

MEMORANDUM TO THE FILE: STATE OF ISRAEL

**Re: Legal implications for Israel Defense Forces soldiers with Swiss citizenship who
enlist in the IDF – 28.11.2019**

This legal opinion is provided at the request of the Ministry of Justice of the State of Israel and aims at analyzing the lawfulness of Swiss citizens enrolling in the **Israel Defense Forces** (hereinafter: “IDF”).

The legal opinion will try to answer the following questions:

- Whether there are laws or regulations (or case law) which regulate Swiss citizens enrolling in foreign military services.
- The sanctions to unlawful behaviors.

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I. DEFINITION

A. CITIZEN

By the term “**citizen**” one must understand any men or women with the Swiss nationality over the age of 18 years old (article 7 of the Federal Act of 3 February 1995 on the Armed Forces and the Administration¹ (hereinafter: “ARMA”)). It is important to note that in Switzerland men must complete their military service but women can choose to complete their military service on a voluntary basis (article 3 ARMA).

According to article 49 para. 1 ARMA people subject to Swiss military service have to join military recruit school the earliest at the beginning of the year of their 19th birthday and the latest during the year of their 25th birthday.

Article 49 para. 2 ARMA specifies that conscripts that have not enrolled into recruit school before they reach the age of 25 years old are freed from their obligations to serve in the Swiss military Service.

This sector of the population will therefore be the Swiss citizens we refer to when we mention mandatory military service for Swiss citizens in the present notice.

B. THE MILITARY CRIMINAL CODE

The Military Criminal Code of 13 June 1927² (hereinafter: “MCC”) takes as its basis the commission of a criminal offence in times of peace. It applies in principle to all persons who are on compulsory military service or performing military duties when not on military service, as well as to certain other groups of people.

¹ RS 510.10

² RS 321.0

The scope of application of the military criminal law is limited to the armed forces and the Border Guard and their organizations and to the members of the national security services.³

C. ISRAEL DEFENSE FORCES

The **Israel Defense Forces** are the military forces of the State of Israel⁴. For the purpose of the present notice it has to be considered – from Switzerland’s point of view – as a “foreign military service”.

II. MILITARY SERVICE FOR SWISS CITIZENS

The lawfulness of a Swiss citizen enrolling into the IDF depends on two main criteria:

- Does the citizen live in Switzerland or abroad?
- Is the citizen national or binational?

Firstly we will analyze the different situations axed on these 2 criteria as follows: Swiss citizens living in Switzerland (*Infra II.A.*), Swiss citizens moving back to Switzerland after completing their service abroad (*Infra II.B.*), binational citizens who live in Switzerland (*Infra III.B.*), binational citizens who live abroad (*Infra III.C.*).

A. SWISS CITIZENS LIVING IN SWITZERLAND

Article 2 ARMA states as a general principle that any Swiss citizen must serve for Switzerland.

³ Office of the Armed Forces Attorney General / Military Justice, *Principles of Military Criminal Law*, available here: <https://www.oa.admin.ch/en/militaerstrafverfahren/die-grundsaeetze-des-militaerstrafrechts.html>.

⁴ <https://www.idf.il/en/>.

Therefore, a Swiss citizen living in Switzerland and meeting the conditions of article 2 ARMA would not be allowed to join IDF instead of serving for the Swiss military service.

For non-dual nationality citizens the accomplishment of military duties in a foreign military service is not foreseen by the current Swiss law. Under the Swiss military legislation, Swiss citizens have to accomplish their military service in Switzerland without benefiting from a derogatory regime⁵.

Therefore, any Swiss citizen who chooses to join the IDF instead of serving for the Swiss military service will find himself in an illegal situation regarding Swiss law. The sanctions will be examined *infra V*.

However, as it will be further examined in *infra III*, Swiss law provides for exceptions to that principle exclusively for binational citizens.

B. SWISS CITIZENS ABROAD

Article 4 para. 1 ARMA states that in peacetime Swiss citizens living abroad are exempted from recruitment and military services. The Federal Council can provide for exceptions to this principle, in particular for Swiss citizens living in neighboring countries.

Article 4 para. 3 ARMA specifies that Swiss citizens living abroad can be summoned for the service of national defense (article 76 ARMA).

Article 4 para. 4 ARMA indicates that any Swiss citizen who lived abroad for over 6 years without interruption before moving back to Switzerland is exempted from serving in the military unless the citizen specifically ask to join.

As a result, Swiss citizens domiciled in Israel for at least 6 years are not required to accomplish their military service in Switzerland.

⁵ DFJP, Office fédéral de la justice, *Libération de l'obligation de servir dans la protection civile pour les personnes ayant effectué leur service militaire à l'étranger* in : JAAC 2007 n° 21 p. 376

This exemption does not however mean that such Swiss citizens are allowed to enroll in a foreign military service. Indeed the sanction for joining a foreign military service will be examined *infra* V.

III. MILITARY SERVICE FOR BINATIONAL CITIZENS

A. BINATIONAL SWISS AND ISRAELI CITIZENS

The obligation to serve for Switzerland also applies to dual nationality citizens hence to binational Swiss and Israeli citizens⁶.

It is important to stress that possession of another nationality has in principle no influence on the military duties of a Swiss citizen⁷.

However a distinction shall be made between the situation of a binational living in Switzerland and a binational living abroad.

B. BINATIONAL CITIZENS WHO LIVE IN SWITZERLAND

Binational Swiss citizens who have accomplished their military duties in their other country of citizenship are not liable for Swiss military service. However they must either meet the conditions provided for in article 5 para 1 and 2 ARMA or benefit from an Agreement with another State as provided by article 5 para. 3 ARMA.

⁶ Arrêt 2A.339/1996 du 12 mai 1997. Also : Confédération Suisse, *Mon service militaire – double-nationaux*, available here : <https://www.vtg.admin.ch/fr/mon-service-militaire/generalites-concernant-le-service-militaire/doppelbuerger.html>.

⁷ Confédération Suisse, *Mon service militaire – double-nationaux*, available here : <https://www.vtg.admin.ch/fr/mon-service-militaire/generalites-concernant-le-service-militaire/doppelbuerger.html>.

a) Exemption under article 5 para. 1 and 2 ARMA

The conditions for a binational citizen to be exempted to serve for Switzerland according to article 5 para. 1 ARMA are the following:

1. The citizen must be binational (para. 1)

In our case the citizen should be Israeli and Swiss.

2. The citizen must have already accomplished its military service in his other national State (para. 1).

This means the disposition only concerns citizens that already have accomplished their service in Israel and have established their domicile subsequently in Switzerland.

3. There are no specific exceptions made by Federal Council (para. 1)

To our best knowledge, such exception has never been made in favor of binational citizens living in Switzerland willing to enroll into the IDF.

4. They must fulfil their obligation to announce themselves and pay an exemption tax (para. 2)

Article 3 para. 1 of the Ordinance on military obligations⁸ (hereinafter: “OMi”) specifies that dual nationality citizens who are domiciled in Switzerland and who already have accomplished the military service in their other State before taking up residency in Switzerland must announce their case at the “*Commandement d’arrondissement*” of the concerned Canton.

The tax amount depends on the individual income (article 13 of the Federal Act of 12 June 1959 on the Military Service Exemption Tax⁹).

⁸ RS 512.21

⁹ RS 661.

On the contrary, it is important to note that under article 3 para. 2 OMi, dual nationality citizens remain liable for Swiss military service if:

- a. The announcement provided by article 3 para. 1 OMi has not been made;
- b. It cannot be proven that the military service has been accomplished in the other Country;
- c. The service accomplished in the other Country is not at least equivalent to the one required in Switzerland.

It then appears that the only situation regulated by Swiss law for binational citizens who live in Switzerland is the event of binational persons who have already accomplished their military service abroad (for instance among the IDF) and wish to move to Switzerland afterwards.

The law remains silent about the possibility for a binational citizen established in Switzerland who wishes to join a military service such as the IDF instead of serving in the Swiss military service.

One can then conclude that binational citizens who reside in Switzerland and have not completed their military service yet must serve for Switzerland unless they can benefit from a derogatory Agreement (*Infra III.B.b*).

b) Exemption under article 5 para. 3 ARMA

According to article 5 para. 3 ARMA, the Federal Council can conclude agreements with other States on the mutual recognition of the military service accomplished by dual nationality citizens. These agreements can allow binational citizens to enroll in a military service solely for one of their national State.¹⁰

¹⁰ Confédération suisse, *Doubles-nationaux – Les doubles nationaux sont en principe également soumis aux obligations militaires*. Available here : <https://www.vtg.admin.ch/fr/mon-service-militaire/generalites-concernant-le-service-militaire/doppelbuerger.html>.

Such agreements have been concluded with Germany¹¹, France¹², The United States¹³, Colombia¹⁴, Argentina, Austria¹⁵ and Italy¹⁶.

As Switzerland and the State of Israel have not concluded an agreement regarding the mutual recognition of the military service, the exemption provided for in article 5 does not apply in our case and the situation will not be examined any further.¹⁷

In conclusion and as no agreement has been made with Israel, binational Swiss and Israeli citizens who live in Switzerland **are not allowed under this provision** to enroll into the IDF instead of the Swiss military service.

C. BINATIONAL CITIZENS WHO LIVE ABROAD

Article 4 para. 1 ARMA states that in peacetime Swiss citizens living abroad are exempted from recruitment and military services. The Federal Council can provide for exceptions to this principle, in particular for Swiss citizens living in neighboring countries.

According to article 94 para. 2 MCC Swiss citizen who reside in his other country of nationality can enroll in this second country's military service without being liable to a sentence in Switzerland.

Therefore, if a binational from Israel and Switzerland lives in Israel, he can enroll into the IDF without the risk of being sanctioned.

¹¹ Convention entre la Confédération Suisse et la République fédérale d'Allemagne relative au service militaire des double-nationaux conclue le 20 août 2009 (RS – 0.141.113.6).

¹² Convention entre le Conseil fédéral Suisse et la Gouvernement de la République française relative au service militaire des double-nationaux conclue le 16 novembre 1995 (RS – 0.141.134.92).

¹³ Convention entre la Suisse et les Etats-Unis d'Amérique relative aux obligations militaires de certains doubles nationaux conclue le 11 novembre 1937 (RS - 0.141.133.6)

¹⁴ Convention entre la Suisse et la Colombie concernant le service militaire conclue le 15 janvier 1959.

¹⁵ Convention entre la Confédération Suisse et la République d'Autriche relative au service militaire des doubles-nationaux conclue le 19 mars 1999 (RS - 0.141.116.3)

¹⁶ Convention entre la Confédération suisse et la République italienne relative au service militaire des doubles-nationaux (RS – 0.141.145.42).

¹⁷ A-7918/2016 c. 4.3.1 – 4.4 *a contrario*.

IV. INTERMEDIARY SUMMARY

From the above-mentioned situations, we can infer that:

For Swiss citizens:

- Swiss citizens who are not nationals of Israel living in Switzerland cannot legally enroll in the IDF and must accomplish their military service in Switzerland.
- Swiss citizens moving back to Switzerland after six years can be exempted from the military service in Switzerland but cannot legally enroll in the IDF.

For binational citizens:

- Binational citizens who live in Switzerland cannot legally enroll in the IDF.
- Binational citizens who live abroad can legally enroll in the IDF.

However, it seems that theoretically an *ultima ratio clause* exists, according to article 94 MCC. Indeed, the Federal Council can deliver express exemptions to Swiss citizens who wish to enroll in a foreign military service.

We do not currently have the knowledge if such exemption has been issued in the past for Swiss citizens willing to enroll into the IDF.

However, the city of Geneva stated that the Federal Council has not given exemptions since the World War I¹⁸. Therefore we respectfully suggest not to rely on this possibility in practice and only consider the possibilities mentioned in the summary above.

We shall now examine the sanctions in the event of illegal enrollment in a foreign military service.

¹⁸ Ville de Genève, Archives InterroGE, *Est- il possible de connaître le nombre de binationaux suisse-israéliens qui sont partis servir l'armée israélienne ces dernières années ?*, available here : http://www.ville-geneve.ch/index.php?id=16358&id_detail=3860.

V. SANCTIONS

A. ENROLLMENT IN FOREIGN MILITARY SERVICES OR OTHER GROUPS

Swiss law is silent about the difference between voluntary enlistments in a foreign military service *per se*, joining a foreign terrorist group and conscription.

However, the Swiss Parliament extended the meaning of the sanctions provided for in article 94 MCC not only to prevent Swiss citizens to join a foreign military services but also to join similar entities such as exiled governments, mercenary armies, voluntary trainings, fighting trainings for political parties, religious movements and rebel groups.¹⁹

Moreover, in an article published in 2014, the newspaper reported that in 2013, 29 Swiss male (either young or minors²⁰) enrolled in a civil service via an association called Sar-El^{21, 22}. As reported by “*Le Matin*”, The Federal Council then stated that the interdiction to enroll in a foreign army also included the interdiction to enroll in a foreign civil service.

Therefore, the sanctions for joining a foreign military service that will be examined below shall be understood as well for a military service *per se*, as any other group with a broader meaning.

B. CIVIL SANCTIONS

To our knowledge current Swiss law does not provide for civil sanctions in the event of a Swiss citizen joining “illegally” a foreign army.

¹⁹ Avis du Conseil fédéral du 05.11.2014 sur la motion « *Empêcher le mercenariat moderne* », déposé par SCHLÄFLI URS le 11.09.2014.

²⁰ In Switzerland a person is of age when he or she has reached the age of 18 years old (Swiss Civil Code, article 14; RS – 210.).

²¹ Sar El, The National Project for Volunteers for Israel, available here : <https://www.sar-el.org/>.

²² Le Matin, *Conflit – Ces Suisses au service de Tsahal*, Raphaël Pomey, 19.09.2014, available here : <https://www.lematin.ch/suisse/suisses-service-tsahal/story/21210878>.

However, according to article 48 of the Federal Act of 29 September 1952 on The Acquisition and Loss of Swiss Citizenship²³ (hereinafter: “LN”), the Federal Office may with consent of the authority in the canton of origin revoke the Swiss, cantonal and communal citizenship of a person holding dual nationality if his or her conduct is seriously detrimental to the interests of the reputation of Switzerland.

Yet, this disposition has never been applied by Switzerland²⁴.

Furthermore, in 2014 a Swiss political group presented a Parliamentary Initiative intended to automatically revoke the Swiss nationality to binational involved in terrorist groups (such as ISIS) or combat operations base on article 48 LN²⁵.

In 2016 the Swiss Council of States rejected the initiative stating that the Criminal Code already provided for sanctions to binational citizens involved in such activities²⁶.

Thus, in our opinion, there is currently no risk for binational citizens who join IDF illegally to lose their Swiss nationality.

The present note will now focus on criminal sanctions, *infra V.C.*

C. CRIMINAL SANCTIONS

a) **For titles and decoration**

It can be important to note that under article 40a ARMA, it is forbidden for conscripts who accept titles or decoration delivered by foreign authorities.

²³ RS 141.0

²⁴ Initiative parlementaire 14.450, *Retirer la nationalité suisse aux doubles nationaux impliqués dans des activités terroriste ou des opérations de combat*, available here : <https://www.parlament.ch/en/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20140450>.

²⁵ Initiative parlementaire 14.450, *Retirer la nationalité suisse aux doubles nationaux impliqués dans des activités terroriste ou des opérations de combat*, available here : <https://www.parlament.ch/en/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20140450>.

²⁶ Initiative parlementaire 14.450, *Retirer la nationalité suisse aux doubles nationaux impliqués dans des activités terroriste ou des opérations de combat*, available here : <https://www.parlament.ch/en/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20140450>.

Article 40a para. 2 ARMA states that soldiers who previously were titled or decorated before joining the Swiss military service cannot use or wear such titles and decorations in Switzerland or in a foreign country as long as they still serve in the Swiss military service.

b) For enrolling in a foreign military service

i) Art. 94 MCC

Article 94 MCC states that any Swiss citizen without an express exemption delivered by the Federal Council who serves in a foreign military service is liable to a custodial sentence not exceeding three years or to a monetary penalty.

According to Tobias Kühne, spokesman of the Military Justice, related by the newspaper “24 heures”, each year one or two proceedings are open against Swiss citizens enrolling into foreign military services. However most cases are related to Swiss citizens enrolling to the French Foreign Legion.²⁷

Nevertheless, to our knowledge, no federal case law has yet been issued by Swiss Courts yet regarding the particular matter of Swiss citizens enrolling into IDF.

ii) Art. 90 MCC

Under article 90 MCC, any Swiss citizen joining a foreign military service at war against Switzerland is liable to a custodial sentence. In particular serious cases, the Judge can pronounce life sentences.

As Switzerland and Israel are not at war and since Switzerland is an independent and neutral country²⁸, this particular disposition seems to be purely theoretical for the issue at stake.

²⁷ 24 heures, *Le Syriaque tessinois arrêté à son retour de Syrie*, available here : <https://www.24heures.ch/news/standard/syriaque-tessinois-arrete-retour-syrie/story/20979447>.

²⁸ Articles 173 and 185 of the Federal Constitution of the Swiss Confederation (RS – 101).

iii) *Art. 96 MCC*

Article 96 MCC states that anyone who tried to exempt himself or oneself from the military service using misleading or deceptive ways in order to deceive the civil or military authorities is liable to a custodial sentence not exceeding three years or to a monetary penalty. Article 96 para. 2 MCC specifies that if the infraction is considered of minor gravity it shall be liable to a disciplinary punishment.

Consequently, it could be argued that a dual nationality citizen established in Switzerland could be liable to a sentence if he moves his residency to Israel to serve for the IDF around the time he should enroll into military recruit school in Switzerland.²⁹

In that regard, the Organization of the Swiss Abroad seems to confirm this assessment stating that “[...] *a departure for that other State with the sole purpose of completing military service is a punishable offence in Switzerland by virtue of the Military Criminal Code*”.³⁰

However to our knowledge there is no such precedent.

Nevertheless, we respectfully draw your attention that one should be cautious for this move not to be considered as a deceptive way to exempt oneself from the Swiss military service.

D. ADDITIONAL DEVELOPMENTS³¹

a) **The Federal Council’s statements**

As mentioned in the article published by “*Le Matin*”, the Federal Council stated in 2014 that the interdictions to enroll in a foreign army also included the interdiction for civilians

²⁹ Organisation des Suisses de l’étranger, *Service militaire – double nationaux*, available here : <http://aso.ch/fr/conseils/vivre-a-letranger/service-militaire/double-nationaux>.

³⁰ Organisation des Suisses de l’étranger, *Military service – dual nationals*, available here : <http://aso.ch/en/consultation/living-abroad/military-service/dual-nationals>.

³¹ Additional developments following Mrs. MAZEL’s email from 1st August 2019.

to enroll in a service behind the front. This statement has been made in relation to a parliamentary motion filed by Mr. Lukas REIMANN, member of the Parliament, in March 2014³².

The Federal Council made the following statement: *“Article 94 of the Military Criminal Code (MCC) concerning foreign military service has a wide scope of application, since it covers both the taking up of service in a foreign army and the enrolment of a Swiss national for foreign military service. Attempt, instigation and complicity are punishable. As the mover of the motion indicates, this criminal standard also covers service behind the front. It is applicable to all civilians (Art. 3 para 1 ch. 7 CPM) and not only to mercenaries. The nationality of the person who enlists a Swiss for foreign military service is not decisive. Article 94 MCC is also applicable to warlike formations that are not recognized by international law as regular troops”*³³.

Moreover, in his answer to the parliamentary motion filed by Mr. Egger MIKE, the Federal Council had the opportunity to clarify once again his interpretation of Art. 94 MCC³⁴. The Federal Council specified that *“Under Article 94 of the Military Criminal Code (MCC), not only service in a foreign State army is punishable, but also any service in clandestine formations organized militarily by governments in exile, mercenary armies, volunteer formations and combat formations of political parties, religious movements and insurgents. Foreign military service means not only troop or armed service at the front, but also any support services at the rear of the front if they are subject to a military command or similar command”*.

Those statements are actually answers to parliamentary motions, which have been both dismissed since then. They have no legal consequences as such.

³² Motion 14.3223, Précision et extension de l'interdiction du service et du recrutement en vue du service dans des forces armées étrangères, Lukas REIMANN, 21 mars 2014, available here : <https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20143223>.

³³ Motion 14.3223, Précision et extension de l'interdiction du service et du recrutement en vue du service dans des forces armées étrangères, Lukas REIMANN, 21 mars 2014, available here : <https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20143223>.

³⁴ Motion 19.3036, Compétence de la justice militaire Suisse pour la poursuite des djihadistes de l'Etat islamique, Mike EGGER, 6 mars 2019, available here : <https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20193036>.

b) Analysis of “military service” and “foreign civil service”

A service is considered as a military service if the following cumulative requirements are met:

- The military service is provided within an organization, independently of its structure. Whether the organization is governmental or non-governmental does not play a role according to leading legal scholars³⁵.
- The organization has a military purpose, concept which is hardly defined by legal scholars. According to SCHRÄMLI, the organization has a military purpose if it "serves to defend the country against external and internal attacks" or "strives for the armed implementation of political goals"³⁶.
- The organization is hierarchically structured, which means that members are subject to an authority or subordinate³⁷.
- The service to be provided must have a military purpose in order to be regarded as military service³⁸. Whether armed or unarmed, the service must ultimately contribute to the achievement of the military objective of the organization. As an example, the legal scholar cites the entry into a civil defense organization which, according to his doctrine, must remain unpunished³⁹.

Additionally, the jurisprudence considers that a service “behind the front” is also punishable as a prohibited military service if the organization in which the service is

³⁵ WIDMER Raphael/STÄHLI Armin, Der Eintritt in fremden Militärdienst gemäss Art. 94 MStG, *Sécurité & Droit* 3/2016 p. 166 ss, 172.

³⁶ SCHRÄMLI Eduar, Unerlaubter Eintritt in fremden Militärdienst und Werbung für fremden Militärdienst nach schweizer. Recht, Diss. Zürich 1941, 56.

³⁷ WIDMER Raphael/STÄHLI Armin, Der Eintritt in fremden Militärdienst gemäss Art. 94 MStG, *Sécurité & Droit* 3/2016 p. 166 ss, 172.

³⁸ SCHRÄMLI Eduar, Unerlaubter Eintritt in fremden Militärdienst und Werbung für fremden Militärdienst nach schweizer. Recht, Diss. Zürich 1941, 18.

³⁹ WIDMER Raphael/STÄHLI Armin, Der Eintritt in fremden Militärdienst gemäss Art. 94 MStG, *Sécurité & Droit* 3/2016 p. 166 ss, 173

performed is (1) organizationally part of the armed forces and (2) the service provider is subject to military authority⁴⁰.

Therefore, the “foreign civil service” is not defined as such, while the “service behind the front” provided by civilians is defined and punished.

The Federal Council statement does not refer to the specific case of Sar-El. However, Sar-El’s structure should be evaluated to determine whether it could be considered as a civil defense organization, in which case one legal scholar believes joining it would not be punishable, or if Sar-El actually provides a “foreign service behind the front”.

There is currently no available information about the eventual sanction against the 29 Swiss citizens who joined Sar-El. However, according to the Federal Statistical Office, there have been two judgments based on Art. 94 MCC pronounced in 2014, as well as one for each year between 2015 and 2018⁴¹.

c) Particular questions

What other laws or regulations could be implicated in the particular scenario where a Swiss citizen merely volunteers with the IDF for a short period (a few days or weeks), through the Sar-El program or otherwise, without enlisting or being inducted into the IDF. For instance, would article 94 MCC (which you mention on page 11 of the memorandum) be implicated even if in the contemplated situation:

⁴⁰ Decision of the Military Court of Cassation from 25 August 1938, TMC III Nb. 24 point B; Decision of the Military Court of Cassation from 6 March 1945, point 1, in: Schweizerisches Bundesarchiv: Wasem Walter 1905, Eintritt in fremden Militärdienst, Dossier E5330-01#1975/95#31004*; Decision of the Military Court of Cassation from 29 November 1945, point C, in: Schweizerisches Bundesarchiv: Wasmuth Friedrich (Fritz) 1908, Illegal Grenzübertritt, Ungehorsam gegen allgemeine Anordnungen, unerlaubter Eintritt in fremden Militärdienst, Dossier E5330-01#1975/95#36630*; confirmed by the decision of the Military Court of Cassation from 5 February 1946, TMC V Nb. 15 point 1.

⁴¹ Federal Statistical Office, Adults: Convictions for an offence or a crime within the meaning of the articles of the Military Criminal Code (MCC) by year (1984-2018), 24 June 2019, <https://www.bfs.admin.ch/bfs/fr/home/statistiques/catalogues-banques-donnees/tableaux.assetdetail.8946552.html>>.

i) The volunteers do not go through any process of membership or enlistment into the IDF armed forces?

The relevant element to be evaluated is Sar-El's structure and its link with the IDF, especially its dependence. The volunteers' enlistment does not play a role as such.

Consequently, article 94 MCC may play a role in this situation.

ii) Their duties are limited to providing logistical support such as organizing uniforms and supplies, base renovation projects (such as painting, gardening or custodial work), and other non-combat related activities?

The duties are not the only element to take into account when evaluating the service provided; the organization structure also matters. Therefore, a service may potentially be qualified as a "service provided behind the front" if the organization is part of the IDF and subject to military authority.

Consequently, article 94 MCC would play a role in this situation.

iii) They do not shoot guns or receive any weapons training?

A service may be considered as having a military purpose armed or unarmed. Therefore, the mere question of whether the volunteers are carrying weapon is not determinant to evaluate if the service would be considered as a "service provided behind the front".

Consequently, article 94 MCC may play a role in this situation.

iv) *They wear military work uniforms, but do not receive military dress uniforms with unit insignia?*

According to legal scholars and the jurisprudence, the uniforms do not play a role to evaluate whether a service is considered as a military service⁴². The wear of military work uniforms has no impact on the service analysis, only the organization structure matters.

Consequently, article 94 MCC may play a role in this situation.

v) *They are invited by and work under the supervision of a unit in the IDF's Logistics Corps?*

The IDF is a military organization. Therefore, as long as the work is provided under the supervision of the IDF, the service will be considered as a “service provided behind the front” and could be punished.

Consequently, article 94 MCC would play a role in this situation.

vi) *They are housed in IDF bases, and are fed by the IDF. They also receive instructions on topics related to the State of Israel and the IDF?*

Regarding the link with the IDF, the service would probably be considered as a “service provided behind the front”.

Consequently, article 94 MCC would play a role in this situation.

⁴² WIDMER Raphael/STÄHLI Armin, Der Eintritt in fremden Militärdienst gemäss Art. 94 MStG, *Sécurité & Droit* 3/2016 p. 166 ss, 173; SCHRÄMLI Eduar, Unerlaubter Eintritt in fremden Militärdienst und Werbung für fremden Militärdienst nach schweizer. Recht, Diss. Zürich 1941, 57.

vii) *Once the program is completed, the volunteers do not receive the rights or benefits of a discharged soldier?*

According to legal scholars and the jurisprudence, the pay does not influence the evaluation made of the service⁴³.

Consequently, the fact the volunteers receive rights or benefits of a discharged soldier is not relevant *per se* for the evaluation of the application of Article 94 MCC.

VI. CONCLUSION

In conclusion, Swiss legislation does not allow Swiss citizens only to enroll into the IDF. As for binational citizens, they can enroll into the IDF but only under certain conditions.

If Swiss or binational citizens enroll illegally into the IDF they may face sanctions if they come back to Switzerland, but the sanction will most likely not exceed 3 years imprisonment. At least, Swiss citizens do not seem to be at risk of losing their Swiss nationality.

Geneva, the 10th of February of 2018 – completed the 28th of November 2019

⁴³ WIDMER Raphael/STÄHLI Armin, Der Eintritt in fremden Militärdienst gemäss Art. 94 MStG, *Sécurité & Droit* 3/2016 p. 166 ss, 173; SCHRÄMLI Eduar, Unerlaubter Eintritt in fremden Militärdienst und Werbung für fremden Militärdienst nach schweizer. Recht, Diss. Zürich 1941, 57; Decision of the Military Court of Cassation from 10 December 1938, TMC III Nb. 34 point C.