Der fünfte und letzte Teil des Buches trägt die Überschrift „The Spirit of International Law". Hier erstellt *Koskenniemi* „a sociology of the international law as a profession" (S. 271), wobei er die Rolle von Richtern, Rechtsberatern, Aktivisten und Akademikern im Spannungsfeld zwischen Überzeugung und Zynismus beschreibt (S. 284 ff.). Angesichts aktueller Herausforderungen wie der zunehmenden Fragmentierung und Deformalisierung des Völkerrechts betont *Koskenniemi* abschließend die Rolle des Völkerrechts als „secular faith", als „placeholder for the vocabulary of justice and goodness, solidarity, responsibility" und damit als Projekt eines kritischen Universalismus im kantschen Sinne (S. 361).

„The Politics of International Law" baut auf das solide Fundament einer dezidierten Auseinandersetzung mit den großen Theoretikern der Disziplin (u.a. Hans Kelsen, Hersch Lauterpacht, Carl Schmitt und Hans Morgenthau) und ist ausgeschmückt mit den Anekdoten des ambitionierten Praktikers *Koskenniemi*. Nach seiner Analyse bedeutet die notwendige Politisierung des Völkerrechts Fluch und Segen zugleich; in einer Weltordnung zwischen Hegemonie und Emanzipation nimmt *Koskenniemi* den Völkerrechtsanwender in die Verantwortung. Dabei sind bereits die in der Aufsatzsammlung verarbeiteten autobiographischen Elemente für sich genommen so interessant wie ungewöhnlich und eröffnen intime Einblicke in das vielzitierte Gesamtwerk des nunmehr Sechzigjährigen.

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Reconciling Privatization with Human Rights

Intersentia (School of Human Rights Research, Volume 49), Cambridge/Antwerp/Portland, 2012, xvii + 750 pp., paperback, 105 €; ISBN 978-1-78068-049-1

"Reconciling Privatization with human rights" by Antenor Hallo de Wolf is a dissertation published with Intersentia's School of Human Rights Research Series. The book analyzes privatization mainly through the lenses of international human rights law. The goal is to answer the question "whether and if so how international law in general and human rights law in particular can be reconciled with the privatization of state functions and services" (p. 11). The book is divided in two parts with four chapters each. The first part includes an in-depth doctrinal analysis of legal obligations regarding human rights-based constraints on privatization and a detailed elaboration on human rights accountability. At the center of the second part are two detailed case studies on the privatization of military and security services as well as the privatization of water services.

In Part I, the author focuses first on the term "privatization" (Chapter 2). He argues that privatization is a cyclical and dynamic rather than a linear process. This argument is underpinned by a historical review of selected tasks and functions, such as the management of prisons and security services, or of water and electricity networks. The author illustrates, for example, that the management and ownership of water and electricity services passed from

private to public hands at the end of the 19th century, and was often transferred back to private companies during the period of neoliberalism in the 1980 s and 1990 s, before several of these private companies were recently re-nationalized. The author concludes that it is therefore hard to identify certain inherent or core state functions that can *per se* not be privatized (p. 56). Consequently, instead of trying to search for allegedly inherent state functions, he argues that one should look at the practical consequences of the delegation of certain functions, tasks or services on private entities in light of the current international (human rights) obligations of states. (p.56).

Having thus set the stage, the third chapter examines potential legal constraints stemming from international law and especially from international human rights law. Even though there can be constitutional limitations – Uruguay's constitution for example outlaws the privatization of water services – the author asserts that neither general international law nor human rights law *directly* prohibits privatization (p. 125), but is quasi "privatization agnostic" (p. 684). However, it remains open whether there are other legal constraints, such as the principle of democracy, which could limit a government's ambition to privatize certain legislative or judicial tasks and functions.

As international law does not prohibit privatization, the next question is if there are any legal obligations on *how* to privatize. Consequently, the author analyzes next the *indirect* constraints imposed by international human rights law on privatization policies. He extensively reviews international human rights case law that explicitly deals with privatization, but also explores what human rights doctrine, such as the concept of core human rights obligations, indirect horizontal application or the margin of appreciation, offers to clarify the relationship between human rights and privatization. The author concludes (p. 195 f.) that human rights law does not impose *substantive* constraints, but that states rather enjoy a wide margin of appreciation to decide how to privatize. However, human rights law imposes certain *procedural* constraints that limit this margin of appreciation. These are rooted in the obligation to respect, protect and fulfill human rights and to adopt effective remedies for victims of human rights transgressions. There are three main observations in this regard: Firstly, states have to refrain from taking measures that would result in a violation of human rights. To do so, states shall guarantee public consultation of potentially affected stakeholders and the implementation of human rights impact assessments. Secondly, states must take the necessary steps to prevent violations by private actors carrying out public tasks and function, including the establishment of adequate regulatory measures. Finally, the obligation to fulfill human rights requires states to create conditions in which certain minimum standards can be met. This means, for example, that certain privatized services must remain accessible to all at an affordable prize.

The fourth chapter discusses the accountability for human rights abuses in the context of privatization. Here, the author argues for the need of a new paradigm to hold private entities exercising public functions directly accountable. The starting point of this argument is the concept of state responsibility and the attribution of private activities to the state. Reviewing decisions of the Human Rights Committee, the Committee against Torture, the European

Court of Human Rights and the European Court of Justice, the author identifies what he calls a functional approach: the respective bodies have made clear that the state is and remains responsible for abuses committed by private actors *in the exercise of public functions* delegated to them (p. 257). The author further develops his thesis by comparing how private actors entrusted with public functions are held accountable for human rights abuses under constitutional and other public law norms. This comparative analysis focuses on a broad range of jurisdictions, namely the European Union, the UK, the US, Canada, France and Ecuador. The author identifies a growing tendency to apply constitutional norms to private entities when exercising public tasks or functions. Based on these findings from international and constitutional human rights doctrine, the author concludes the first part of the book by suggesting a new paradigm: Private actors should be regarded as "public actor *sui generis*" (p. 349) when they carry out public functions, tasks or services, especially if these were delegated by the state. As "public actors *sui generis*", they can be held directly accountable for human rights abuses. This thought-provoking concept might indeed help victims to hold private actors accountable (at least in national courts, as long as only states have standing in international human rights institutions). Admittedly, the concept does not come without problems. First, the qualifier "*sui generis*" itself demonstrates how hard it is for human rights doctrine to grasp the role of private entities carrying out public functions, tasks or services. Second, as the author himself admits (p. 349 f.), it is difficult to draw a line between the public and private sphere. As private actors, even when exercising public functions, still enjoy human rights themselves, such a line seems important in order to avoid or resolve a collision of human rights. The author offers a set of criteria that must be fulfilled in order to determine which activities are public and thus subject to direct human rights review (p. 350). Even though it might be hard to precisely identify a clear line, this point of criticism does not rebut the proposed paradigm: law making and law application are almost always also a "line-drawing" exercise.

The first chapter of Part II describes the practice of Human Rights Courts and Human Rights Monitoring Bodies concerning human rights and privatization (Chapter V). This well-structured compendium could serve as a convenient work of reference for everyone who wishes to look up what a certain committee or body has decided in the context of privatization and human rights. However, the role this chapter plays in answering the main research question remains a little vague: a reader might wonder why these decisions are not presented and discussed in Part I if they are relevant to the development of the central arguments.

The next chapters present two extensive case studies, illustrating and testing the results of the previous analysis. They deal with two very different sectors and touch upon political and civil as well as social and economic rights. Chapter VI focuses on the privatization of military and security services, and, specifically, on the situation in Abu Ghraib prison, Iraq. Chapter VII discusses the privatization of essential public utilities, namely the privatization of water utilities in the city of Buenos Aires. Especially the latter comes at a time when popular resistance against the privatization of water services is even growing in Europe: One of the first European Citizens Initiatives invites the European Commission to propose legislation to protect the human right to water. In this context, "Reconciling Privatization with Human

Rights" provides not only many doctrinal human rights arguments, but also interesting insights and experience from Argentina. The eighth and final chapter of the book contains a summary, concluding remarks and a list of recommendation that states and other public entities should respect in order to guarantee that the "privatization of functions, tasks or services in certain sensitive areas" is compatible with human rights (p. 690 ff.). These recommendations include the application of human rights principles such as proportionality, the consultation of affected stakeholders, the adoption of effective regulatory measures and the provision of effective legal remedies.

In conclusion, the author carefully develops his argument and offers exhaustive reference to relevant international and constitutional case law as well as academic literature. The idea of a "public actor *sui generis*" for direct human rights accountability of private entities is worthy of more discussion among academics and practitioners alike. In addition, the case studies shed light on two important areas of privatization. The very readable constitutional comparison could also be seen as a starting point for future research, which might add more jurisdictions from the so-called "global south" or advance the analysis by also applying contextual approaches to comparative law and give more account to the social, historical, economic and political context.

Due to the largely doctrinal methodologies applied, the book seems most accessible to *lawyers* dealing with the respective topic. Practitioners might also want to have a closer look at the list of recommendations in the final chapter. Given the wide range of sectors and human rights involved, these recommendations are very broad and might need to be duly appropriated for specific situations and purposes. Still, they read like recommendations from a policy paper and might serve as practical guidelines for a human-rights based approach to privatization.

The book is a mine of information comprising a doctrinal analysis of international and constitutional case law and two extensive case studies. But the author's desire for comprehensiveness is a strength and weakness at the same time: "Reconciling Privatization with Human Rights" is, as the author himself admits, an "overly long book" (p. v). This might, but should not scare potential readers away. The structure of the book is very accessible, and thanks to the helpful overview provided by an informative summary as well as a set of preliminary and final conclusions in each chapter, the reader will be able to easily navigate through the 750 pages and focus on those parts that are of most importance to him or her.

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