

BOOK REVIEWS

Private Security, Public Order: The Outsourcing of Public Services and Its Limits
BY SIMON CHESTERMAN & ANGELINA FISHER, eds. [New York: Oxford University Press, 2009. 1xiv + 247 pp. Hardcover: US\$145.00]

Much of the public debate about the use of private military and security companies (“PMSCs”) has focused on PMSCs as a separate and independent phenomenon. This excellent compilation edited by Simon Chesterman and Angelina Fisher, *Private Security, Public Order*, adds much breadth and nuance to this debate by bringing together a group of scholars who analyse the topic of PMSCs through different theoretical frameworks, disciplinary perspectives and comparative case studies.

This compilation is the second of a series resulting from the project on PMSCs by New York University School of Law’s Institute for International Justice. The first compilation of this series, Simon Chesterman & Chia Lehnardt, eds., *From Mercenaries to Market* (New York: Oxford University Press, 2007), focuses on situating PMSCs “in the context of moves towards regulation of activities through market and non-market mechanisms” (at p. 1). This second compilation takes the PMSC debate further by focusing on “transformations in the nature of state authority” (at p. 1). As Simon Chesterman explains, the debate regarding privatisation has previously focused on costs, self-dealing and corruption (at p. 185). Recent reports linking private contractors in Iraq and Afghanistan to prisoner abuse and civilian killings have however, added a new urgency to this debate. This compilation’s contextual treatment of PMSCs against broader themes of privatisation will be instrumental to expanding and furthering the debate on PMSCs.

The chapters in Part 1 of this compilation consider general questions of accountability, such as the type of accountability, the target of accountability and the beneficiaries of accountability. Michael Likosky’s chapter provides a historical overview of private-public partnerships, their complex nature, the different actors involved and the need to adopt a flexible and comparative approach to accountability (Chapter 1). In his chapter, Olivier De Schutter examines the responsibility of different states for the unlawful activity of PMSCs (Chapter 2). Specifically, he examines the extent to which states where PMSCs are registered and states where PMSCs operate may be held responsible for the wrongful acts of PMSCs. In her chapter, Angelina Fisher focuses on the responsibility of PMSCs themselves (Chapter 3). She explains how PMSCs should be held directly accountable for any unlawful activity and the need for PMSCs to establish remedial mechanisms which enable affected

individuals to make claims against the PMSC concerned for harms suffered as a result of its activities.

Part 2 features case studies from other sectors. Daphne Barak-Erez provides an overview of the different types of privatisation taking place across different sectors and emphasises the need to develop a “public law of privatization” (Chapter 4 at p. 84). Alfred C. Aman’s chapter examines the privatisation of prisons in the U.S. and points out certain democratic concerns (Chapter 5). Mariano Mota Prado undertakes an analysis of privatisation processes in the infrastructure sector (Chapter 6). And Rebecca DeWinter-Schmitt’s chapter sets out lessons that may be learnt from the apparel industry in establishing private-public hybrid regulatory mechanisms (Chapter 7).

Part 3’s contributions question whether there should be any limit to the privatisation of traditionally public functions by examining three “extreme cases of outsourcing” (at p. 4). Jacqueline Ross explores how the German authorities regulate the use of private informants in criminal investigations (Chapter 8). Simon Chesterman surveys the U.S. authorities’ privatisation of security and intelligence functions and draws attention to the absence of clear and transparent decision-making standards (Chapter 9). In the final chapter, Chia Lehnardt studies the use of PMSCs in international peacekeeping functions and underscores international law’s limited ability to regulate such PMSCs (Chapter 10).

Private Security, Public Order adds to the current debate on PMSCs in a number of significant ways. First, this compilation substantially addresses what Michael Likowsky refers to as the “empirical deficit” surrounding the privatisation of public functions (at p. 23). Decisions to privatise raise fundamental democratic questions of government accountability and responsibility, but these decisions and their facts are often not subject to public assessment. Comprehensive information is necessary to foster public scrutiny and deliberation. For example, Simon Chesterman’s chapter on the privatisation of intelligence services and Jacqueline Ross’ chapter on police use of private informants describe little known case studies as well as their legal and political implications. In his chapter, Chesterman undertakes a definition and account of the “not well-defined” field of intelligence (at p. 186) and describes the different types of outsourcing occurring in this area. In her chapter, Ross draws on social science “participant action” research findings to illuminate and explain the dynamics and associated problems of using inside informants or organisational insiders in police operations (at pp. 169-173).

Second, the authors of this compilation position the topic of PMSCs within broader ongoing academic discussions. Michael Likosky situates PMSCs within the historical trend towards “privatization of violence”. He traces the historical roots of transnational private-public partnerships to colonial chartered companies and railroads (at pp. 13-15). Daphne Barak-Erez argues that there is a need to understand the “full picture” of privatisation as well as “the inter-relations among the various forms of privatization” (at p. 72). She goes on to describe nine different forms of privatisation and the main features underlying this trend, specifically, “an increased role of private entities in the operation of social and economic activities; intensive collaboration between public authorities and private entities; and the application of private-market logic to the authorities’ activities” (at p. 73). A number of chapters,

such as those by Alfred Aman and Simon Chesterman, explain how the 'privatisation' dilemma raises important democratic questions. By making comparisons and drawing connections to wider academic debates, these contributions invite us to consider the issues raised by the use of PMSCs from different angles.

Given their expansive powers, how then should PMSCs be held responsible and accountable for their decisions and actions? Several authors focus on identifying and applying different regulatory frameworks to PMSC activity. Olivier De Schutter applies the international law of state responsibility to the question of PMSC activity. A state may be directly held responsible for a PMSC's activity if the latter is directly attributable to the state. Alternatively, a state may be held responsible based on its obligation to protect rights that may be violated by the PMSC concerned. De Schutter notes that while the latter should primarily be discharged by the PMSC's host state, the home state where the PMSC was registered may have a responsibility to exercise extraterritorial jurisdiction over the PMSC concerned if the host state is unwilling or unable to perform its obligations. While De Schutter focuses on state responsibility, Angelina Fisher notes that the right to a remedy holds PMSCs directly accountable to individual victims. She explains that PMSCs are under the general duty to "respect human rights" and "become aware of, prevent, and address adverse human rights impacts" (at p. 58). Under certain conditions, PMSCs are also obligated to respect and promote the rights of those within "its sphere of activity and influence" as well as protect and prevent the abuse of those to whom it has "proximate ties" (at p. 58).

At the domestic level, Daphne Barak-Erez observes that public law has traditionally taken a limited and hands-off approach to privatisation (at p. 76). She argues and shows why constitutional and administrative law needs to be systematically rethought and applied to three areas of privatisation: the decision to privatise, the decision-making process, and the regulation of privatised bodies and functions. Simon Chesterman's chapter underscores how there is a need for state authorities to develop and adopt clearer guidelines regarding which activities may be privatised. He demonstrates how the language of "inherently governmental", as presently applied by US authorities, is insufficiently clear and proposes that there needs to be a more transparent definition of what this means to ensure governmental accountability (at p. 203).

Contributors to this compilation recommend a number of possible oversight and remedial mechanisms. The models and guidelines suggested are particularly valuable given the lack of established practice in this area. Angelina Fisher evaluates a list of remedial models, such as the intergovernmental agency model, the industry association model and the office of ombudsman (at pp. 59–67). Mariana Mota Prado advocates designing contractual processes to improve PMSC accountability, such as by requiring competitive bidding that is subject to public scrutiny (at p. 131). Jacqueline Ross explains how German confidentiality rules indirectly limit and regulate the German police's use of private informants in their investigations (pp. 166–170). Based on her study of the Fair Labour Association and the Worker Rights Consortium, Rebecca DeWinter-Schmitt suggests principles that should guide the design of regulatory mechanisms, including the need for "inclusive multi-stakeholder involvement", such as NGO participation (at p. 149).

Given its varied perspectives, creative proposals and clear analysis, *Private Security, Public Order* is an invaluable addition to the field and will be of great interest to scholars, policy-makers and the general public alike.

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