnerable groups in conflict situations.

As a committed, political, independent agency, NOVACT promotes peace initiatives, training programs and action-oriented research to advocate for national and international public policies and regulations that guarantee human security and the effective protection of human rights and fundamental freedoms.

With its headquarters in the Mediterranean city of Barcelona, NOVACT is an initiative of Nova-Social Innovation, which is registered as a non-governmental organization and is recognized by the United Nations. The Institute raises funds from committed citizens and public institutions.

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About the Observatory on Private Military and Security Companies & Human Rights

Since the end of the Cold War the private military and security industry has experienced an increasing expansion at the national and international level. While the industry has been the subject of abundant analysis, NOVACT has identified an important deficit of documentation and information on the direct impact that activities of private military and security companies (PMSCs) have on the human rights of local populations and the staff of these companies, i.e. specific human rights incidents.

The Observatory on Private Military and Security Companies & Human Rights aims to respond to this deficit by documenting, systematizing and analysing human rights incidents involving PM-SCs and private security and military personnel (contractors) in Colombia, Iraq and the Occupied Palestinian Territory. NOVACT is working on the expansion of the Observatory to other regions such as Africa.

To this end, the Observatory cooperates with a network of field researchers and research centers in the above-mentioned countries to obtain factual data on the operations of PMSCs and their impact on the human rights of local communities.