VIENNA WORKSHOP

10 MAY 2019

Does the contracting of outcomes from the private security sector in support of national military power have normative ethical legitimacy?

This is a question that has been analysed in some depth by a number of published authorities, but almost invariably in the somewhat narrow context of *how* such activities are undertaken rather than in the context of *for what contracted outcome* the private security actor is being engaged to deliver.

This delineation is important. Where the ethical legitimacy of physical actions undertaken by a commercial security contractor may be assessed against criteria such as international and domestic laws[1] or the broadly accepted ethical and legal norms attached to the conduct of warfare,[2] the ethical legitimacy of engaging him [or her] in the first instance is less clear.

This raises a concern in that, if it is legitimate [for example] for the UK Government to engage the private security actor for the purpose of providing or enhancing military capacity, is it also legitimate for an unstable or maverick state to do the same? Or indeed, is it legitimate for non-state actors such as multinational corporations or even ideological groupings to engage with the private security sector for the provision of military services?

[1] For example, laws legislating against crimes such as murder, rape, torture, crimes against humanity etc.

[2] For example, the Geneva Conventions of 1949.

If so, then it is a sector that requires a clearly defined ethical boundary if we are to conceptualise it in terms of its significance as a constituent actor in future structures of local, regional and global power.

At the strategic level, there is widespread agreement that it would be unethical for states to employ private companies to wage war on their behalf.[3] This perception is based upon the hitherto accepted norm that sovereign states hold a monopoly of force, what Kinsey (2006) terms the "bureaucratisation of violence".[4] This is a viewpoint that strongly reinforces the perception that soldiers are the moral agents of the state, and by extension accountable to both the state and to its citizens.

This soldier/citizen relationship serves as a crucial differentiation between state militaries and Private Military Security Companies (PMSCs), especially when contrasted against an international norm against the secret use of military force. The deployment of state militaries is subject to political and ultimately public scrutiny, so the argument goes, whereas the engagement of PMSCs attracts no such transparency.

In short, there is no ethically significant relationship between civilian contractors and the citizens of the state, whereas there generally exists a very strong relationship between the soldier of the state and its citizens.[5]

Notwithstanding the well debated and increasingly analysed differentiation between state militaries and PMSCs, it is a reality that

---

[3] M. Frost (a), *Ethics in International Relations: A Constitutive Theory,* Cambridge: Cambridge University Press, 1996, pp. 132-133.

[4] C. Kinsey (a), *Corporate Soldiers and International Security; The Rise of Private Military Companies,* Abingdon and New York: Routledge, 2006, p. 40-41.

[5] M. Frost (a), op.cit., p. 171-174.

private security capacity has, for many states, become a component element of their national military power. This is evidenced across the literature, and is doctrinally acknowledged in the UK under its emerging 'Whole Force' strategy. Notwithstanding this, formal integration of private military capabilities into the doctrine of UK Defence policy is resisted in some quarters because of a contested norm that it is unethical to contract for commercial military capabilities.

It follows that a clear ethical boundary for contracted private security outcomes needs to be identified in order to establish moral legitimacy if we are to continue using the industry in support of national military power.

How then, to do this?

What is noticeable, is that extant research focuses almost exclusively upon the *actions* of private security contractors rather than the *outcomes* they are contracted to achieve. Whilst it is clearly of the utmost ethical importance that private security contractors have their actions subject to critical analysis, it is my argument that the question of *what they are being contracted to achieve* has a broader utility in making judgments about whether their use is ethically justifiable in the first instance.

What we need here then, is a robust theoretical model of normative analysis for ethically assessing the specified outcomes of private security capacity. In order to build such a model we are inexorably drawn into a consideration of human rights, for almost every argument opposing the use of PMSCs pushes the potential abuse of human rights centre-stage.

There is no clearly defined philosophical, let alone statutory, limit to the use of PMSCs in support of institutional power, or by other clients. That the world's most powerful nations are utilising private security capacity as a significant component of their national military power affords a crude commercial legitimacy to its use by any client, into whatever security assemblage the industry cares to embrace.

If we are to develop a rational view on when the private security industry is being utilised for unethical purposes, and ultimately generate broad international consensus on a framework for its regulation, we need to clearly understand from where such uptake can draw its ethical legitimacy. If we can identify and authenticate this source of legitimacy, then it may subsequently be possible to establish a framework of analysis that has the potential to set an ethical boundary for any given contracted outcome.

It is my contention that establishing such boundaries are essential in ensuring the private security industry does not evolve into a significant agent of rights-abusing *coercive* power, whilst at the same time ethically legitimising its use as a component element, or force multiplier, of national military power.

Security assemblages

Ethical legitimacy has to take account of the remarkable restructuring of global power dynamics in the post-9/11 era, and it is here that the theory of *security assemblages* can help.

Prior to 9/11, Bauman positioned that the contemporary era may be defined as "…one of 'liquid modernity', characterised by flowing forms rather than the traditional rigid demarcations of geographical boundaries,

hegemonic systems of commerce and state-controlled communications".[6] As described in considerable depth by Abrahamsen and Williams,[7] the outsourcing of private security capacity in support of national military power is swept-up in this broad process.

It is against this background of change, rapidly accelerated through the invasions of Afghanistan and Iraq, that the structuring of national military power has trended towards a market model of supply and demand. The component elements of national military power are no longer structured in their entirety as huge armies of combat troops, logisticians and the paraphernalia of war poised to deploy or react at a moment's notice. Force structure for many client states is today constituted in a flexible response model that requires an ebb and flow of capacity from reserve forces and the private security sector across a wide range of disciplines, the scale of which is dictated by emerging operational requirements.[8]

This is not, of course, a leeching away of the state's 'monopoly of violence'. The state retains its own authority to contract for private security capacity or otherwise. The scale and uptake of such capacity therefore remains a component element of national military power, and the private security industry does not represent a military power of its own volition. Constituted as an independent, self-tasking agent of military power, it would in any case have no ethical standing within what we might term the *intra-practice society of citizen-states*.

[6] Z. Bauman, *Globalization: The Human Consequences,* Cambridge, UK: Polity, 1998.
[7] R. Abrahamsen and M. Williams (a), op.cit., pp. 58-88.
[8] Directorate General for External Policies of the European Union, op.cit., p. 21 (4.1).

It is therefore relatively straightforward to ascertain that state disassembly and the modern-day trend towards an asymmetry in national force structure does not in itself imply a compromise of ethical integrity where private security capacity is contracted in support of national military power. Asymmetrical force structure – a combination of state and private military actors - is a policy choice by nation-state governments based on a range of causal factors, none of which necessarily imply an ethical failure on the part of the state. Realigned state security assemblages of force structure that require the provision of private security capacity are wholly bound by the modern state domain of discourse; they are enacted through practices of contract law, Human Rights law, and the Laws of Armed Conflict; and they are situated by definition within the intra-practice society of citizen-states. In similar vein, the provision of private security capacity to sub-state or trans-state actors such as multinational corporations is enacted within the same boundaries, so can therefore not be defined in a holistic sense as being unethical.

A significant difficulty arises, however, when we consider provision of private security capacity in support of supra-national entities such as ISIL. These groupings have assembled local security alliances and have structured hybrid military capabilities that transcend national boundaries and appear to, or claim to, operate outside the intra-practice society of citizen-states.

Whilst it is self-evident that these groupings have evolved local or trans-national security assemblages that have no legitimacy within the society of citizen-states, it is my contention that they are not operating *outside* the intra-practice of this society. Rather, they pose an ethical puzzle – a 'hard

case' – for governance structures within the intra-practice, whilst in fact claiming for themselves the component rights that define it.[9]

Whilst claiming these rights for themselves yet denying similar rights to large communities of alternative faiths or of race, they define themselves as acting *within* the intra-practice society of citizen-states. As such, the provision of any private security capacity in support of military power being projected by such groupings, in common with such capacity being provided in support of national military power, becomes subject to ethical assessment through critical analysis utilising those norms of practice and the identified body of rights conceptualised through the prism of what we can term *constitutive theory*.

I am positioning human rights as central to the required dialectical discourse in analysing the research question because I am proposing that contracted outcomes from the private security sector in support of national military power do in fact have normative ethical legitimacy *provided* such outcomes do not require or imply the compromise of first generation human rights, or of certain specified citizenship rights.

How can I claim this?

I am able claim authenticity for this position because participants in PSMCs are constituted as citizens and rights holders in the global practice of civil society and within the intra-practice society of sovereign states. What these actors say and what they claim for themselves proves this. I

[9] The Australian government, for example, states that ISIL "…aims to establish a Salafist-orientated Islamist state spanning Iraq, Syria and other parts of the Levant". https://www.nationalsecurity.gov.au/Listedterroristorganisations/Pages/IslamicState.aspx (Accessed 30 May 2017).

am not imposing upon them any external standard, but am in fact applying a set of standards that, as members of these global practices, they already accept and must therefore be accountable to. These standards include *human rights*.

By human rights, I do not mean the entire list of rights specified under the United Nations Universal Declaration of Human Rights;[10] nor do I mean the various additional rights adopted by individual sovereign nation states. What I do mean are the so-called *negative* liberties, usually known as 'first generation' human rights. These rights (which may include freedom from being arbitrarily killed, tortured or physically assaulted, etc.,) are termed negative liberties because they are construed as freedom from the harmful actions of others. They are universal in nature. 'Second generation' rights, such as access to social security or education, accrue to the individual through the positive actions of benefactors.

The central point here is that first generation rights are contextualised as the individual being free from harm and from the effects of coercive power, whereas second generation rights are contextualised as the individual receiving some form of positive benefit that is dependent upon available resources within a structured social practice.

How though, are these first generation human rights actualised? Can they be actualised in the so-called 'state of nature', i.e., in civil society, outside the intra-practice society of sovereign states? This question drives to the heart of, and largely defines, *constitutive theory*.

[10] General Assembly of the United Nations (a), op.cit.

Constitutive theory

I have already positioned that holders of first generation human rights own these rights within the practice of civil society, that is, in the global society of humanity that is inclusive of every human being regardless whether they are citizens of a sovereign state or otherwise. First generation human rights accrue to individuals as *civilians;* as members of this civil society. Under constitutive theory however, a right can only become actualised as a right if there exists a reciprocal agreement between members of the practice that it will be mutually respected.

This concept of reciprocity is fundamental to the existence of any right, and the expression of agreement to mutually respect one another's rights in effect *constitutes* the actualisation of the right. Human rights cannot exist in a realisable form unless they are conceptualised on this basis, and they can only be coherently actualised within a constitutive practice such as the *intra-practice society of citizen-states*.

The concept that all people, everywhere, are participants in both global civil society (as civilians) and the society of sovereign states (as citizens) provides solid ground upon which to build a logical and defensible argument for ethical legitimacy that may be subject to rational, dialectical discourse.

It is therefore a central contention of my research that the use of private security capacity in support of national military power, or indeed by any other contracting entity,[11] is only permissible where it is utilised for purposes that claim their ethical legitimacy within the society of modern

[11] Such as multinational corporations, the United Nations and other non-governmental organisations.

sovereign states, and where contracted outcomes do not compromise the derivation of certain rights that extend from this arena of human interaction.

Such encapsulation allows research to be bounded, and analysis of contracted outcomes to be tested, against a clearly delineated theoretical model of constitutive ethics in both international relations and in human rights. The absence of such encapsulation renders debate fractious, contested and confused… the current position. The key for progress is to *ethically legitimise use of the industry in support of national military power*. This can only be done through the establishment of a model of analysis such as the one presented here.

In summary

Problems attached to analysing PMSCs as an emerging institutional field include categorisation by typology. Current categorisations such as those defined by Singer and Kinsey are by *function and space*. My contention is that future categorisation should be by *contracted outcomes*. It is worth noting here that *actual outcomes* is a separate issue, whose academic dynamics are properly attached to the concept of consequentialism [a debate for another day].

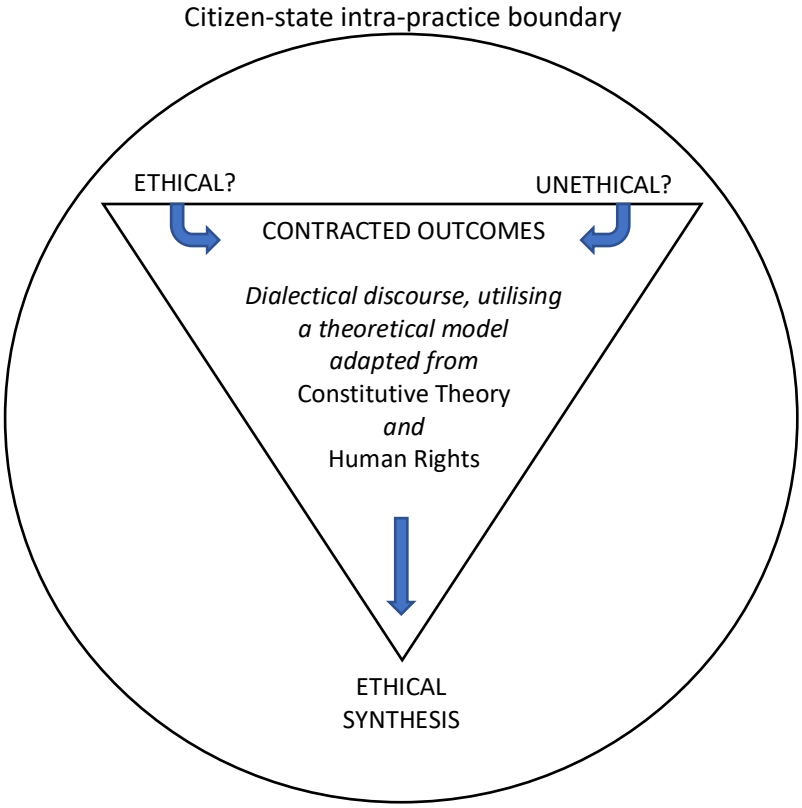
Institutionally at both the state and international levels, there is no discernible single view of PMSCs other than, that controversy about their use centres around questions of ethics. The normative view, therefore, must be addressed before concepts such as universal regulation can be applied, or even effectively analysed.

Mechanisms for accountability and democratic scrutiny of PMSCs can only be effectively identified if there is universal acceptance of the industry's ethical legitimacy in its support of national military power. Given the scale of uptake from the industry by the biggest countries in the world, it seems to me a redundant and somewhat futile position to view PMSCs in any other way. Rather, we should be analysing whether *outcomes contracted from them* are ethically sound, or otherwise.

Finally then, under constitutive theory, use of PMSCs in *war as an institution* becomes legitimised where the conflict at hand draws its own legitimacy within the constitutive frameworks of – for example – the Laws of Armed Conflict, its derived Conventions, and, of course, relevant Articles drawn from the United Nations Charter. Thus, logically, there should be a *parallel international Convention* that regulates, and legitimises, the roles and contracted outcomes of PMSCs, and the actions of their contractors.

The inevitable asymmetry of self-regulation in its function, application and integration, does not provide the universality required for addressing what may be considered one of the more important questions facing the structure, command, control and ethical legitimacy of military power assemblages into the future.

Robert Parr MBE MSc
Kings College London
robert.parr@kcl.ac.uk


Citizen-state intra-practice boundary
ETHICAL?
UNETHICAL?
CONTRACTED OUTCOMES
Dialectical discourse, utilising a theoretical model adapted from
Constitutive Theory
and
Human Rights
ETHICAL SYNTHESIS