
Book Reviews

Simon Chesterman and Angelina Fisher (eds). **Private Security, Public Order. The Outsourcing of Public Services and its Limits.** Oxford: Oxford University Press, 2009. Pp. 247. £75. ISBN: 9780199574124.

This is the second release by a research project undertaken by the Institute for International Law and Justice at New York University, following the previously reviewed (21 *EJIL* (2010): 251) *From Mercenaries to Market. The Rise and Regulation of Private Military Companies* (Simon Chesterman and Chia Lehnhardt (eds), Oxford University Press, 2007). In that commendable first volume, the editors sought to bring a variety of perspectives to bear on the increasingly topical issue of private security providers and their regulation by states. The contributions to that earlier collection were characterized by a distinctly pragmatic approach to the issue, seeking to re-assess the degree to which international law's categorical proscription of mercenarism remained tenable in a world where most states, rich and poor, view private service providers as an increasingly important part of their military posture.

The common point of departure of both books' contributors is the accurate empirical observation that almost all states, as well as many international and non-governmental organizations, are relying increasingly more strongly on the real or perceived benefits of 'outsourcing' certain hitherto public functions to private actors. Somewhat belying its title, which hints at a broader examination, the present book continues the theme of the first volume, namely the regulation of private security providers. This is based on the editors' correct estimate that the perceived benefits accruing to states from their utilization of private actors outweigh normative concerns. Their agenda is therefore a self-consciously pragmatic one in search of 'relevance', with the overriding aim of regulation rather than abolition of private security.

In the pursuit of this goal the editors try in this volume to cast a wider net of empirical and conceptual approaches, trying to extract from the experience with privatization in other industries applicable lessons for the regulation of private violence. They realize that this cannot be an exclusively legal exercise: '[a]ddressing these accountability gaps requires political will and institutional creativity that has, to date, been lacking in the private military and security sector' (at 3). As in most collaborative works, the quality, style, and pertinence of the individual contributions is not uniform, but overall the editors should be commended for having collated the various pieces into a coherent argument.

As was noted in the earlier review, a historical chapter outlining the development of the strong abolitionist norm in international law would have been helpful. This omission has now at least partly been addressed by Michael Likosky's opening chapter, which provides a much needed historical perspective on the privatization of violence. It sets the tone of the book, which is premised on the notion that the current prominence of private military and security companies is but a part of a wider and historically cyclical realignment of functional mandates between public and private actors. Some of the examples he uses appear to have at best anecdotal value, and a somewhat more methodical approach might have been helpful. Still, there is some justification for his refusal to attempt the impossible task of providing a comprehensive history of public versus private violence in the space allotted (for a monograph-length exposition see for instance Patrick Bruneteaux, *Maintenir l'ordre: les transformations de la violence d'État en régime démocratique* (1996). Instead, his exposition helps to set the stage for the following probing into

the nature of public interest and principal–agent relationships whenever violence and security are produced jointly by public and private actors.

Olivier De Schutter and Angelina Fisher follow on with opposing angles on the question of responsibility. De Schutter offers a straightforward exposition of the international law of state responsibility, focussing his attention on possible mechanisms through which the acts of private security contractors can be legally imputed to a state. Given quintessential weaknesses of the states in which these firms generally operate, his focus lies in establishing a judiciable link between the firm and its state of incorporation. This very institutional weakness is likewise the point of departure for Fisher, who focuses on the civil liabilities incurred by these firms *vis-à-vis* the civilian population most directly affected by their operations. Given the difficulty of finding effective judicial fora for claims by affected individuals against states, she seeks to establish a legal basis for a direct duty of care owed by these firms to locals, without the onerous need to prove the degree of control and agency required when relying on state responsibility. Given the inaccessibility of judicial fora, she explores various alternative grievance mechanisms, such as industry associations or ombudsmen, not all of which appear to this reviewer to be likely to prove relevant in a war-zone.

The thrust of the book lies in the application of lessons derived from other sectors to the regulation of private security contractors. Daphne Barak-Erez's contribution provides to this end a valuable conceptional overview. She cautions against the tendency to treat private violence and military functions in isolation, correctly pointing out that, despite the obvious special traits of security functions, they are similar in nature to other tasks carried out by the state. Likewise, she stresses that these special concerns should not obscure the broader question of defining the limits of privatization in general. Rather than a binary isolated event, she presents privatization as a continuum involving an ongoing political renegotiation of functional tasks between the public and private spheres.

One example of such renegotiation of functional distribution is the privatization of prisons examined by Alfred C. Aman. He focuses on the practical and legislative challenges involved in the transfer of public functions to private actors while maintaining adequate levels of transparency and public accountability. Heavily concentrating on the US experience (like most of the contributions in this book), his exposition would have benefited from the inclusion of a wider geographic perspective, as well as a less pronounced emphasis on the human rights of inmates. Without denigrating these concerns, one would have liked in the context of this particular book to learn more about his operational doubts as to efficiency gains promised by advocates of privatization but seldom actualized in practice (at 91). Particularly instructive are his expositions of the irreversibility of many ill-conceived privatization schemes which he contrasts with successful instances of ongoing state supervision where 'the privatising agency should be willing to treat the proposed contract more like a rule than a contract negotiated between two parties' (at 104).

Similar questions are raised by Mariana Mota Prado regarding regulatory choices in the privatization of infrastructure. Starting with a reasonably convincing listing of the justifications for privatization, the chapter suffers from stylistic hurdles, little substantive depth, and ambiguity of purpose. The sections on the judiciary and on private security companies add little value and appear out of place. The reader would have been better served if these had been omitted in favour of an exposition of actual infrastructure projects, as the chapter's title and placement within the book indicate. Equally bewilderingly vague is Rebecca De Winter-Schmitt's contribution on self-regulation in the apparel industry, derived from her doctoral thesis. Her chief argument appears to be that this industry used self-regulation as a transparent device to foreclose mandatory public regulation (at 139), lamenting the fact that the countries in which private security companies are incorporated fail to assume their responsibility to oversee the sector.

This is hardly news. But unfortunately, the text offers little more, leaving the reader pondering its relevance to the issue at hand.

Considerably more grating is Jacqueline Ross' contribution on police informants. Already her point of departure, in which she likens the use of informants to the privatization of a public function, leaves the reader baffled: 'law enforcement agencies routinely outsource the investigation of crime to non-state actors who serve as informants' (at 159). Is this really accurate? Wouldn't it be rather more fitting to treat the informer as a part of the *evidentiary* toolbox deployed by police officers or prosecutors in *their* investigation of the crime? To this reviewer, the question of informers appears less related to the problem of outsourcing or privatization with which this book is concerned, than a subset of the evidentiary rules of criminal procedure: what deals can the state strike in order to gain access to judicially usable information. In principle, the rules dealing with informants are no different from rules dealing with wire-tapping, DNA testing, expert witnesses, or physical evidence – things that are used by the agents of the state to carry out the state's most prominent function, namely the maintenance of law and order. This fundamental conceptional misunderstanding is exacerbated by an opaque style, sparing use of sources, and the postulation of wild analogies: '[c]omparing the undercover role of [criminal] insiders to that of teachers and managers who study their own workplaces made it possible to identify the unique ethical and epistemological challenges that insiders face' (at 180).

That the procurement of information can indeed be a legitimate object for the study of privatization is shown by Simon Chesterman's exposition of the enormous reliance of the United States intelligence community on commercial information-gathering and analysis. He carefully traces the evolution of the term 'inherently governmental functions', which in US federal law delineates the limit beyond which the state must not divest its authority. Applying this standard to the intelligence community, he highlights the considerable fiscal, personnel, and oversight challenges of the contemporary shift towards private suppliers in order to conclude accurately that 'uncertainty in this area appears to be intentional and thus exacerbates the accountability challenge posed by secrecy and problematic incentives' (at 203). Contrary to the somewhat self-righteous lamentations in international law circles about the violation of essential norms by US secret services deliberately utilizing private actors to avoid public oversight and criminal liability, he somewhat cynically, if correctly, concludes that the American public is less concerned about the opprobrium of torture than the fiscal outlay required to perform it: 'reforms – if any – seem most likely to come because each of these [private sector] torturers cost the US taxpayer double the salary of a Federal employee' (at 204).

The reputational and fiscal costs of privatization likewise feature prominently in Chia Lehnhardt's final essay on the potential role of private contractors in United Nations peacekeeping. While focussing on the technical challenges with respect to the attribution of responsibility under international law, she raises the interesting point of legitimacy. She objects to simplistic, self-serving claims by industry representatives that the reputation of the United Nations could easily be married to these firms' operational prowess. While her concerns about considerable reputational risks to the world organization are certainly correct and duly noted, this reviewer still believes that the argument as such would have merited a more thorough investigation.

Overall, this is a timely and thorough collection on an issue of increasing global importance. Like its companion volume, this work is characterized by a pragmatic approach and intellectual flexibility and will be read with great benefit by a wide range of practitioners and academics alike.

Individual Contributions

Simon Chesterman and Angelina Fisher, Introduction;

Michael Likosky, The Privatization of Violence;

Olivier De Schutter, The Responsibility of States;
Angelina Fisher, Accountability to Whom?;
Daphne Barak-Erez, The Privatization Continuum;
Alfred C. Aman, Jr, Private Prisons and the Democratic Deficit;
Mariana Mota Prado, Regulatory Choices in the Privatization of Infrastructure;
Rebecca DeWinter-Schmitt, Human Rights and Self-Regulation in the Apparel Industry;
Jacqueline Ross, Police Informants;
Simon Chesterman, Intelligence Services;
Chia Lehnardt, Peacekeeping;
Simon Chesterman and Angelina Fisher, Conclusion: Private Security, Public Order

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