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Private Security, Public Order: The Outsourcing of Public Services and Its Limits (Introduction)

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Simon Chesterman and Angelina Fisher (eds), *Private Security, Public Order: The Outsourcing of Public Services and Its Limits* (Oxford University Press, 2009). For information about the book, click here.

Introduction

Simon Chesterman & Angelina Fisher

Private actors are increasingly taking on roles traditionally arrogated to the state. In the industrialized North and the developing South, functions essential to external and internal security and to the satisfaction of basic human needs are now routinely contracted out to non-state agents. In the area of privatization of security functions, attention by academics and policy makers tends to focus on the activities of private military and security companies (PMSCs), especially in the context of armed conflicts, and their impact on human rights and post-conflict stability and reconstruction. The first edited volume emerging from New York University School of Law's Institute for International Justice project on private military and security companies, *From Mercenaries to Market*, broadened this debate to situate the private military phenomenon in the context of moves towards regulation of activities through market and non-market mechanisms. This second volume looks at the transformations in the nature of state authority.

In the past two decades, the responsibilities delegated to private actors—especially but not only in the United States—have grown in depth and breadth. The much-discussed role assumed by Blackwater (now rebranded 'Xe') and other contractors in Iraq is in many ways the tip of the privatization iceberg. Many sectors traditionally regarded as 'public' have experienced varying degrees of privatization, from the operation of public utilities to the administration of prisons, from intelligence activities to peacekeeping. Drawing on insights from work on privatization, regulation, and accountability in the emerging field of global administrative law,² this book examines private military and security companies through the wider lens of private actors performing public functions.

The book is organized around three sets of questions. First, how do PMSCs fit within the broader context of outsourcing of public functions to private entities, and what implications does this have for the possibility of holding them or other actors accountable? Secondly, what lessons can be learned from other cases of privatization of public services? Thirdly, should there be limits on the ability of governments to outsource traditionally 'public' functions?

¹ Simon Chesterman and Chia Lehnardt (eds), From Mercenaries to Market: The Rise and Regulation of Private Military Companies (Oxford: Oxford University Press, 2007).

² See Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15. Additional materials are available online at www.iilj.org.

Part I considers the problem of accountability posed by PMSCs. In chapter one, Michael Likosky describes the links between privatization of military civilian activities and the significance this has for efforts to hold PMSCs accountable for their conduct. Through examining the trajectory of privatization across time and across sectors, he outlines the important role that public-private partnerships played from colonialism to the 20th century industrialization of the United States. The link between nominally civilian privatization projects and violence is explored through a Peruvian natural gas pipeline project: the contract did not directly address security questions but its effect on an indigenous population was no less violent. The difficulty of dissociating public and private aspects of a given industry is seen in the modern high tech industry: though its archetype is the garage entrepreneur made good, the foundations of this industry lie squarely in the US Department of Defense. Both insights suggest the need to have a broader and more flexible approach to accountability. Among other things, this means looking not just to who is contracting for or carrying out a given service, but also determining who is financing it. It also means looking beyond court-based prosecution of wrongdoers to embrace a wider range of potential legal and political means of accountability.

The basic questions of *what kind* of accountability is being sought with respect to PMSCs and *to whom* are examined in chapters two and three. In chapter two, Olivier De Schutter looks at the varied efforts to use the international law of state responsibility to hold states in which PMSCs are registered or incorporated (home states) accountable for their conduct. In chapter three, Angelina Fisher considers the possibilities for ensuring that accountability takes into account the interests of those most affected by PMSC conduct.

De Schutter examines whether, under international law, the home state is obliged to control its companies. Must such a state allow its courts to adjudicate claims filed against these companies? If such duties do exist, how may they be implemented taking into account the sovereignty of the state on the territory of which the PMSC is operating? Home states can be held responsible for PMSC actions when the company is a mere fiction used to pursue state interest, if governmental authority has been delegated to it, or if it is in fact under state direction or control. Such 'easy cases' do not capture the growing instances of PMSCs being employed by private entities (rather than states), however. In those cases, if the state on whose territory the company operates is unable or unwilling to hold the company accountable, the home state should bear that responsibility either through the exercise of extraterritorial jurisdiction or through the use of incentives, such as selective public procurement schemes, reporting obligations, or other contractual terms.

Fisher continues the discussion of PMSC accountability but focuses on 'downward' accountability; that is, accountability of private companies to the victims of their conduct. She concludes that conditions under which victims of PMSC abuse may seek legal accountability of the companies are limited under

many domestic regimes as well as under international law. Attention must therefore be shifted to creating grievance mechanisms as an alternative means of augmenting PMSC accountability to victims. She proposes a mechanism for PMSCs that draws on experience of other private industries, including those discussed in the subsequent chapters. To be effective, such a mechanism must enjoy legitimacy with both the industry and the local populations, be accessible to the public, be transparent both with regards to process and the outcome, engage relevant multi-stakeholders in productive dialogue, have a predictable and fair process, and empower local populations.

Addressing these accountability gaps requires political will and institutional creativity that has, to date, been lacking in the private military and security sector. Part II therefore turns to what lessons may be learned from other sectors. The use of lethal violence by private actors is often identified as a uniquely troubling aspect of the PMSC phenomenon.³ As Daphne Barak-Erez demonstrates in chapter four, however, our understanding will remain only partial if this is not discussed in the broader context of other privatization policies. Through the prism of domestic constitutional law, with recourse to comparative tools, Barak-Erez analyses the trend to privatize public functions and discusses the limitations on privatization in general and the limitations on privatization of security functions in particular. She argues that the realities of widespread privatization of public functions necessitate a rethinking of the basic principles of constitutional and administrative law beyond the mere adjustment of specific rules and doctrines. She proposes a framework for examining private initiatives, including the decision to outsource military and security functions, that is situated around three fundamental questions: What are the boundaries of privatization? What is (and ought to be) the administrative process of privatization? And what are (and ought to be) the outcomes of privatization and its regulation? Consideration must be given to whether certain types of actions or powers cannot be privatized because they represent core government functions. If this initial threshold is crossed, one must consider the process through which the decision to privatize is made. This, in turn, requires a level of transparency and participation frequently lacking in the military and security sector, but seen at least in part in other sectors. The other chapters in Part II build on this framework, considering the boundaries of privatization (chapter five), the administrative process of privatization (chapters five and six), and the outcomes of privatization and its regulation (chapters six and seven).

In chapter five, Alfred Aman describes the case of prison privatization in the United States. Prisons offer an interesting insight into debates over which coercive aspects of the state should be kept within government hands, and thus shed some light on the outsourcing of military functions. They also present a

³ See generally Sarah Percy, 'Morality and Regulation', in Chesterman and Lehnardt (eds), From Mercenaries to Market, 11.

slightly more developed example of administrative oversight of outsourced functions. Aman argues that the question of what is and is not 'inherently governmental' is a decision that must be made democratically, through an open political process that meets standards of transparency and accountability set in place by legislatures and overseen by courts. A new kind of administrative law may need to be created to respond to the democratic deficit associated with modern privatization.

In chapter 6 Mariana Mota Prado also considers the question of how a decision to privatize is made and examines how such a decision impacts the choice of regulatory framework. By developing a comparative analysis of the privatization processes in infrastructure sectors as well as the military and security sector, Prado discusses the circumstances under which a regulatory framework is established, designed, and enforced. Drawing on her analysis, Prado develops a series of recommendations for the establishment of a regulatory process for PMSCs. She argues that a government contracting with PMSCs should not only justify why privatization is necessary but that any such claim should be assessed by an independent body (similar to the cost-benefit analysis of regulation performed by the Office of Management and Budget in the United States). Secondly, with limited exceptions, a competitive bidding process should be the default rule for contracting with PMSCs, allowing for limited exceptions. Thirdly, the contracting government needs to assess some of the broader national public policy concerns that are connected to privatization of military and security services and impose across-the-board regulation to address them, preferably through legislative intervention. Similarly, home countries need to assess broader international public policy concerns that are connected to privatization of the military and impose regulation that applies to activities of its PMSCs abroad. Echoing Barak-Erez and Aman, Prado calls for transparency in privatization of private military and security services, arguing that citizens should have access to all information related to the competitive bidding process and contractual provisions. These policy implications must be considered within the broader regulatory context of different countries, because the circumstances under which a regulatory framework is established are relevant to the content of such a framework and its effectiveness and, consequently, can have an impact on the success or failure of a privatization process.

A more in-depth look at the content of regulation is provided in chapter seven by Rebecca DeWinter-Schmitt. She examines the evolution of regulatory regimes in the apparel industry as a comparison with efforts to regulate PMSCs. Lessons learned from the efforts of the Fair Labor Association and the Workers Rights Consortium might provide a road map for creating a hybrid public-private regulatory regime for PMSCs that contains all the necessary elements of high standards, implementation guidelines, independent monitoring, an enforcement mechanism, and public reporting. Incentives could be established

by giving companies an industry seal of approval that would indicate their adherence to ethical business practices. DeWinter-Schmitt posits that this could be attractive to non-state customers, like NGOs and other companies that need security and are worried about the reputations of their providers. The existence of a hybrid regulatory regime would not, however, alleviate the state's responsibility to conduct ongoing assessments of the human rights impact of such an effort, including an examination of the global structure and operations of the PMSC industry. Part of those assessments should include whether the provision of certain security services should be limited to government actors.

This question of limits is the focus of Part III, drawing on three extreme cases of outsourcing that have been controversial in their own way: the use of private informants in domestic criminal investigations, the use of private companies in the collection and analysis of intelligence, and the use of private security companies in peacekeeping operations.

In chapter eight, Jacqueline Ross considers the circumstances in which a state can use private informants in criminal investigations. Informants raise concerns of abuse and lack of accountability similar to those posed by PMSCs, but Ross argues that the unique nature of informants as criminal insiders (that is, members of a criminal enterprise) makes the delegation of investigative functions to them particularly troubling. Criminal insiders recruited as informants often remain in place in their targeted organizations and continue to participate in crimes in order to provide investigators with information about the organization's activities. In doing so, informants may purchase and sell contraband undercover, or participate in other offences with their criminal associates. Ross looks closely at the German approach to regulating informants through promises of confidentiality under a series of conditions (including that the informant cannot participate in the crime he or she is investigating) and concludes that German confidentiality regulations not only guard against many of the risks identified with the use of criminal insiders but also provide an instructive example of how regulators set outer limits on the outsourcing of security operations, intelligence gathering, and criminal investigations. Confidentiality regulations may enable the state to keep the police from delegating police investigative functions to those who are structurally unreliable without some compensating mechanisms of accountability.

Unlike the domestic context, safeguards against the risks associated with the use of private parties in intelligence functions are lacking in the international context. In chapter nine, Simon Chesterman surveys the manner in which US intelligence functions have been outsourced in collection activities such as electronic surveillance, rendition, and interrogation, as well as the growing reliance on private actors for analysis. Chesterman focuses on three challenges to accountability specific to the privatization of intelligence: secrecy, incentives, and the difficulty of defining what activities should be regarded as 'inherently

governmental'. Secrecy is inherent to intelligence tasks but undermines effective oversight in predictable ways even when those tasks are performed by government agencies. This suggests the need to avoid further removal of intelligence activities from democratic structures. The different incentives that exist for private and public employees also call for wariness in determining whether and to what extent intelligence functions should be outsourced. The simplest way of containing some of the accountability-related problems would be to forbid certain activities from being delegated or outsourced to private actors at all. A determination of which activities to forbid, however, is far from simple. In the United States, this question is framed in the language of 'inherently governmental' functions: those to be carried out by government employees only. There is, however, great uncertainty over the meaning of the term and little prospect of intelligence agencies adopting a robust definition of 'inherently governmental' functions. The significance of this limitation may be diminished by the ability to outsource even inherently governmental functions in so far as they could be construed merely as 'implementing' policy with some form of oversight. Nonetheless, a transparent definition of what functions should be 'inherently governmental' is the most effective way to achieve clarity, thus echoing the voices of other authors in this book.

Peacekeeping has long presented a troubling frontier for outsourcing. States—in particular Western states—may be reluctant to send their troops on humanitarian missions. Kofi Annan noted a decade ago that the world was probably not ready to 'privatize peace'. Nevertheless, the role of PMSCs in peacekeeping operations has been increasing. In chapter ten, Chia Lehnardt surveys the roles that PMSCs have taken on and the more ambitious possibilities that have been proposed. There is, at present, little guidance on what functions can be outsourced in the implementation of a UN Security Council mandate. In fact, PMSCs have been engaged in a broad spectrum of activities, including some of the more ancillary aspects constituting peace consolidating measures or post-conflict measures, such as the recruitment and training of troops and the clearing of mines. At the same time, the status of PMSCs under international humanitarian law is murky at best. The situation is compounded by the questions of who ultimately bears responsibility for company misconduct. Despite these concerns, suggestions have been made for the expanded use of PMSCs, such as employing them as UN blue helmets or even as UN-mandated or UNled troops carrying out military operations. The implications of taking further steps towards a more active role for PMSCs extend beyond questions of law or operational feasibility as the privatization of peace would also amount to the outsourcing of the international community's most basic commitments under the UN Charter.

⁴ Kofi Annan, 35th Ditchley Foundation Lecture, 26 June 1998, UN Press Release SG/SM/6613.

The privatization of public functions thus raises important legal and political issues in the governance of private actors, but also calls into question the nature of what functions should be 'public'. The concluding chapter by the editors draws together findings from the various chapters and outlines the key elements of a governance framework for private military and security functions.

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