

Simon Chesterman and Chia Lehnardt (eds). ***From Mercenaries to Market. The Rise and Regulation of Private Military Companies.*** Oxford: Oxford University Press, 2nd unchanged paperback edition 2009 (1st hardcover ed. 2007). Pp. 287 pages, £24.99. ISBN: 9780199563890.

Currently prevailing notions of the state have been considerably shaped by Max Weber's definition which distinguished the state from other socio-political communities through its monopoly on the use of *legitimate* violence to enforce its administrative decisions. In order to make this normative claim effective, the state needs to have the necessary coercive instruments (military, police, penitentiaries, etc.) at its disposal.¹ At least in the industrialized nations there has therefore been a linear increase in the strength and reach of the state.² This seemingly perennial increase in the ability of the state to engineer social outcomes, if necessary through the use of coercive means, was fuelled by a steady increase in economic production and a corresponding enlargement of the relative share of public spending. The lasting recessions in the aftermath of 1973, however, dramatically altered this overall picture. The end of full employment, seemingly unlimited economic growth, and attendant tax revenue exposed fundamental structural limits of statehood. This set in motion an ongoing academic and public discourse on the appropriate functional scope of a weakening state in an increasingly globalizing world which appeared far less amenable to deliberate political control, given pressures towards greater efficiency, competitiveness, and rationalization.³

The ensuing debate led to the re-appraisal of alternative conceptions of statehood which had been common until the early modern era before the onset of the dramatic innovation and concentration of the governmental machinery described by Weber. Even before the creation of the Weberian modern rational corporate state (*rationaler Analtsstaat*), the state possessed a monopoly on legitimate violence. But because it lacked the necessary direct means of coercion, the state generally relied for the delegated enforcement of its decisions on the services of duly authorized private actors.⁴

Notwithstanding considerable political and ideological differences, until the prolonged crisis of confidence of the 1970s there existed a remarkable congruity of views between East and West, North and South, about the normative desirability and functional superiority of the Weberian rational, bureaucratically organized state. This consensus shattered after 1979 when the 'conservative revolution' in Great Britain and shortly afterwards in the United States challenged conventional wisdom on the appropriate scope and shape of the state. The events of 1989 and the ensuing rapid collapse of the Soviet Bloc seemingly confirmed the supremacy of these new conceptions of a leaner, less interventionist, more mediate state, centred on far-reaching shifts of state functions to a private sector deemed to be more flexible, efficient, and cost-effective. While any privatization is inherently contentious, the transfer of core sovereign functions to private actors posed particular challenges. While for instance the privatization of railways, postal services, telecommunications, and health care may be politically contested and technically difficult, their implementation does not pose any insurmountable legal or normative problems. It is the state's monopoly of violence, by contrast, which raises fundamental questions about the nature and identity of modern statehood, to say nothing

¹ See, *inter alia*, C. Tilly, *Coercion, Capital and European States, AD 990–1990* (1993).

² See, for instance, Parrillo, 'The De-Privatization of American Warfare: How the U.S. Government Used, Regulated, and Ultimately Abandoned Privateering in the Nineteenth Century', 19 *Yale J L and the Humanities* (2007) 1.

³ See here especially T. Skocpol *et al.* (eds), *Bringing the State Back In* (1985).

⁴ See here, *inter alia*, J.E. Thomson, *Mercenaries, Pirates, and Sovereigns: State-building and Extraterritorial Violence in Early Modern Europe* (1996).

of the ensuing complex problems of practical regulation and supervision. At the heart of these questions lie concerns about democratic political oversight in the application of force, as well as compliance with constitutional and international human rights obligations when private actors use violence on behalf of the state.⁵ These processes began to unfold domestically in the context of (partial) privatizations of correctional facilities and related parts of criminal justice, as well as the increasing substitution of hitherto publicly provided police functions through private security, mainly in the context of object and personal protection, 'gated communities', and the like. The international arena lagged behind in this respect, and only since the 1990s have private security providers (re-)emerged as prominent actors. These developments are largely the result of a confluence of two separate historical phenomena. The first was the ideologically driven re-evaluation of the essential functions of statehood under Prime Minister Thatcher and President Reagan: a process which not only led to far-reaching changes in the operation of government in these two countries, but likewise affected a host of allied nations and, importantly, came to be reflected in strongly market-oriented policies of many multilateral organizations (also known as the *Washington Consensus*, i.e. the imposition of a standard package of radical structural adjustment imposed on crisis-ridden developing countries seeking World Bank and IMF assistance. It has subsequently been thoroughly refuted, not least by the institutions themselves⁶).

The second crucial factor has been the simultaneous end of the Cold War and the

South African Apartheid regime which provided the material wherewith to implement these ideas in the security sector (at 181–183). The end of the militarized bipolar competition permitted a certain 'peace dividend' in the form of, e.g., strongly reduced military manpower and financial budgets. Simultaneously, the loosening of inter-bloc stability allowed a number of local conflicts to erupt (former Yugoslavia, Somalia, Ethiopia–Eritrea, Congo, Rwanda, etc.). The newly-found superpower consensus, demonstrated impressively during the First Gulf War 1991, and the existence of massive, apparently redundant military capacities increased domestic pressure in Western nations to intervene militarily in overseas conflicts (Bosnia, Somalia, Cambodia, Namibia, etc.) for essentially humanitarian ends.⁷

What the general public failed to realize, however, was the elementary mismatch between the operational demands of pacifying internecine overseas conflicts and the kind of military capabilities which were suddenly available in large numbers. Western armies had for decades prepared for territorial defence against armoured invasion by Soviet tanks and bombers; they were ill-prepared for jungle or desert warfare amidst a hostile alien population. The contemporary landscape of conflict suddenly required hardened light infantry, special operations troops, and considerable force projection (air- and sealift) capabilities, which were unavailable in the typical Western army with its heavy investments tied up in armoured and mechanized warfare.⁸ This mismatch led to a dramatic increase in the demand for private military expertise, not only in technically sophisticated areas such as the maintenance and operation of complex weapons systems, but progressively also in traditional core competences of the

⁵ See in this respect Program on Humanitarian Policy and Conflict Research at Harvard University (HPCR), *Private Security Companies in the Occupied Palestinian Territory (OPT): An International Humanitarian Law Perspective* (2008).

⁶ See Rodrik, 'Goodbye Washington Consensus, Hello Washington Confusion? A Review of the World Bank's "Economic Growth in the 1990s: Learning from a Decade of Reform"', 44 *J Econ Lit* (2006) 973.

⁷ See here in general S.M. Lynn-Jones and S.E. Miller (eds), *The Cold War and After: Prospects for Peace* (1997).

⁸ On the particular operational needs of overseas warfare in peripheral conflicts see, *inter alia*, M. Boot, *The Savage Wars of Peace: Small Wars and the Rise of American Power* (2002).

military, such as logistics and air transport, object and personal protection, intelligence gathering and evaluation including the interrogation and incarceration of detainees, as well as privately-supplied light infantry and special forces.

Coincidentally, this enormous increase in public demand was met by large contingents of superbly trained, often battle-hardened, former soldiers from the dramatically changing armies of post-communist Europe, post-Apartheid South Africa, and Israel, where the combined effects of sustained economic recession and the Oslo Accord had likewise created considerable pressure for military change. In these countries and in the US and UK, as well as to a smaller extent in France, the reservoir of decommissioned military personnel was tapped in the 1990s by a large number of security companies of a new type. These companies could offer the entire gamut of military operations, including offensive operational planning, training, even full territorial defence and military campaigns (as were provided on behalf of Croatia and Bosnia in the mid-1990s by American companies). This new availability of offensive capabilities on hire and the dramatically increased number and size of these companies, as well as the growing operational role they play in major campaigns by Western powers, have called into question the adequacy of existing regulatory instruments in international law.

It is debatable to what extent the International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries (signed in 1989 and entered into force in 2001) and similar instruments are still relevant. Irrespective of the opaqueness of international and municipal legal regulation, an important industry has sprung up the services of which the international community (including the UN, humanitarian and developmental multilateral and non-governmental organizations) has come to rely upon. If and how this emerging global market for private violence is amenable to normative control and public regulation is the subject of the present collection of essays. The 15 chapters of the book present the complexity of the underlying

issues well and offer a good overview into the normative contradictions. The book deliberately focuses on the experience of the past 20 years, and therefore excludes the mercenary problem during decolonization. This concentration is an asset because, as shown above, the contemporary prominence of private security companies represents a fundamentally different phenomenon from the mercenary forces of yesteryear. Nevertheless, it would have been helpful for students new to the field if a historical chapter could have provided some background on the development of the existing strong normative censure of mercenaries in international law. This would have facilitated an appreciation of the qualitatively different functional and organizational range offered by contemporary companies in the course of the last 20 years. In this context it would likewise have been desirable if a dedicated chapter had offered some insight into the reasons for the extreme circumspection shown towards the industry.

Quite irrespective of the obvious political, ethical, and regulatory problems associated with the new-found prominence of private security providers, the existing categorical prohibition of mercenarism in international law appears anachronistic. Increasingly, even states in the South see great potential in a collaboration with private security companies, as these offer access to a range of expertise which would otherwise not be available, or only at unacceptable cost, as well as offering much greater operational and political flexibility. One can thus observe that a wide range of different states no longer object on normative grounds to the deployment of private security providers. The most typical case in this respect is certainly the 'new' Iraq after 2003. Its extremely exposed government relies very heavily on the services of private security companies, as shown convincingly in the contribution by David Isenberg in the present volume (at 82–93).

The strongly abolitionist streak of international law is derived from the negative experience many former colonies have had with mercenaries in the course of their independ-

ence struggles.⁹ However, this unequivocal normative rejection has increasingly been replaced by a more nuanced appreciation of the phenomenon. Even if particularly South African and Israeli security companies have engaged in ethically questionable joint ventures with local elites and extractive industries (for instance in Sierra Leone, Angola, Papua-New Guinea, etc.), a sizeable number of Third World nations nowadays have a legitimate interest in cooperating with private security providers. This applies especially to the fields of Security Sector Reform (SSR); Demobilization, Disarmament, Reintegration of former civil war combatants (DDR), as well as mine clearance and sundry training needs. Elke Krahmann in her contribution highlights these aspects and provides a good overview of the changing needs of post-conflict states. Her text is characterized by very careful provision of reference material and can therefore serve as the point of departure for further studies of the field (at 94–114).

The extreme violence of many contemporary unstructured conflicts has challenged the adequacy of unarmed neutrality upon which humanitarian and developmental activities have traditionally relied, having led to a reappraisal of the need for armed protection.¹⁰ From here it was only a relatively small step to demand, as many liberal individuals and organizations did in the 1990s, active military intervention for humanitarian reasons.¹¹ It was the confluence of the vulnerability of humanitarian workers and the attendant perceived necessity actively to interfere in local conflicts which led to the dramatic increase in the number of military interventions, and thereby to the increase in the role of private security companies. Here a separate chapter

on the ethics of using force in the pursuit of moral goods and the corresponding moral ambivalence surrounding mercenarism would have been helpful.¹²

This omission is regrettable as the choice of the contributing authors betrays an uncommon proximity to the industry in question. All authors, including those who are relatively critical, like Louise Doswald-Beck on the applicability of international humanitarian law (at 115–138) and Angela McIntyre and Tya Weiss on the dependence of weak African states on mercenaries (at 67–81), take the view that private security companies should not be rejected wholesale, but appreciated for their positive contributions to the stabilization of local conflicts. This liberal approach (in the sense outlined above, namely defending the necessity of humanitarian intervention) and its attendant normative and practical problems could have been addressed in a dedicated chapter, given the centrality of these underlying assumptions to the main argument of the book. The introductory and concluding chapters by Simon Chesterman and Chia Lehnardt explicitly underline the differences between modern security companies and traditional soldiers to defend the necessity of a ‘realistic approach’ (at 2) which balances the positive contributions of the former against the negative historical experiences with the latter. But even if one agrees generally with this approach, the moral case for the constructive contributions made by private security companies fails to be made explicitly in the book.

Having said that, Sarah Percy’s contribution on morality and regulation (at 11–28) does indeed represent a workable point of departure for further discussion of this question. She stresses convincingly the myopia of instinctive calls for further legal proscription in the framework of the UN; efforts which remain futile in the face of the apparent practical value private security providers offer to a host of state and non-state actors. These points are taken up by Kevin A. O’Brien and

⁹ See, for instance, Botha, ‘From Mercenaries to “Private Military Companies”’. The Collapse of the African State and the Outsourcing of State Security’, 24 *SA Yrbk Int’l L* (1999) 133.

¹⁰ See, *inter alia*, N.O. Berry, *War and the Red Cross: The Unspoken Mission* (1997).

¹¹ The intricacies of the dilemmas involved in this demand are well laid out in J.L. Holzgrefe and R.O. Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (2003).

¹² Something akin to N. Leader, *The Politics of Principle: The Principles of Humanitarian Action in Practice* (2000).

Anna Leander in their respective contributions (at 29–48 and 49–66). O'Brien especially demands greater pragmatism because he sees the public image of the industry to be skewed by a few extreme (mostly South African) cases, while many of the remaining firms undoubtedly offer valuable services in the context of endemically weak Third World states (at 29, 33). Unfortunately, his suggestions for municipal regulation remain unconvincing, as do those offered by Leander. Both contributions suffer from an over-abundant use of commonplace phrases and the nonchalant deployment of insufficiently understood core tenets of Weber and Clausewitz. Especially Weber's axiom of the state monopoly on legitimate violence and the Clausewitzian theory of violence in the service of political aims (at 50, 54) are strewn around more as buzzwords than useful building blocks of a coherent argument.¹³

The contribution by James Cockayne, by contrast, starts from the premise that political science in general and principal–agent theory in particular can help our understanding of the relationship and relative weight of private security providers and their governmental and non-governmental principals. He offers a good abstract definition of the research programme and convincingly outlines the respective cost-benefit calculations of both parties (at 197–198) in order to show the inherent weakness of remote agency which lies at the core of self-regulatory approaches propagated by industry associations and certification mechanisms (at 207–208). These fundamental difficulties of any national regulation are likewise conceptualized in the contributions by Marina Casparini on national licensing schemes (at 158–180), Deborah Avant on general problems of regulation (at 181–195), as well as Andrew Bearpark and Sabrina Schulz on the future of the international (commercial) market for security (at 239–250). One should

mention in this respect that both Bearpark and Schulz, as well as Isenberg, represent industry associations founded by private security companies (the British Association of Private Security Companies (BAPSC) and the British American Security Information Council (BASIC), respectively; a prominent role is likewise played by the US-American International Peace Operations Association (IPOA), which is not represented in the book, as well as by similar organizations in South Africa, France, and Israel). It is noteworthy and commendable, however, that both contributions are nevertheless characterized by a requisite degree of self-critical distance to the field: '[c]ritics further argue – to some extent legitimately – that self-regulation will ultimately favour the industry rather than the public interest' (at 249).

Given apparent market failures, it is difficult fully to share their optimism regarding the prospects of certificatory and licensing schemes premised on the self-healing abilities of the market. Other avenues for enforcing norm compliance by private actors appear to this reviewer to be more promising, not least the possibilities of creating greater awareness for applicable legal norms among private security contractors through the use of civil litigation, insurance premiums, and contractual terms imposing greater corporate (financial) liability. Unfortunately, such instruments are discussed in the book only peripherally, especially in connection with mass claims brought against the 'interrogation specialists' of Titan Corp. implicated in the torture at Abu Ghraib (at 227, 236, 252). In this respect, the behaviour of the British and American governments, which not only did *not* respond to massive public allegations of severe misconduct with investigations into these allegations, but, on the contrary, renewed contracts with the implicated companies,¹⁴ is remarkable.

¹³ A better way of doing this is offered for instance in J. Keegan, *A History of Warfare* (1993) and Bassford, 'John Keegan and the Grand Tradition of Trashing Clausewitz: A Polemic', 1(3) *War in History* (1994) 319.

¹⁴ See here, for instance, Schooner, 'Contractor Atrocities at Abu Ghraib. Compromised Accountability in a Streamlined, Outsourced Government', 15 *Stanford L & Policy Rev* (2005) 549.

Such apparent failures in the award and supervision of public contracts are the subject of arguably the best contribution in the present volume, Laura A. Dickinson's effort to show parallels between existing administrative law dealing with privatizations in the criminal justice and health care sectors with the emerging field of private military contractor liability (at 217–238). She argues eloquently and convincingly that the inclusion of appropriate contractual terms can force private third party providers of public services to comply with constitutional and human rights provisions. Such clauses can force private providers to ensure adequate staff training and create effective complaint mechanisms. As conceded at the beginning of this review, private security providers do offer states a plethora of policy options the very utility of which make international law's rigid prohibition of mercenaries appear increasingly anachronistic. An often under-appreciated value of private contractors to states is precisely the ability to conduct 'robust' operations without much of the political and legal oversight attaching to government agencies (often subsumed under the label of 'plausible deniability'). As Chia Lehnardt describes in her contribution, international rules on state responsibility are generally broad enough to cover the activities of private contractors and attribute them to a particular state (at 139–157). Nevertheless, the apparent rarity and difficulty of such attributions and their necessarily indirect and tardy effect on the firms and their personnel make Dickinson's contractual approach appear far more immediate and practically relevant.

In conclusion, it needs to be stated that the present volume cannot but be an introduction to a complex and rapidly changing field. All contributors share a certain accommodating proximity to the industry's position which some readers may find objectionable. Such possible normative opposition notwithstanding, the expressly pragmatic approach chosen by the editors is to be commended for its realism and search for relevance. Furthermore, the book's careful editing, its compact but helpful references, and the thorough index are laudable.

Individual Contributions

James Jonah, Foreword;

Simon Chesterman and *Chia Lehnardt*, Introduction;

I Concerns

Sarah Percy, Morality and regulation;

Kevin O'Brian, What should and what should not be regulated?

Anna Leander, Regulating the role of private military companies in shaping security and politics;

II Challenges

Angela McIntyre and *Taya Weiss*, Weak governments in search of strength:

Africa's experience of mercenaries and private military companies;

David Isenberg, A government in search of cover: Private military companies in Iraq;

Elke Krahmann, Transitional states in search of support: Private military companies and security sector reform;

III Norms

Louise Doswald-Beck, Private military companies under international humanitarian law;

Chia Lehnardt, Private military companies and state responsibility;

Marina Caparini, Domestic regulation: licensing regimes for the export of military goods and services

IV Markets

Deborah Avant, The emerging market for private military services and the problems of regulation;

James Cockayne, Make or buy? Principal-agent theory and the regulation of private military companies;

Laura A Dickinson, Contract as a tool for regulating private military companies;

Andrew Bearpark and *Sabrina Schulz*, The future of the market;

Simon Chesterman and *Chia Lehnardt*,

Conclusion: From mercenaries to market

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