



Private Military Contracting and the CAF Social Contract

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PRIVATE MILITARY CONTRACTING AND THE CAF SOCIAL CONTRACT

ABSTRACT

2022 saw an influx of reporting of former military members from NATO countries working as private military contractors for foreign militaries, notably China. Military contracting by retired Canadian Armed Forces (CAF) members, as with Allies and partners, is not secret. The manner in which retired service members utilize their transferrable skills and qualifications gained from their employment in the armed forces varies widely. Of great concern, however, is the contracting of those with exclusively military skills, such as combat or military-specific qualifications, for adversarial or near-adversarial countries. This raises significant ethical issues surrounding the parameters of employment of former members of the armed forces when utilizing the knowledge and experience gained from service to the state, to an adversarial country, for monetary gain.

This paper examines the ethics of private military contracting for adversarial or near-adversarial countries using a contractarian ethical framework. It argues that once a member joins the CAF, there exists both explicit and implicit social contracts to which both the state and the soldier are subject to. Importantly, the implicit social contract exists for both the state and the member beyond one's period of service has ended, and that the former CAF member is obliged, through the implicit social contract, to continue to adhere to the ethical standards which fundamental to the CAF.

As context to the ethical argument, an examination into the state of great power competition and to the threats to Canadian national security are conducted, as well as an overview of the reasons why statutory intervention is required to enforce the implicit social contract of CAF members.

PRIVATE MILITARY CONTRACTING AND THE CAF SOCIAL CONTRACT

CHAPTER 1 – INTRODUCTION

In 2022, reports emerged in the United Kingdom of retired Royal Air Force (RAF) pilots were training Chinese military pilots from the Peoples Liberation Army Air Force (PLAAF). As the media investigated, more information emerged that a group of pilots were contracted by a South African private contractor and working for the Chinese Government. The British Parliament launched an investigation. Other examples soon emerged. Military contracting by retired Canadian Armed Forces (CAF) members, as with Allies and partners, is not secret. The manner in which retired service members utilize their transferrable skills and qualifications gained from their employment in the armed forces varies widely. Of concern, however, is the contracting of those with exclusively military skills, such as combat or military-specific qualifications, for adversary or near-adversary benefit. This opens up larger questions regarding the ethics of such employment, as well as legal restrictions or implications of such actions.

In an era of heightened competition in a multipolar world, not only is conflict fought on a battlefield, but in a larger space that engages not only governments but civil societies more broadly. The spectrum of conflict has expanded, and the international political entities often operate below the legal threshold of armed conflict. Threats to Canadian national security are not necessarily overt, and will continue to occur in all domains.

In a post February 2022 world, given the Russian invasion of Ukraine as a clear example of military aggression against the territorial sovereignty of a neighbouring state, few would dispute the ethics of contracting with Russia. However, what about other countries which qualify as near-adversaries, or threaten Canada or other western countries below the legal threshold of armed conflict. This paper will explore the ethics behind contracting for foreign adversarial or near-adversarial states post-CAF employment. Using a contractarian approach, it will examine the existence of a social contract between the CAF and each individual member, both explicitly and implicitly, and the implications of such social contracts beyond one's service in the CAF. There are consequences to Canadian national security where former members of the CAF work for such countries who threaten Canada across the continuum of conflict.

This paper will examine the ethical implications of post-military employment with adversarial countries. It will examine if it is reasonable to restrict the economic freedom of former CAF members based on the current geopolitical security climate, and if so, what are the appropriate methods to do so. While the emphasis of this paper is on Canada, it will also look to examples of both the United Kingdom and the United States, as allied countries who are experiencing similar issues of former military members contracting for foreign governments, and given the vast levels of integration which occurs amongst both members of the North Atlantic Treaty Organization (NATO) and the Five-Eyes Alliance (Canada, United Kingdom, United States, and New Zealand).

This paper asserts that service with the CAF involves an implicit social contract that one will not use the specific knowledge and skills gained through CAF employment to give advantage to an adversary once a member is no longer employed with the CAF. Chapter One will review and analyze the contemporary operating environment where conflict is conducted below the threshold of declared states of war. It will problem frame this issue and analyse both the current situation of post-military employment with examples from allied countries, and the current post-employment restrictions which the CAF imposes on members, which will be demonstrated to be primarily focused on economic and material conflict of interest matters, largely directed to the technological and acquisition side of military procurement. Chapter Two will also include an analysis on the differences between mercenaries, private military corporations, private security contractors, and private military contractors.

Chapter Three will be an analysis of the ethical considerations of private military contracting and the evolution of corporate social responsibility. It will use a contractarian approach to the analysis of the social contract between the soldier and the state, and will argue that there exists an implicit social contract which exists once a citizen signs joins the armed forces, and that this implicit social contract continues to exist, and both parties continue to be subject to it, beyond ones release from the CAF. Therefore, the ethical conditions which members of the CAF exist under continue beyond their service to the State.

Having established that a continuing implicit social contract exists, Chapter Four will examine the options available for when this social contract is broken. Specifically, when a former CAF member breaks this social contract by working as a private military contractor for an adversarial or near-adversarial country. It will discuss the legislative options which are required at the federal level in order to enforce the social contract, and examine the difficulty in enforcing such laws. When a problem is identified, the desire to legislate it can be strong. However, are laws governing foreign conduct of Canadian citizens of value when enforceability is so difficult, particularly where the act is conducted extraterritorially, and is legislating the ethical behaviour of former-CAF members the correct approach. An analysis of both legal and ethical approaches to restrict advising of foreign military will be conducted.

CHAPTER 2 – THE PROBLEM FRAME

This chapter will examine the differences between mercenaries, private military companies and private military contractors, framing the context of this paper to private military contractors. This Chapter involves a discussion on Great Power Competition and emerging threats to Canadian national security. Following examples of former military members working for private military corporations sub-contracted to foreign militaries, an overview on current restrictions on post-CAF employment will be conducted.

Through the course of a military career, valuable skills are obtained through military trade training. Some military trades, such as Artillery or Armour, have no civilian equivalent, although there are skills obtained which can be used for employment outside of the military after one decides to conclude their career with the Armed Forces. Other trades, such as pilots, have directly transferrable civilian equivalents. However, despite declared no direct civilian equivalent, there are times where certain qualifications are used for employment after departing a military force. As an example, several Joint Terminal Attack Controllers (JTAC), ground controllers for Close Air Support (CAS) have been employed by foreign governments to instruct students in the use of CAS for the government of the United Arab Emirates. All trades in the CAF develop knowledge of Tactics, Techniques and Procedures (TTPs) which are valuable to an adversary looking to develop tactical knowledge of how Canada and its allies both train and fight on the spectrum of conflict.

Mercenaries, Private Military Contractors, and Private Military Corporations

The Oxford English Dictionary defines mercenary as a “person who works merely for money or other material reward; a hireling. In later use: a person whose actions are motivated primarily by personal gain, often at the expense of ethics.”¹ Under International Humanitarian Law, a mercenary is defined as any person who is recruited locally or abroad, participates directly in hostilities, is motivated to do so by the desire for private gain and is compensated for doing so, and is neither a national nor a member of the armed forces of a party to the conflict, and has not been sent on official duties by a State that is not a party to the conflict.² Sarah Percy notes that the commonly accepted definition of mercenary has two components: “mercenaries are foreign, having no national association with any of the parties to the conflict in which they fight; and their dominant motive is financial gain.”³ Similarly, H.C. Burmester suggests a mercenary as “a volunteer who, for monetary reward, enters into an agreement to fight for the armed forces belonging to a foreign state or an entity purporting to exercise authority over a country or people or a part thereof.”⁴ Burmester also notes that although often primary, monetary reasons are not

¹ Oxford Dictionary, <https://www.oed.com/view/Entry/116635?redirectedFrom=mercenary#eid>, accessed at 27 March 2023.

² International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3. Article 47.

³ Sarah V. Percy, “Mercenaries: Strong Norm, Weak Law,” *International Organization* 61, no. 2 (2007): 371.

⁴ H.C. Burmester, “The Recruitment and use of Mercenaries in Armed Conflicts,” *The American Journal of International Law* 72, no. 1 (1978): 37.

the sole reasons for partaking in a conflict, and mercenaries can also be strongly motivated by political or ideological reasons.⁵

Private Military Contractors , Private Military and security companies

Private military contractors are described as private contractors which “replace soldiers and members of the armed forces in a variety of situations that include armed conflict, prolonged military occupation, peacekeeping, and territorial administration in post-conflict institutional building and intelligence gathering.”⁶ Hin-Yan Liu defines private security companies as a “private, usually for-profit, company offering security-related services which include potentially lethal activities involving the possession and use of weapons and firearms.”⁷ From a definition perspective, private military companies and private security contractors are very close, the latter having solely a security task. It is a logical delineation which further divides an individual contractor from a corporation, the former being an individual and the latter being a company which consolidates and facilitates the actions in contracting for services.

The scope of this paper deals with deals with Private Military Contractors and Companies, given the definition of mercenary is directly involved in violence as part of an identified conflict. Private military contracts, and the corporations they work for, operate in a broader context and includes a wide range of activities, including military provider firms (implementation and command), military consulting firms (advice and training), and military support firms (supplementary services).⁸

Global Strategic Competition

Originating in 1815 at the Congress of Vienna, the term *great power* was first used to describe states such as Russia, Britain, Austria, France and Prussia which could field 60,000 in battle.⁹ Great power competition is the principle that great state powers compete for power and influence on the global stage, militarily, economically, politically, amongst other domains, such as cyber. It is a framework for understanding the historical paradigm for interstate relations and global political affairs prior to World War II, and is the dominant paradigm of interstate relations since 2017.¹⁰ While the historical list of

⁵ Burmester, 37.

⁶ Francesco Francioni, “Private Military Contractors and International Law: An Introduction,” *European Journal of International Law* 19, no. 5 (2008): 961.

⁷ Hin-Yan Liu, “The Involvement of Private Security Companies in Multinational Military Operations,” in *The ‘Legal Pluriverse’ Surrounding Multinational Military Operations*, ed. Robin Geiss and Heike Krieger (Oxford: Oxford University Press, 2019), 407.

⁸ P.W. Singer, “Corporate Warriors: The Rise of the Privatized Military Industry and its Ramifications for International Security,” *International Security* 26, no. 3 (2002): 200.

⁹ DiCicco, Jonathan M., and Tudor A. Onea. “Great Power Competition.” *Oxford Research Encyclopedia of International Studies*. 31 Jan 2023, Accessed 01 May 2023.
<https://oxfordre.com/internationalstudies/display/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-756.jsessionid=4A31DED345CB0B0EA3CDD416B575D5DB>

¹⁰ Thomas F. Lynch III, and Frank G. Hoffman, “Past Eras of Great Power Competition: Historical Insights and Implications,” in *Strategic Assessment 2020: Into a New Era of Great Power Competition*. Ed Thomas F. Lynch III. Institution for National Strategic Studies: National Defence University Press, Washington D.C. 2020. 17.

great powers included 12 countries, current great powers are considered the permanent members of the United Nations Security Council (People's Republic of China, United States, Russia, France and the United Kingdom) plus Germany and Japan.¹¹

Thomas F. Lynch III and Phillip C. Saunders describe three main and enduring characteristics of great powers: increased capabilities in comparison to other states, behavior which indicates a willingness to use these capabilities beyond the borders of their state, and the perception by other state actors that the possession of these two attributes makes it a major power.¹² Lynch and Saunders assess that three states are considered great powers according to this criteria, from the late 20th century to 2020: the United States, Russia, and China.¹³

Throughout the Cold War, great power competition was focused on Russia and the United States. The 9/11 attacks on the United States refocused US and western priorities to the global war on terror. Great power competition is both intensifying and becoming more contentious.¹⁴ Great power competition has now been elevated over war on terror priorities.¹⁵ This represents a paradigm shift to confront China's rise in both economic and military domains, Russia's resurgence in the military domain, and the continued presence of the United States but with an added focus on Asia.¹⁶

Current trends in great power competition identify an expanded scale of global competition. It is no longer just identified as an arms race; competition is increasingly occurring in non-traditional domains, and that competition will be "dominated by economic sanctions, changes in relational power might not occur at the level of military resources... but focus on the game of science, technology and economy."¹⁷

In 2012, China's President Xi Jinping came to power and adopted policies in support of the 'great rejuvenation of the Chinese nation' by 2049, using all instruments of national power, including economic and military.¹⁸ Aaron Friedberg describes President Xi's "strategic activism" as involving more assertive actions in the maritime domain, the

¹¹ DiCicco, Jonathan M., and Tudor A. Onea. "Great Power Competition." *Oxford Research Encyclopedia of International Studies*. 31 Jan 2023, Accessed 01 May 2023.

<https://oxfordre.com/internationalstudies/display/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-756?jsessionid=4A31DED345CB0B0EA3CDD416B575D5DB>

¹² Thomas F. Lynch III and Phillip C. Saunders. "Contemporary Great Power Geostrategic Dynamics: Relations and Strategies," in *Strategic Assessment 2020: Into a New Era of Great Power Competition*. Ed Thomas F. Lynch III. Institution for National Strategic Studies: National Defence University Press, Washington D.C. 2020. 46.

¹³ Lynch, and Saunders, 46.

¹⁴ Timothy W. Crawford, *The Power to Divide: Wedge Strategies in Great Power Competition*. Ithaca, New York: Cornell University Press, 2021. 7.

¹⁵ Thomas Wright. "COVID-19's impact on Great Power Competition," in *COVID-19 and World Order*, ed. Hal Brands and Francis J. Gavin, (Baltimore: Johns Hopkins University Press, 2020), 375-377.

¹⁶ Mark D. Miles and Charles R. Miller, "Global Risks and Opportunities: The Great Power Competition Paradigm." *Joint Force Quarterly* no. 94 (2019): 86.

¹⁷ X.Y. Wang and B. Chen, "World Power Trends and International Relations: Measuring Power with an Entropy-QAP Approach." *Journal of Chinese Political Science*. 2023. <https://doi.org/10.1007/s11366-023-09853-3>

¹⁸ Aaron L. Friedberg, "Competing with China." *Survival: Global Politics and Strategy* 60, no. 3 (2018): 22.

Belt and Road Initiative, and a campaign of increased “peripheral diplomacy intended to offset and neutralise the American pivot [to Asia] while enhancing Beijing’s own standing and influence.”¹⁹ China has made significant investments in infrastructure across Central Asia, including energy and transit infrastructure, and invested billions to secure middle eastern oil, notably in Iran and the Persian Gulf.²⁰ China has invested heavily into regional commercial port infrastructure in Egypt, Abu Dhabi, Oman, Djibouti, and Panama.²¹ It is assessed that the People’s Liberation Army Navy (PLAN) operational support base in Djibouti is a template for additional expansion of Chinese military outside its “traditionally claimed sphere of influence in the South China Sea.”²²

A constant state of global strategic competition is the new norm in international relations. In 2017, the Government of the United States acknowledged this state in its National Security Strategy of 2017 and 2018, citing that it occurs in the political, economic and military realms. In amplification of this document, Secretary of Defense Mattis described facing “increased global disorder, characterized by decline in the long-standing rules-based international order – creating a security environment more complex and volatile than any we have experienced in recent memory. Inter-state strategic competition, not terrorism, is now the primary concern in U.S. national security.”²³

As Mazarr et al note, there is some ambiguity into what a state such a state of competition means, and that there is variation in different approaches: “While there is a expectation of a new era of strategic competition, there is not yet clear understanding what that means, what forms it could take, and what it might imply for U.S. national security or U.S. defense policy.”²⁴ However, their study into the emerging era of international competition finds that this emerging competition is likely to be most intense between a handful of specific states: the United States, China and Russia: “The hinge point of the competition will be the relationship between the architect of the rules-based international order (the United States) and the leading revisionist peer competitor that is involved in the most specific disputes (China).”²⁵ What is consistent, however, is the view that such strategic competition will involve military competition.

New Domains of Great Power Competition

While the ethical considerations of employment with adversarial countries will be covered in Chapter 2, here will cover a synopsis of the national security concerns and

¹⁹ Friedberg, 23. The Belt and Road Initiative is an ambitious China-led infrastructure project, a vast collection of development and investment initiative to link East Asia to Europe, Africa, and the Middle East. Council on Foreign Relations. *Backgrounder: China’s Massive Belt and Road Initiative*. <https://www.cfr.org/backgrounder/chinas-massive-belt-and-road-initiative>. Accessed 30 April 2023.

²⁰ Miles and Miller, 87.

²¹ Miles and Miller, 87.

²² Miles and Miller, 87.

²³ James Mattis, United States Department of Defense, “Summary of the 2018 National Defense Strategy of The United States of America.” <https://dod.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf>

²⁴ Michael J. Mazarr, Jonathan Blake, Abigail Casey, Tim McDonald, Stephanie Pezard, and Michael Spirtas. *Understanding the Emerging Era of International Competition*: RAND Corporation, 2018. 2.

²⁵ Mazarr et al, 1.

why foreign contracting to non-allied countries poses a threat to Canadian national security.

In Canada, national security is defined as “the condition achieved through the implementation of measures that ensure the defence and maintenance of the social, political and economic stability of a country.”²⁶ In its 2021 Public Report, the Canadian Security Intelligence Service (CSIS) identifies eleven threats to Canadian national security: the COVID 19 pandemic; foreign interference and espionage; election security; economic security; cyber threats; counter proliferation; ideologically motivated violent extremism; politically motivated violent extremism; religiously motivated violent extremism; Canadian extremist travellers; international terrorism; and security screening.²⁷ Of these eleven identified threats to Canadian national security, the Director of CSIS identified foreign interference, espionage, malicious cyber activity and violent extremism as the key threats to Canada.²⁸

In this report, the Director of CSIS identifies key trends which affect Canadian national security. These include the spread of misinformation and disinformation, by both state and non-state actors, and the manner which the rate of technological change in a hyper-connected society. The Director notes that the trends in national security warrant “a robust and ongoing discussion on national security” and an acknowledgement on the interconnected nature of security threats: “threats do not stop at the border.”²⁹

In an era of increasing great power competition, strategic competition between China and the Western Allied countries is increasing. Competition is increasing between the United States and China, characterized as “intensifying rivalry... exacerbated tensions over such flash points as Taiwan and the South China sea.”³⁰ The relationship between China and the West in an era of competition is described as complex, with competition occurring across economic, security, technological, and political domains.³¹ The competition continuum “describes a world of enduring competition conducted through a mixture of cooperation, competition below armed conflict, and armed conflict.” In this continuum, there is no start and end state, with actors consistently working in an attempt to gain an advantage. It is in this state which Canada and other Western Allies must be ready to operate, and understand that all actions contribute to a part of the competition. Protecting national military doctrine and TTPs is essential to protect national military intellectual property in order to prevent its use from potential future adversaries.

²⁶ Government of Canada, TERMIUM Plus, <https://www.btb.termiumplus.gc.ca/tpv2alpha/alpha-eng.html?lang=eng&i=&index=alt&srchtxt=NATIONAL%20SECURITY>. 08 February 2017. Accessed at 02 April 2023.

²⁷ Canada. Canadian Security Intelligence Service. *2021 Public Report*. 15-28. https://www.canada.ca/content/dam/csis-scrs/documents/publications/2021/public-report/2021_PublicReport_Digital-ENG.pdf

²⁸ Canadian Security Intelligence Service, 7.

²⁹ Canadian Security Intelligence Service, 7.

³⁰ Timothy R. Heath, *U.S. Strategic Competition with China*. Rand Corporation. June 2021. <https://www.rand.org/pubs/perspectives/PEA290-3.html>

³¹ Heath, 19.

Canadian foreign policy identifies China as an increasingly disruptive global power.³² China continues below the threshold of armed conflict activities towards Canada. The Canadian Centre for Cyber Security assesses that state-sponsored cyber programs of China, Russia, Iran and North Korea, pose the greatest strategic threat to Canada, and that it is a constant and persistent threat which exists amidst a context of larger, global campaigns by these states.³³ Chinese state-sponsored cyber threat actors targeted Canadian science and technology research companies, including maritime technology, vaccines, virus treatments, information technology, aviation, and defence.³⁴ In 2021, China state-sponsored actors “engaged in the indiscriminate exploitation of Microsoft Exchange servers, putting several thousand Canadian entities at risk.” Targets included governmental agencies and department, policy think tanks, academic institutions, law firms, defense contractors and retailers.³⁵ Canada identifies Chinese intelligence services as hostile, utilising non-traditional collectors, such as scientists and business people, which exploit non-transparent means of intelligence collection in Canada, thus exploiting “the collaborative, transparent, and open nature of Canada’s government, private sector and society.”³⁶ This serves as an example of the constant state of competition and the pervasiveness of the threat to Canadian national security.

A Vignette on Contracting

Working for foreign governments is not a new invention and has been conducted for hundreds of years. Nate Jones and Craig Whitlock offer the interesting history of how Captain John Paul Jones, the “Father of the American Navy,” ended up commanding a ship in the Russian Navy. Jones, who commanded several ships during the American Revolutionary War, had received authorization from Congress to sail on a French ship during the Revolutionary War in order to attack British assets in the Caribbean. Approval was granted, although the sailing never took place. Jones used the logic of his approval to sail on French ships as justification to accept an offer from Catherine the Great of Russia to Command the ship *Vladimir* in operations against the Ottoman Empire in the Black Sea.³⁷ Most western states, Canada included, have laws prohibiting or restricting enlistments of nationals into a foreign military. The logic is to prevent foreign recruiting within a state not a party to the conflict, and prevent circumstances where recruitment could call into question a states neutrality to a conflict.³⁸ Examples of this include the

³² Global Affairs Canada, *Indo-Pacific Strategy*, 2022, 10. <https://www.international.gc.ca/transparency-transparence/assets/pdfs/indo-pacific-indo-pacifique/indo-pacific-indo-pacifique-en.pdf>

³³ Communications Security Establishment. *Canadian Centre for Cyber Security - National Cyber Threat Assessment 2023-2024*. 2022. 20. <https://www.cyber.gc.ca/sites/default/files/ncta-2023-24-web.pdf>

³⁴ United States Department of Justice, *Four Chinese Nationals Working with the Ministry of State Security Charged with Global Computer Intrusion Campaign Targeting Intellectual Property and Confidential Business Information Including Infectious Disease Research*. 19 July 2021.

<https://www.justice.gov/opa/pr/four-chinese-nationals-working-ministry-state-security-charged-global-computer-intrusion>

³⁵ Canadian Security Intelligence Service, 22.

³⁶ Non-traditional collectors are defined as “individuals without formal intelligence training who have relevant subject matter expertise.” Canadian Security Intelligence Service, 18.

³⁷ The Washington Post, “‘Father of American Navy’ helmed Russian ship for Catherine the Great” 18 October 2022.

³⁸ Tyler Wentzell, “An 85-year-old law paves the way for Canadians to fight in Ukraine: Tyler Wentzell (SJD) for The Conversation” University of Toronto Faculty of Law, accessed 02 May 2023.

50,000 Canadians who fought for American federal forces in the U.S. Civil War, and the 1,700 Canadians who found in the Spanish Civil War.³⁹ In fact, the United States crafted some of its restrictions around the time that Captain Jones was sailing and advising members of the Second Continental Congress's Marine Committee that rewards for the destruction of ships should be matched by the Continental Navy otherwise it may lead to corruption or loss of personnel.⁴⁰ The framers of the US constitution included foreign emoluments as a restriction in the 1787 Constitution in an effort to combat potential bribes.⁴¹ In 1977, the US Congress delegated authority to "approve foreign work by retired military personnel to the secretary of their military service and the secretary of state."⁴²

Canada's legal restriction on foreign enlistment are contained in the Foreign Enlistment Act of 1985, which restricts enlistment of Canadian in a foreign military at war with a friendly country.⁴³ Canada does not, however, have a similar approval process for working for a foreign government after retirement from the Canadian Armed Forces. This example of Captain Jones differs from the contracting examples which are the scope of this paper, however offers interesting context to the fluidity of employment of military personnel. In the contemporary context, the case of British pilots working overseas for adversarial or near-adversarial countries demonstrates this fluidity, and calls into questions the ethics of such action. As detailed above, private military contractors often view monetary gain as the primary motivation contracting work.⁴⁴ This creates an ethical dilemma where military knowledge gained from service to the state as a soldier in the armed forces is then used to the benefit of an adversary for the monetary gain of an individual.

Private Military Contractors - The Pilots

In 2022, reports emerged that approximately 30 former United Kingdom (UK) Royal Air Force (RAF) fighter pilots has been contracted by the Chinese government to train fighter pilots of China's People's Liberation Army.⁴⁵ The UK Ministry of Defence (MoD) describes the tasks of the contracted former RAF pilots as assisting the Chinese military in understanding the Tactics, Techniques and Procedures (TTPs) of western air forces.

In attempting to minimize the public reaction to the reports, the UK government cited that the majority of these pilots had left RAF service between ten and fifteen years ago, and as such their knowledge of current TTPs and technological advancements would

<https://www.law.utoronto.ca/news/85-year-old-law-paves-way-canadians-fight-in-ukraine-tyler-wentzell-sjd-conversation>

³⁹ Wentzell, "An 85-year-old law paves the way for Canadians to fight in Ukraine: Tyler Wentzell (SJD) for The Conversation."

⁴⁰ The Washington Post, "'Father of American Navy' helmed Russian ship for Catherine the Great."

⁴¹ The Washington Post, "'Father of American Navy' helmed Russian ship for Catherine the Great."

⁴² The Washington Post, "'Father of American Navy' helmed Russian ship for Catherine the Great."

⁴³ *Foreign Enlistment Act, Revised Statutes of Canada* 1985, c. F-28.

⁴⁴ Burmester, 37.

⁴⁵ British Broadcasting Corporation, "Ex-UK pilots lured to help Chinese military, MoD says." 18 October 2022.

be limited.⁴⁶ While it is true that over a decade removed from service would degrade one's skills, in particular in such a highly technical trade such as fighter pilot, still knowledge of TTPs and equipment would still be significant, and as described by an official in the UK MoD, an asset in the development of Chinese understanding of western planes and TTPs: "It's taking Western pilots of great experience to help develop Chinese military air force tactics and capabilities."⁴⁷

The UK government asserts that China is increasing active recruitment of former UK fighter pilots.⁴⁸ One method of recruiting occurs through intermediary consulting companies, such as Test Flying Academy of South Africa (TFASA), based in Oudtshoorn, South Africa. In a statement released 22 October 2022, TFASA characterizes the attention on their work by the UK Government, including the Ministry of Defence, and the media, as partially misleading.⁴⁹ While not directly refuting the claims of British Intelligence services that they are training active duty Peoples Liberation Army Air Force pilots or other Chinese military members, the company describes their work as "a test pilot and flight test engineer training school based in South Africa, providing training services to a variety of clients in the aviation sector, across the MEA and APAC regions... TFASA provides training to test [pilots, flight test engineers, and basic operational instructor pilots under closely controlled security conditions. All training aspects and material are strictly unclassified, and provided either from open source or the clients themselves. No training involves classified tactics or other information, nor any frontline activities."⁵⁰ TFASA maintains their company and employees follow a strict Code of Conduct and have not violated any laws.⁵¹ Additionally, TFASA maintains that the UK MoD has known of their activities and had not previously raised concerns.⁵² At the time of the media frenzy, the UK MoD asserted that the actions of the retired RAF pilots training Chinese military pilots did not break any UK law.⁵³ Both the UK Minister of Defence and the UK Prime Minister's office indicated that the status of the laws surrounding such activities of training foreign militaries would be examined, in favour of stricter controls prohibiting such actions, including working for intermediaries such as TFASA, however as of the time of writing, no legislation has been introduced.

As part of the investigation, the Australian home of TFASA Chief Executive Officer (CEO) Keith Hartley, was searched in March 2023 as part of an Australian Federal Police investigation into former military pilots training Chinese military pilots.⁵⁴ In October 2022, US former Marine pilot Daniel Duggan was arrested in Australia

⁴⁶ British Broadcasting Corporation, "Ex-UK Pilots in China did not share classified information – flying school." 25 October 2022.

⁴⁷ British Broadcasting Corporation, "Ex-UK pilots lured to help Chinese military, MoD says."

⁴⁸ British Broadcasting Corporation, "Ex-UK pilots lured to help Chinese military, MoD says."

⁴⁹ Test Flying Academy of South Africa, "Statement Regarding Media Reports," 22 October 2022. <https://www.tfasa.com/statement-regarding-media-reports.php>

⁵⁰ Test Flying Academy of South Africa.

⁵¹ Test Flying Academy of South Africa.

⁵² Test Flying Academy of South Africa.

⁵³ British Broadcasting Corporation, "Ex-UK pilots lured to help Chinese military, MoD says." 18 October 2022.

⁵⁴ Reuters, "Australian police investigate South African flying school exec over Chinese military training." 17 March 2023.

connection with previous work for TFASA training Chinese pilots, instructing the PLAAF on how to land on US aircraft carriers.⁵⁵ On 18 October 2022, the UK MoD asked the approximately 30 former RAF pilots to cease involvement of TFASA's operations in training PLAAF pilots.⁵⁶ The challenge with this request, is that it can only be requested. Currently the UK Government does not have the legislative authority to restrict extraterritorial employment of former members of the Armed Forces, the same position Canada is in.

Private Military Contractors - The Generals

Working for foreign governments is not new and is not limited to any certain military trade. Senior officers have a long history of consulting (or *tutoring*, as used by TFASA). In the United States, the US Congress permits former military personnel to work for foreign governments as a Foreign Government Employee provided they first obtain approval from their branch.⁵⁷ The US Department of Defense judges applications "based on whether they would adversely affect the foreign relations of the United States."⁵⁸ This law only applied to US military veterans who have served more than 20 years in the United States military and receive a pension. Unapproved Foreign Government Employment by individuals are subject to military discipline.⁵⁹ Annual reports are submitted to the United States Congress by each military department of all approved Foreign Government Employment for retired and general flag officers.⁶⁰

The United States Government has been very restrictive in its acknowledgement and access to information regarding the employment by foreign countries of retired US military. Receiving a continual and total lack of response to their inquiries on the matter, the *Washington Post* sued the US Army, Navy, Air Force and Marine Corps under the United States Freedom of Information Act in order to gain access to documents detailing the number and types of former US military employed by foreign governments.⁶¹ After a two year legal battle, the US Department of Defense released 4,000 pages of documents, revealing that since 2015 more than 500 retired military personnel have or are currently working for foreign governments.⁶² The list of countries for which these personnel worked for is varied, including a large number of Persian Gulf states.⁶³

The range of positions for which former US military personnel are hired for includes lobbyists, political and strategic consultants, think tank analysts, lawyers, public

⁵⁵ Reuters. "Ex-US pilot faces charges over Chinese military pilot training in South Africa." 13 December 2022.

⁵⁶ Janes, "TFASA defends recruitment of former RAF pilots for Chinese training programme." 26 October 2022.

⁵⁷ United States of America, Public Law 95-105, Section 509: Foreign Employment.

⁵⁸ The Washington Post, "UAE relied on expertise of retired U.S. troops to beef up its military." 18 October 2022.

⁵⁹ Congressional Research Service: "*U.S. Nationals & Foreign Military Service*". Washington, D.C.: Targeted News Service 2022. <https://crsreports.congress.gov/product/pdf/IF/IF12068>

⁶⁰ United States of America, Title 37 United States Code, Section 908.

⁶¹ The Washington Post, "Retired U.S. generals, admirals take top jobs with Saudi crown prince."

⁶² The Washington Post, "Retired U.S. generals, admirals take top jobs with Saudi crown prince."

⁶³ The Washington Post, "Retired U.S. generals, admirals take top jobs with Saudi crown prince."

relations executives, aircraft mechanics, instructor pilots, drone operators, missile defence experts, artillery trainers, radar specialists, cybersecurity advisors, logistics planners and maintenance supervisors.⁶⁴

Recently, the *Washington Post* also profiled several former United States General Officers who worked for foreign governments after their departure from the United States military. Interestingly this includes General (Retired) James Mattis, before his appointment as United States Secretary of Defense. After retirement in 2013, General Mattis filed an application in 2015 for federal authorization to accept civil employment with the United Arab Emirates as a military advisor.⁶⁵ General Mattis commenced his term as US Secretary of Defense in January 2017. As part of the US Marine Corps obligations under the legal decisions in response to the Washington Post's Freedom of Information Act Request (FOIA), the US Marine Corps redacted all financial details of Mattis' agreement with the United Arab Emirates.⁶⁶

How Training Foreign Actors Constitutes a Threat

In response to the public reports of former RAF pilots training PLAAF, both the UK Prime Ministers Office and the UK Ministry of Defense that while such actions were not illegal, they would be taking decisive steps to deter such activities in order to protect national security, given the advantage that such training would provide a potential adversary in possible future conflicts, such as a possible war over Taiwan. In response to the targeted recruitment of RAF pilots to train PLAAF, the UK issued an intelligence alert, warning British pilots of Chinese recruitment efforts and reminding them not to disclose classified or sensitive information.⁶⁷

Prior to the public reporting of the training of Chinese pilots in October 2022, the Honourable James Heappey identified national security threats posed by China in the UK House of Commons on 18 July 2022:

“The Ministry of Defence and the whole of Government are taking active steps to counter state threats from China. In line with the NATO strategic concept, we are working with allies to increase our shared understanding and to protect against China's coercive tactics. Together with other Departments, we have strengthened investment screening, the academic technology approval scheme and our export control regimes... But we should not think that our competition with China is exclusively concentrated on the high-end warfighting capabilities that may or may not be required in the first and second island chains. Every single week, we compete with China for influence around the world. Maintaining the defence effort across the global south to protect our interests around the Commonwealth is

⁶⁴ The Washington Post, “Retired U.S. generals, admirals take top jobs with Saudi crown prince,” and The Washington Post, “UAE relied on expertise of retired U.S. troops to beef up its military.”

⁶⁵ The Washington Post, “UAE relied on expertise of retired U.S. troops to beef up its military.” 18 October 2022.

⁶⁶ The Washington Post, “UAE relied on expertise of retired U.S. troops to beef up its military.”

⁶⁷ Tegler, Eric. “Red Alert: Former British Military Pilots Are Training China's Pilots to Fight the West.” Forbes, 18 October 2022.

every bit as important as preparing to stand alongside the US in anything that might happen in the Pacific.”⁶⁸

Both the UK government and private military contractors assert that in the case of former UK RAF pilots training for Chinese nationals, there has been no breach of official secrets and no classified information passed. However, it represents a threat to the operational security of CAF operations. There is great value in understanding the tactics, techniques and procedures (TTPs) of foreign militaries. TTPs are elements of military doctrine and describe the way of doing things of various levels of the military. The lowest level of doctrine, largely surrounding the tactical level of operations and environment-specific, they are general very detailed and prescriptive in nature.⁶⁹ They evolve as the military gains knowledge and experience from both training and operations, and best practices are developed: “They support and implement fundamental principles, linking them with associated applications. The ‘how to’ of TTPs includes descriptive and prescriptive methods and processes.”⁷⁰ Doctrine describes the employment of military assets, individually or collectively, to achieve a military aim.⁷¹ It is defined as “the fundamental principles by which the military forces guide their actions in support of objectives. It is authoritative but requires judgement in application”⁷² Coupled with strategy, defined as “the manner in which military power should be developed and applied to achieve national objectives or those of a group of nations,”⁷³ acquisition of the doctrinal methods of training of a military force can be a powerful tool acquired by a foreign government. Insight into methods of manoeuvre and TTPs enables foreign militaries to train to fight and defeat allied militaries in operations, it enables understanding how a force fights which degrades that force in a future conflict.

A significant amount of Allied Joint Doctrine is available open source, such as some NATO Allied Joint Publications, US Joint Publications, and Canadian Joint and service specific doctrine. A significant amount of both doctrine and TTPs are controlled or restricted access, but not secret, therefore may be shared internally on unsecure networks, but remain controlled materials. An example of a controlled good is certain technical data on munitions, missile technology and which have military significance.⁷⁴ It is an ethical obligation of CAF members to ensure that controlled documents remain controlled and not shared publicly.

While the protection of doctrine, strategy and TTPs will normally be outside the scope of the Security of Information Act, protection of TTPs remains important to the

⁶⁸ House of Commons, *Parliamentary Debate*, 18 July 2022 (James Heapey, UK Minister of Defence.) (UK)

⁶⁹ Canadian Armed Forces Joint Publication A1, Doctrine Development Manual. 15.

⁷⁰ Spencer, John. “What is Army Doctrine?” Modern Warfare Institute at West Point. <https://mwi.usma.edu/what-is-army-doctrine/>. Accessed 20 March 2023.

⁷¹ Brady-Lee, Patrick, Lt. Col. “TTPs and Lessons Learned – Why They Matter.” US Air Force Expeditionary Center. <https://www.expeditionarycenter.af.mil/News/Article-Display/Article/1145040/ttps-and-lessons-learnedwhy-they-matter/>

⁷² Allied Administrative Publication - 06 Edition 2021 – NATO Glossary of Terms and Definitions. 66.

⁷³ Allied Administrative Publication - 06 Edition 2021 – NATO Glossary of Terms and Definitions. 106.

⁷⁴ Government of Canada. DAOD 3003-1, Management, Security and Access Requirements relating to Controlled Goods.

CAF and NATO allies. An example of this commitment is reflected in the CAF Presiding Officer Training, where a training vignette suggests that a circumstance which warrants a closed-door summary trial is the trial involving a negligent discharge of a Special Operations Forces (SOF) member. The trial proving the negligent discharge would detail certain SOF TTPs, therefore it is in the CAF interest to have the trial closed to include only the trial participants.

In the example discussed above of former UK RAF pilots working for TFASA, contracted to train Chinese PLAAAF pilots, both TFASA and the UK Ministry of Defence assert that there was no breach of the UK Official Secrets Act. Regardless of the fact that TFASA maintains the training was low level, there would still have been knowledge transfer of TTPs to military pilots to a NATO strategic competitor and not an ally. While not a named adversary, China increasingly poses a threat to the West as NATO on the global scale of competition.

Protection of doctrine and TTPs can be considered an extension of the principle of operational security, defined as “all measures taken to give a military operation or exercise appropriate security, using passive or active means, to deny an adversary knowledge of the essential elements of friendly information or indicators thereof.”⁷⁵ It is valuable to consider operational security not as a stand-alone concept to be employed on a single operation or exercise. Rather, it is an enduring task which essential to military operations, employed at all times for the same principles as it is employed on operations: to deny the adversary knowledge of essential friendly elements or information. This approach, supported by Canadian doctrine, acknowledges the importance of CAF security, outside of formal named operations, as providing necessity, cohesion, and protection of force, and acknowledging that the protection of information is vital to guard vulnerabilities and vital interests.⁷⁶ The ten principles of war (security) in Canadian Military Doctrine, is important that this mindset is extended further than just a principle of war used in operational planning. Given advancements in technology and ambition, Canada must acknowledge that competition does not just occur on operations, where traditionally has been the focus of the principle of operational security. Adversaries are looking to gain knowledge of and exploit information on a wide range of Allied technological capabilities and operational techniques, including TTPs. Studying an adversary’s way of war is not new. However, this must not be aided and abetted by individual action by former military personnel. Training adversary or near-adversary countries, whether at the strategic, operational or tactical level, represents a risk to Canada.

Current Restrictions on Employment After Leaving the Canadian Armed Forces

Currently, there are very few restrictions on post-employment freedom for Canadian Armed Forces (CAF) members who decide to conclude their service with the CAF. As noted above, Canada does not have similar restrictions on post-military employment as the United States, who require their personnel to register with and receive approval from their respective branch of the armed forces before commencing

⁷⁵ Allied Administrative Publication - 06 Edition 2021 – NATO Glossary of Terms and Definitions. 118.

⁷⁶ Canadian Forces Joint Publication 01 – B-GJ-005-000-FP-001 – Canadian Military Doctrine. 25.

employment with a foreign government. In Canada there is no similar approval process exists. The only notification requirement is overall regarding the declaration of potential conflict of interest, largely surrounding the future and potential employment of former Canadian Armed Forces members in the military procurement complex. Defence Administrative Order and Directive (DAOD) 7021-2 details guidance and restrictions on Post Employment of members of the Canadian Armed Forces. Additionally, the Canadian Armed Forces Code of Ethics provides post-military employment guidance. DAOD 7021-2 states “Upon cessation of their employment or service, all DND employees and CAF members are expected to avoid situations which could give rise to a conflict of interest with respect to their most recent official duties without unduly restricting their ability to seek employment.”⁷⁷ DAOD 7021-2 divides conflict of interest into two categories: organizational and personal conflict of interest, and applies to both. Organizational conflict of interest is defined as a “situation in which the action or decision of a DND employee or CF member calls into question the integrity, objectivity, impartiality or non-partisanship of the DND or the CF... a situation [which] could be perceived by a reasonable observer as placing the DND or the CF in a conflict of interest with the public interest.”⁷⁸ A personal conflict of interest is defined as a:

“situation in which a DND employee or CF member has private interests that are not an integral part of their public role and that could improperly influence the performance of his or her official duties and responsibilities or in which the DND employee or CF member uses his or her office for personal gain... an apparent conflict of interest could be perceived by a reasonable observer to exist in a situation, whether or not it is the case; and a potential conflict of interest could reasonably be foreseen to exist in the future.”⁷⁹

The phrasing of DAOD 7021-2 leaves ambiguity in the execution of this Directive. To have an expectation of a CAF member after release, but not a legal requirement, is an ethical obligation on the member as to conduct outside of their employment with the CAF.

DAOD 7021-2 Section 3.2 details the categories of persons which are subject to post-employment restrictions, and does not cover all members of the CAF. Section 3.2 states that it only applies to any Regular Force officer of the rank of lieutenant-colonel or commander or above, any Reserve Force officer of the rank of lieutenant-colonel or commander or above serving on Class B or Class C reserve service, or any incumbent of a position designated as being subject to post-employment compliance measures, and excludes persons who are reporting public office holders given they are subject to provisions of the *Conflict of Interest Act*.⁸⁰ This includes the Deputy Minister, the Associate Deputy Minister, the Chief of Defence Staff, the Judge Advocate General, the Principal of the Royal Military College of Canada or a military judge.

⁷⁷ DAOD 7021-2, Section 3.1.

⁷⁸ DAOD 7021-2, Section 2.

⁷⁹ DAOD 7021-2, Section 2.

⁸⁰ DAOD 7021-2, Section 3.2.

DAOD 7021-2 Section 4 details Post-Employment Restricted Activities, which restricts any person with one-year employment limitations to not make any direct contact, in any capacity on behalf of themselves or an external entity or individual, with any member of DND or the CAF, accept employment with an external entity or individual with which the person had significant official dealings at any time during the past year of their CAF service, or give advice to an external entity, individual or new employer using information that is not publicly available concerns DND or CAF operations.⁸¹ Anyone subject to restrictions detailed in DAOD 7021-2 must disclose offers, including accepted offers, of employment from external organizations with which they have had significant dealings with. Restrictions on employment can be waived by the Deputy Minister or the Chief of Defence Staff. Enforcement of this DAOD is difficult, and is largely reliant on the ethical conduct of individuals members in self-reporting.

Despite the post-employment restrictions contained in DAOD 7021-2, all CAF members remain bound by National Defence Security Orders and Directives, *The Security of Information Act* (formerly the *Official Secrets Act*), and National Defence Security Policy and Treasury Board Security Guidelines, including Treasury Board *Policy on Government Security*, and DAOD 2006-0, Defence Security. However, the *Security of Information Act* is the only legislation which applies to personnel post-employment with the CAF. National Defence Security Orders and Directives do not apply to persons other than those employed with the CAF or the Department of National Defence. The *Security of Information Act* identifies special operational information and persons who are permanently bound to secrecy, largely concerning the Canadian national security and intelligence organizations, such as members of the National Security and Intelligence Review Agency, current or former members of the National Security and Intelligence Committee of Parliamentarians, or persons issued with notice under the Act.⁸² The *Security of Information Act* Section 4 details wrongful communication of information which has been entrusted to an individual through employment with the CAF or the DND, and where this information is communicated and used for the benefit of any foreign power or in any other matter prejudicial to the safety and security interests of the State. Section 4, however, applies to personnel outside of CAF employment, only deals with the transmission of actual documents.⁸³ While the conditions of the *SIA* do apply to

⁸¹ DAOD 7021-2. Section 4.

⁸² Section 10(1) of the *Security of Information Act* permits the designation of a person to be a person permanently bound to secrecy if it is assessed by the Deputy Head of their department (for CAF members, the Chief of Defence Staff) that by reasons of this person's office, position, duties, contract or arrangement, the person has or will have authorized access to special operational information; and it is in the interest of national security to designate this person. Special operational information is defined in Section 8(1) of the Act as "information that the Government of Canada is taking measure to safeguard." It includes information which reveals, or may be inferred, such as the identity of sources or potential sources of information, intelligence or assistance to the Government of Canada; plans for Canadian military operations of a potential, imminent or present armed conflict; means of the State in collecting intelligence; persons who are or may be the object of a covert investigation or a covert source of information; the means of gathering covert intelligence; and information or intelligence regarding or received from a foreign entity or terrorist group.

⁸³ Section 4 of the *Security of Information Act* details that the transmission of documents includes communicating code words, passwords, sketches, plans, models, articles, notes, or other documents or information, and retains such documents when they have no right to retain it or when it is contrary to their

personnel outside of CAF employment, behaviour such as those detailed above and the training of the PLAAF fall below the threshold of the conditions stipulated in the *SIA*, prompting the ethical considerations which will be examined in Chapter 2.

The *Operational Standard for the Security of Information Act* is the implementation standard for the *Security of Information Act*. The *Operational Standard* contains examples of types of special operational information, of which unauthorized disclosure would cause obvious damage to the Government of Canada.⁸⁴ This includes military operational plans for armed conflicts. CAF members are not required to sign a non-disclosure agreement (NDA), and have not been required to do so since World War II. Parliamentary controversy arose surrounding the Future Fighter Capabilities Project, but the concern was largely focused on the restriction of public servants' freedom of speech. Department of Justice officials explained in writing to the Standing Committee on Government Operations and Estimates that both DND public servants and CAF officials were required to sign the Special Security Accountability Form, which "is not a non-disclosure agreement and that it simply highlights the obligations of public servants and members of the CAF to safeguard federal government information."⁸⁵ This form is common for visiting high level security institutions, such as special operations units. Such forms remind individuals, who already have the required level of security clearance, of their obligations when visiting installations which have special security requirements, and that "breaches of this obligation may result in administrative, disciplinary or legal action."⁸⁶

The above analysis highlights the reality that there are very few legal or regulatory restrictions on post-employment of CAF members outside of contracting requirements. The act of training the military of a foreign power does not violate Canadian law. Brigadier-General Boucher, Director of General Defence Security for the CAF noted that regarding reports of former Royal Canadian Air Force pilots working for TFASA, that while the matter was of concern to the CAF, they were post-employment activities and do not fall under the jurisdiction of the CAF, but that members are still bound by the *Security of Information Act*.⁸⁷

The position of the CAF, that post-CAF employment is beyond the jurisdiction of the CAF, highlights both the legal and ethical grey zone regarding former military personnel working for Private Military Contractors who sub-contract for foreign governments. Unlike the United States, Canada does not have any regulations for

duty, including the duty to comply with all directions issued by a lawful authority regarding the return or disposal of such documents.

⁸⁴ *Operational Standard for the Security of Information Act* 2003. <https://www.tbs-sct.canada.ca/pol/doc-eng.aspx?id=12323>

⁸⁵ House of Commons Canada. "Strengthening the Protection of the Public Interest within the *Public Servants Disclosure Protection Act*" Report of the Standing Committee on Government Operations and Estimates. June 2017.

⁸⁶ Dwyer Hill Training Center Security Instruction, Annex D-1 to Unit Security Orders 2-5, 30 October 2004.

⁸⁷ Steven Chase, "Former RCAF Fliers Working at South African School that Trains Chinese Military Pilots; General Tells Committee Forces Cannot Police Former Members After They Leave." *Globe and Mail*, 4 November 2022.

registration of post-service employment, therefore has very little scope of understanding the extend of post-service foreign employment metrics.

CHAPTER 3 – THE ETHICAL DILEMMAS OF PRIVATE MILITARY CONTRACTING: THE SOCIAL CONTRACT OF THE CAF

As established in Chapter One, the acts of the former RAF pilots contracted by a South African PMC to train PLAAF pilots does not break any existing national laws of the United Kingdom. However, there are ethical norms and values which govern an individual's behaviour after they leave employment in the UK Armed Services. As well, there are the ethics governing private military contractors, to include the doctrine and philosophy of corporate social responsibility.⁸⁸ This chapter will examine models of corporate social responsibility (CSR), the adequacy and appropriateness of CSR to cover PMCs and their relevance in ethical grey areas concerning contracting to adversarial or near-adversarial countries.

This chapter examines the ethics in private military contracting and the evolution of corporate social responsibility within private military contracting. The obligations of members of the Canadian Armed Forces (CAF) will be analysed through a contractarian approach within a rights-based ethical framework. It will argue that an implicit social contract exists between CAF members and Canada, and that the obligations of this social contract exist beyond one's service with the armed forces. Part of this social contract includes, given the nature of employment in the areas of military and security, an obligation to prevent aiding and abetting an adversary, and that the obligations contained within this social contract continue beyond one's employment within the CAF. The existence of this social contract is an ethical obligation to Canada, but currently one which is not represented within law or policy, given that the National Defence Act does not apply to members once they have released from the CAF.

Ethics of Private Military Contracting: An Evolution of Corporate Social Responsibility

The significant amount of the literature on both mercenaries and private security contractors deals with both conflict areas and the use of force, yet parallels can be drawn to the conduct of PMCs in both peace and in conflict. Wars in Iraq and Afghanistan brought to the forefront the use of PMCs and ethical problems, such as their use of force. However, the ethical principles developed are relevant to all aspects of PMC activity, offering context for the field in which individual private military contractors work and operate.

The evolution of ethical conduct of PMCs began with conversations surrounding conduct, not just the use of violence, but action, inaction, and ethical conduct. Ethical approaches were advanced with the advent of the Global Compact, an initiative of former UN Secretary General Kofi Annan, who the initiative at the 1999 World Economic Forum. Rather than a regulatory instrument, in that it did not aim to enforce or measure the behaviour of companies, the compact proposed to rely on "public accountability, transparency and the enlightened self-interest of companies, labor and civil society to

⁸⁸ International Committee of the Red Cross and the Federal Department of Foreign Affairs Switzerland, *The Montreux Document on Private Military and Security Companies*. August 2008. <https://www.icrc.org/en/publication/0996-montreux-document-private-military-and-security-companies>.

initiate and share substantive action.”⁸⁹ Formed in 2000, the UN Global Compact is the world’s largest corporate sustainability initiative, a “call to companies to align strategies and operations with universal principles on human rights, labour, environment and anti-corruption, and take actions that advance societal goals.”⁹⁰ There are ten principles of the UN Global Compact, covering human rights, labour, the environment, and anti-corruption.⁹¹ Over 12,000 companies based in 160 countries are involved, in various sectors and size.⁹² Involvement requires a commitment to operate responsibility in alignment with the Global Compact’s universal sustainability principles, and commitments to CSR principles. The UN Global Compact requires a commitment from the company CEO, or non-business equivalent, with support of the Board of Directors, to four fundamental responsibilities: human rights, labour, environment and anti-corruption.⁹³ All participants are required to submit an annual report on progress efforts. These reports are posted publicly on the UN Global Compact website.

The 2008 Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict (hereafter referred to as the Montreux Document) was an initiative of the International Committee of the Red Cross (ICRC) and the Government of Switzerland. It is a non-binding document aimed to “promote respect for international humanitarian law and human rights law whenever private military and security companies are present in armed conflicts.”⁹⁴ The Montreux Document was the first major international attempt to address, refine and encourage best practices for PMCs.⁹⁵ In the years since, there have additional attempts to bolster the accountability of PMCs. However the Montreux Document remains the only initiative which focuses on the relationship between the state and the PMC industry.⁹⁶ The Montreux Document is seen in a more positive light than other UN conventions on PMCs given the prominent contracting and territorial states which signed onto the accord, including the United States, United Kingdom, South Africa, and host countries such as Angola, Afghanistan and Iraq.⁹⁷ Despite not being a legal instrument, Montreux significantly guides ethical behaviour of PMCs by clarifying the “legal twilight surrounding the PMSC industry” and hopefully over time forming the basis of customary international law regarding the use of

⁸⁹ Simon Chesterman, “Lawyers, Guns and Money: The Governance of Business Activities in Conflict Zones.” *Chicago Journal of International Law* 11, no. 2 (2011): 323.

⁹⁰ The United Nations Global Compact, <https://unglobalcompact.org/what-is-gc>. Accessed 19 March 2023.

⁹¹ The United Nations Global Compact, Ten Principles. <https://unglobalcompact.org/what-is-gc/mission/principles>. Accessed 19 March 2023.

⁹² The United Nations Global Compact, Participants <https://unglobalcompact.org/what-is-gc/participants>. Accessed 19 March 2023.

⁹³ UN Global Compact, <https://unglobalcompact.org/participation/join/commitment>. Accessed 19 March 2023.

⁹⁴ International Committee of the Red Cross, *The Montreux Document on Private Military and Security Companies*.

⁹⁵ International Committee of the Red Cross, *The Montreux Document on Private Military and Security Companies*.

⁹⁶ Gary Schaub Jr and Ryan Kelly, “The Montreux Document.” In *Private Military and Security Contractors*. United States: Rowman & Littlefield Publishers, 2016. 235.

⁹⁷ Chesterman, 334.

PMCs.⁹⁸ The general obligations identified in the Montreux Document provide that states (contracting, territorial or home states) have an obligation to “ensure the respect for international humanitarian law... and are responsible to ensure respect for international humanitarian law.”⁹⁹

The Montreux Document extends the philosophy of corporate social responsibility. Conceptually, CSR suggests the integration of social and environmental concerns into business planning, operations and interactions with stakeholders.¹⁰⁰ Undergirding CSR is a view that businesses should play a positive role in society, and consider the social and environmental impacts of their operations, and the governance mechanisms which support these.¹⁰¹ The movement towards corporate social responsibility reflects a wider acceptance for and promotion of ethical conduct in private business. Regarding PMCs, philosophical questions about their ethical behaviour as business practices are raised in the same avenue of wider CSR thought: “The conversations on corporate social responsibility begs the questions, ‘*to whom, and for what?*’”¹⁰² The conversation includes operations outside of PMCs involved in conflict zones and with the use of violence. PMC operations cover a wide range of activities, including logistical support and operational training.

The Ethical Dilemma

Providing military contracting to either adversarial or near-adversarial countries poses a challenge given what is contracted is often training and preparedness for war. In the examples detailed in Chapter 1 on former RAF pilots training PLAAF pilots, while contractors have asserted that no classified information has ever been divulged during the course of contracting with the PLAAF, the training itself gives an insight into tactics, techniques and procedures (TTPs) for operations and war fighting may be divulged.¹⁰³ Even if specific TTPs are not taught, the act of aiding an adversarial country, such as China, with knowledge and skill learned from service to Canada with the Canadian Armed Forces, is an ethical dilemma, raising questions as to the appropriateness and fairness of restricting usage of skills learned during the course of military employment based on the current geopolitical situation, or the restriction of employment options. After all, the geopolitical situation is in constant flux, and difficult for each individual to

⁹⁸ Although controversial in its use, is also referred to as “soft law.” Schaub and Kelly, Additional basis for the development of customary international law in this field can also be seen in the International Code of Conduct for Private Security Service Providers. <https://casebook.icrc.org/case-study/international-code-conduct-private-security-service-providers>

⁹⁹ International Committee of the Red Cross, *The Montreux Document on Private Military and Security Companies*.

¹⁰⁰ United Nations Industrial Development Organization. “Corporate Social Responsibility.” <https://www.unido.org/our-focus/advancing-economic-competitiveness/competitive-trade-capacities-and-corporate-responsibility/corporate-social-responsibility-market-integration/what-csr>. Accessed 20 March 2023.

¹⁰¹ Business Development Bank of Canada. “What is Corporate Social Responsibility.” <https://www.bdc.ca/en/articles-tools/entrepreneur-toolkit/templates-business-guides/glossary/corporate-social-responsibility>. Accessed 20 March 2023.

¹⁰² Chesterman, 323.

¹⁰³ Test Flying Academy of South Africa.

adequately assess. Moreover, international trade by private corporations tends to be less encumbered by restriction, absent any sanction's regimes.

The Social Contract

The idea of a social contract between society and the state is a recurrent and consistent feature of political thought.¹⁰⁴ Originating with Greek philosophers Protagoras and Epicurus, its modern evolution began with Thomas Hobbes who developed the concept as the method for “justifying political principles or arrangements by appeal to the agreement that would be made among suitably situated rational, free, and equal persons” and was further advanced by John Locke, Jean-Jacques Rousseau and Immanuel Kant.¹⁰⁵ Underlying social contract theory is the idea that society is a cooperative and deliberative effort whereby individuals give up some of their natural freedoms in exchange for order and security. Social contract theory also explains obligation: “if society’s members are expected to recognize and comply with social norms (laws, conventions, etc.), then they should also be in a position to accept these norms and government’s enforcement authority.”¹⁰⁶ Essentially, the social contract is an imaginary agreement between a governing and sovereign body (the state) and the people (later subjects or citizens). Certain powers are given away; protections are provided. Natural laws and natural justice give way to a regime of rights and responsibilities. Hobbes imagined a state of nature where each human exists on their own accord and in rough equality with one another, with no avenue to solve disputes, with ever-present danger and disorder. For Hobbes, absent a state, “there is always war of every one against every one.”¹⁰⁷ Within the state of nature humans are trapped in a world of “continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short.”¹⁰⁸

The goal of social contract theory is to demonstrate that social rules and ultimately state-based governance can be rationally justified.¹⁰⁹ In using the social contract approach, justification comes from the rational agreement that members of a civil society, given their individual reasoning, agree to a set of rules or principles as participants of the society as justification for the rules and principles which they exist under, imposed by the state.¹¹⁰ A more contemporary version of the approach adopted by Hobbes and Locke can be found in John Rawls’ classic *A Theory of Justice*. Rawls identifies principles of justice as the basic structure of society, guiding the evolution of the social contract that free and rational persons would accept entering into such a contract with the state: “These principles are to regulate all further agreements; they specify the kinds of social

¹⁰⁴ Samuel Freeman, “Social Contract Approaches.” In *Oxford Handbook of Political Philosophy*, ed. By David Estlund (Oxford: Oxford University Press, 2012), 133.

¹⁰⁵ Stanford Encyclopedia of Philosophy. *Hobbes’s Moral and Political Philosophy*. 12 September 2022. <https://plato.stanford.edu/entries/hobbes-moral/>.

¹⁰⁶ Freeman, 133.

¹⁰⁷ Thomas Hobbes and Michael Oakeshott. *Leviathan: Or the Matter, Forme and Power of a Commonwealth, Ecclesiasticall and Civil*. (New York: Touchstone, 1997), 100.

¹⁰⁸ Hobbes and Oakeshott, 100.

¹⁰⁹ Stanford Encyclopedia of Philosophy. *Contemporary Approaches to the Social Contract*. 1.1. <https://plato.stanford.edu/entries/contractarianism-contemporary/>

¹¹⁰ Stanford Encyclopedia of Philosophy. *Contemporary Approaches to the Social Contract*. 1.1.

cooperation that can be entered into and the forms of government that can be established.”¹¹¹

Regarding military affairs in particular, an implicit social contract assigns both obligations and duties to citizens and military members alike.¹¹² Citizens place their natural right to the use of force to the state, which becomes the only legitimate entity to use and regulate force. In turn, the citizenry through participation, taxation or some other mechanism, is obliged to fund the use of force, and when required, to offer or be compelled to serve the state “as conscripts or volunteers in cases of acute emergencies when the survival of the discretionary association is at stake.”¹¹³

Social contracts can be explicit or implicit. Laws, including the constitution, are explicit examples. Norms and values which members of a society follow which are not codified in law but are nonetheless followed, are implicit, to the extent that they imply a type of bargain or exchange. In the context of military service, the social contract exists in both explicit and implicit contexts, CAF members are subject to the National Defence Act, and the rules and regulations which flow from the NDA, such as the Kings Regulations and Orders. The explicit part of the contract is embedded in terms and length of service, the idea of universality of service and unlimited liability in exchange for payment, benefits, and commitments, both written and unwritten, to force protection. CAF members also undergo ethics training under the Defence Ethics Program, aimed at instilling ethics and values leading to a common operating standard of ethical conduct, covering implicit obligations of CAF members. Ethical obligations of CAF members are covered in further detail below.

Ethical Obligations in the Canadian Armed Forces

*Military service is a privilege and is founded upon the trusted relationship that the CAF builds with Canadians, the Government, and those within the Defence Team. Those who trust the CAF have confidence in our professional military advice and service because they recognize our purpose, character and commitment to deliver successful results.*¹¹⁴

Defence ethics are the values and expected behaviours of members of the Canadian Armed Forces (CAF) and members of the Department of National Defence (DND) personnel. Ethos is defined as the set of beliefs and ideas about the social behaviour and relationships of a person or group.¹¹⁵ The CAF details military ethos in the *Canadian Armed Forces Ethos: Trusted to Serve*, the latest evolution of CAF ethical doctrine, which focuses on explaining CAF ethos, military values and professional expectations. It is expected that these ethics and values are employed by CAF members

¹¹¹ John Rawls, *A Theory of Justice*. Rev. ed. (Cambridge, Massachusetts: Harvard University Press, 1999), 29.

¹¹² Krieg, Andreas. *Commercializing Cosmopolitan Security: Safeguarding the Responsibility to Protect*. (Switzerland: Palgrave Macmillan, 2016), 23.

¹¹³ Krieg, 23.

¹¹⁴ Canadian Armed Forces. *Trusted to Serve*. 9. https://www.canada.ca/content/dam/dnd-mdn/documents/reports/The_Canadian_Armed_Forces_Ethos_Trusted_to_Serve_FINAL.pdf

¹¹⁵ Cambridge Dictionary, Ethos. <https://dictionary.cambridge.org/dictionary/english/ethos>.

throughout their duties. However, the ethics and values which form an integral part of CAF members duty to Canada do not end when a member leaves the CAF. The knowledge gained from employment with the CAF has value to Canada's adversaries, and therefore the moral obligation to prevent the aiding of adversaries continues beyond one's service in the CAF. This obligation in part flows from the role which the CAF serves Canada, being that the defence of Canada and its interests are the primary role of the CAF.¹¹⁶

Trust is an integral part of Canadian Defence Ethics, and is emphasized in Part 1 of *Trusted to Serve*. In order to effectively function within the expected level of civil-military relationships, that is the recognition that the CAF serves as the subordinate to the elected civil authority, trust must be maintained in the CAF: "Those who trust the CAF have confidence in our professional military advice and service because they recognize our purpose, character and commitment to deliver successful results."¹¹⁷ *Trusted to Serve* describes trust as being built by two elements: commitment to character and competence.¹¹⁸ The CAF works to intentionally develop character, using an evidenced-based understanding and developing an essential set of behaviours based on ethical principles and values.¹¹⁹ Professional competence is continually developed through the course of a military career and "demands a lifelong commitment to learning and both the drive and humility to pursue continuous improvement."¹²⁰ Both of these traits are foundations of CAF Ethos, which the CAF states "unifies our personnel under one value system... Because it is a value system, the CAF Ethos creates and shapes a desired professional culture that then builds trust."¹²¹ CAF Ethos identifies three ethical principles, which are founded on *The Constitution Acts 1867 to 1982*: respect the dignity of all persons, serve Canada before self, and obey and support lawful authority.¹²² It identifies six categories of military values: loyalty, integrity, courage, excellence, inclusion, and accountability.¹²³ Finally, it lists the eight core attributes which it identifies as professional expectations: duty, accepting unlimited liability, fighting spirit, leadership, discipline, teamwork, readiness, and stewardship.¹²⁴

The final chapter of *Trusted to Serve* outlines the relationship between ethos and leaders, purposely excluding rank identifiers, given that leadership exists at every rank level within the CAF. It describes leaders as those who "personify the ethos by internalizing its values and by living them in daily military service. CAF leaders instill the ethos in others, they establish and maintain a professional culture, they protect the reputation of the CAF, and they face and resolve problems lawfully and ethically."¹²⁵ *Trusted to Serve* emphasizes that CAF ethos cannot be sustained by only leading people, that the institution must also be led. Institutional leaders "develop and maintain the

¹¹⁶ Canadian Armed Forces. *Trusted to Serve*. 5.

¹¹⁷ Canadian Armed Forces. *Trusted to Serve*. 9.

¹¹⁸ Canadian Armed Forces. *Trusted to Serve*. 9.

¹¹⁹ Canadian Armed Forces. *Trusted to Serve*. 10.

¹²⁰ Canadian Armed Forces. *Trusted to Serve*. 10.

¹²¹ Canadian Armed Forces. *Trusted to Serve*. 12.

¹²² Canadian Armed Forces. *Trusted to Serve*. 16 - 21.

¹²³ Canadian Armed Forces. *Trusted to Serve*. 22 - 31.

¹²⁴ Canadian Armed Forces. *Trusted to Serve*. 33 - 44.

¹²⁵ Canadian Armed Forces. *Trusted to Serve*. 47.

institution's professional identity, align the organization's culture with the ethos, and steward the Profession of Arms."¹²⁶

Although *Trusted to Serve* makes a few mentions relating to time of military service, my argument suggests that the ethos and values which are at the heart of CAF service are expectations which *continue* beyond CAF employment. All CAF ethical duties and obligations do not cease when members exit the CAF. Explicitly, service and commitment to Canada should not end upon release.

The Evolution of the Social Contract of CAF Service

The concept of both an explicit and implicit the social contract within the CAF is not new. A series of academic papers commissioned by the House of Commons Standing Committee on National Defence and Veterans' Affairs in 1997, after the Committee was requested by then-Minister of National Defence, the Honourable Doug Young, to make recommendations regarding a social contract. Minister Young asked the Committee to make recommendations to chart a way ahead for the Canadian Forces (CF), to include an in-depth look at the social and economic challenges which confronted CF members.¹²⁷ Several papers made the case for a social contract between members and the CAF, noting that ideas surrounding the social contract, of overarching ideas surrounding community and the rights and responsibilities which the citizenry enjoy as a whole, in a military context: "those serving in the military take on dangerous jobs and given up such liberties as free expression and the ability to participate in politics and should expect in return that the community would provide for them reasonably and honour them for their work."¹²⁸

Historical context of the time of these writings is essential to understand the context of the work. Colloquially referred to as the 'Decade of Darkness', the 1990's saw a decrease in funding, closure of bases, and a Force Reduction Plan to reduce the number of military and DND personnel.¹²⁹ Beginning in the April 1989 Federal budget, the closure of several military bases was announced, a cut in 2,500 military personnel, and a decrease of \$2.7 billion in military funding over 5 years.¹³⁰ Although the Government of Canada reaffirmed its commitment to traditional defence priorities in September 1991 *Statement on Defence Policy*, additional base closures in Europe were announced, and 1992 saw additional spending cuts and a reduction of the force to 75,000.¹³¹ The

¹²⁶ Canadian Armed Forces. *Trusted to Serve*. 48.

¹²⁷ In 2013, the official name for Canadian Forces (CF) changed to Canadian Armed Forces (CAF).

¹²⁸ Savage, Donald C. and Canada. Department of National Defence. *A Social Contract for the Military?* Ottawa: Department of National Defence, 1997. See also: Copp, Terry and Canada. Department of National Defence. *A Social Contract for the Canadian Forces*. Ottawa: Department of National Defence, 1997; Hamelin, Christian and Canada. Department of National Defence. *Discussion Paper on the Proposed CF Social Contract*. Ottawa: Department of National Defence, 1998; and Milner, Marc and Canada. Department of National Defence. *A Proposal for a New Social Contract for the Canadian Armed Forces*. Ottawa: Department of National Defence, 1998.

¹²⁹ Horn, Bernd and Bentley, Bill. "The Road to Transformation: Ascending from the Decade of Darkness." Canadian Military History 16, 4 (2007). 33-44.

¹³⁰ Michel Rossignol, MR-112E, *Defence Policy Review*. 4 February 1994. <https://publications.gc.ca/Collection-R/LoPBdP/MR/mr112-e.htm>

¹³¹ Rossignol, Michel, MR-112E, *Defence Policy Review*. 4 February 1994. <https://publications.gc.ca/Collection-R/LoPBdP/MR/mr112-e.htm>

Canadian Forces Force Reduction Program, announced in 1992, was designed to achieve the smaller total force by encouraging CF members to release early or take an early retirement.¹³² The fallout from the Somalia Affair, investigated by a Public Commission of Inquiry (1995-1997) and resulting in the disbandment of the Canadian Airborne Regiment, was one of the events which strained the relationship between the Canadian public and members of the Canadian Forces. By the time the House of Commons Standing Committee on National Defence and Veterans Affairs commissioned the series of academic analysis on the status of the social contract in 1997, morale in the CF was low, with CF members feeling “extremely undervalued by the [Canadian] public. They feel not only misunderstood and ignored, but disliked and rejected by the people of Canada.”¹³³ Discontent amongst the ranks of the CF was noted in all reports, academics noting the trend of the perception that the lower ranks of the CF were not well treated.¹³⁴ The Terms of Reference for the examination of a CF social contract included the focus on pay and standard of living, while balancing the duties and conditions of employment which CAF members were subjected to, such as frequent moves, short notice deployments or tasks, and the concept of unlimited liability, ending with the question: “Do we ask a great deal and not give enough in return?”¹³⁵ For the academics writing for the House Standing Committee, Both Christian Hamlin and Donald C. Savage moved to examine whether a formal explicit social contract was necessary, in the form of a formalized Charter of Military Service in Canada. This explicit form of a social contract would “declare its expectations about the essential nature of military service, its meaning and stature in Canada, its relationship to more generalized notions of citizenship, including the Canadian Charter of Rights and Freedoms, and the reciprocal obligations of those serving and those served.”¹³⁶ The explicit declaration of a social contract as an evolution in the relationship between members of the CAF and Canadian civil society, with a specific emphasis on the social and economic well-being of CAF members. Charles Alexander Cotton was a proponent of a written social contract for CAF members, in the form of a formalized Charter of Military Service, which would balance the rights of members of the armed forces with the obligations of unlimited liability service.¹³⁷ Cotton argues that the implicit relationship between the state and the members of the armed forces had broken down, therefore it was required to make the social contract relationship explicit.¹³⁸

The historical context offered in the late 1990’s is part of the larger discourse following what it means to serve in the CAF, the nature of the implicit social contract and how to approach a breakdown of morale and opinion of the CAF and the resulting relationship with civil society. A focus on rates of pay, allowances, and benefits and

¹³² Department of National Defence, *Director General Audit – Audit of the Force Reduction Program*. Ottawa: National Defence, Chief Review Services, January 1997.

¹³³ Christian Hamelin and Canada. Department of National Defence. *Discussion Paper on the Proposed CF Social Contract*. Ottawa: Department of National Defence, 1998. 5.

¹³⁴ Savage, 3.

¹³⁵ Savage, 3.

¹³⁶ C.A. Cotton, and Canada. Department of National Defence. *Toward a Charter of Military Service in Canada*. Ottawa: Department of National Defence, 1997. 6.

¹³⁷ Cotton, 18.

¹³⁸ Cotton, 20.

manifestations of the obligation to serving members, suggesting the explicit form of a social contract be passed by the House of Commons and the establishment of a Quality of Life Committee from all ranks and services to continuously monitor, review and make recommendations about quality of life issues.¹³⁹

There exists the implicit social contract once members enroll in the CAF. Upon enrollment, members swear an oath or solemn affirmation that the member “will be faithful and bear true allegiance to His Majesty, King Charles the Third, King of Canada, His heirs and successors according to law.”¹⁴⁰ Interestingly, the oath to be taken by a person who is not a Canadian citizen or other British Subject includes the requirement “to resist His Majesty’s enemies and cause His Majesty’s peace to be kept and maintained.”¹⁴¹ Thus commences the start of the social contract a member has with the CAF and by extension the Government of Canada. It is explicit, in that it is not a signed set of laws but rather a set of conditions for behaviour of CAF members. While the National Defence Act (NDA) does represent the explicit side of the social contract, the ethical norms and values which CAF members are expected to adhere to throughout their service and beyond, form an implicit set of norms of behaviour which it is expected to be followed as a condition of service. One cannot imagine a situation where a former CAF member decides to abandon those ethics and values. Indeed, it is exactly that approach to service that enables former CAF members to market themselves in post-CAF employment. Thus, it is not unreasonable to expect ongoing ethical commitments to be followed as a condition of post-service life as Canadians and citizens. Indeed, the generous pension and status afforded to veterans implies an ongoing relationship of trust and respect.

The social contract between members of a society and a state involves the exchange of certain rights and privileges in exchange for a certain level of security and state action: “the governed consent to give up certain personal liberties in exchange for protection, on which all government depends.”¹⁴² The aim of social contract theory is “to show that members of some society have reason to endorse and comply with the fundamental social rules, laws, institutions, and/or principles of that society.”¹⁴³ The premise of contractarianism, as a moral theory, holds that “moral norms derive their normative force from the idea of contract or mutual agreement.”¹⁴⁴ Contractarianism stems from the Hobbesian reasoning of the social contract, holds that “persons are primarily self-interested, and that a rational assessment of the best strategy for attaining the maximization of their self-interest will lead them to act morally... and to consent to governmental authority.”¹⁴⁵

¹³⁹ Terry Copp and Canada. Department of National Defence. *A Social Contract for the Canadian Forces*. Ottawa: Department of National Defence, 1997. 17-19.

¹⁴⁰ Department National Defence, Form CF 444 – Canadian Armed Forces Enrolment Form. Section 4.1.

¹⁴¹ Department National Defence, Form CF 444 – Canadian Armed Forces Enrolment Form. Section 4.2.

¹⁴² Savage, 2.

¹⁴³ Stanford Encyclopedia of Philosophy. *Contemporary Approaches to the Social Contract*. 1.1.

¹⁴⁴ Stanford Encyclopedia of Philosophy. *Contractarianism*.

<https://plato.stanford.edu/entries/contractarianism/>

¹⁴⁵ Stanford Encyclopedia of Philosophy. *Contractarianism*.

The social contract between CAF members and the state represents a higher level of restriction on personal liberties than among other members of Canadian society. In short, the CAF imposes additional restrictions on liberty, political involvement, and freedom of movement. The NDA imposes explicit restrictions or impositions imposed by the NDA, such as the placement of any member on active service in or beyond Canada at any time (Section 31), or leaving duty without authorization (Section 88 and 90).

Some restrictions are imposed by the state in order to protect the civil-military relationship, and indeed civilian authority over the armed forces in general, such as restrictions on political involvement and unionization.¹⁴⁶ The unique nature of CAF employment and varying operational response times are reasons for including prohibitions on such actions such as Absenting Oneself without Leave and Malingering. Both are examples of restrictions on CAF personnel which represent unique conditions of employment. Reflective of the unique tasks which CAF members are trained to perform, including the use of force, up to and including the state sanctioned use of deadly force. The acceptance of unlimited liability, the principle that CAF members may be ordered, or may have to order others, into harms way, is a professional expectation of all CAF members.¹⁴⁷ The acceptance of the principle of unlimited liability warrants that CAF members “embrace a spirit of self-sacrifice and dedication to duty that requires them to carry out their lawfully assigned mission and tasks without regard to personal fear or danger. This may even mean loss of life.”¹⁴⁸ This is a unique requirement which CAF members agree to upon enrollment, distinct and unique from members of greater civil society. The principle of unlimited liability is demonstrative of the unique requirements of CAF service, an example of how the social contract is unique.

Under a contractarian approach, an average citizen lives in an implicit social contract with the state, abiding by state-imposed laws, rules and regulations that, in Canada, are prescribed by law and consistent with those in a free and democratic society (as per Section 1 of the *Canadian Charter of Rights and Freedoms*). In exchange, Canadians expect the state to function in accordance within constitutional limitations, provide adequate governance and support the social support Canadians have come to expect – health care, subsidized education, and regulated commerce, to name a few. Canadians do not, however, live under the burden of additional rules and regulations which those of the armed forces operate. In addition to the parameters, such as unlimited liability, detailed above, members of the CAF become trained in a vast array of specific military knowledge, including the doctrine and tactics, techniques and procedures detailed in Chapter One. In the space of knowledge outside of what is protected information in the context of the Security of Information Act, CAF members will become educated in a tremendous amount of information of both operational and strategic value. Whereas the

¹⁴⁶ The Royal Canadian Mounted Police won the right to unionize following the 2015 decision of the Supreme Court of Canada decision in *Mounted Police Association of Ontario v. Canada (Attorney General)* [2015] 1 SCR 3, which held that prohibitions of RCMP members to unionize or engage in collective bargaining were unconstitutional. Following this decision, it would follow that any attempt to restrict CAF unionization would not withstand Charter scrutiny.

¹⁴⁷ Canadian Armed Forces. *Trusted to Serve*. 34.

¹⁴⁸ Duty with Honour: The Profession of Arms in Canada. 14. <https://www.canada.ca/content/dam/dnd-mdn/documents/reports/2019/duty-with-honour-en.pdf>

social contract in general sets out the general principles which govern the relationship between citizens and the state, the social contract between soldiers and the state “is a moral covenant regulating the relations between this political leadership and statutory security providers, most notably the state military.”¹⁴⁹ The soldier serves the state in a myriad of ways, and thus the contract is made explicit. In the reasoning of Andreas Krieg, “...by consenting to dedicate one’s service to public security provision, the soldier enters into a moral agreement with the state that has wider implications for the life of the soldiers as well as for the ability of the state to use him.”¹⁵⁰

Indeed, this is the obligation of the state to fulfill the social contract to the citizenry. In order to fulfill the state obligations of the social contract, the state has an obligation to raise armies in order to protect civil society. Armies “perform a morally necessary function: safeguarding the rights to which the members of that society are entitled *vis à vis* external threats to their security, individually and collectively.”¹⁵¹ Krieg describes the soldier’s role as an extension of the social contract, given its necessity to enable the state-citizen social contract.¹⁵² He further suggests a trinity between the state, the citizen and the military: the citizen reliant on the state for protection, the state exercising authority on behalf of and in the best interests of the citizenry, and the military protecting the security of the state, but subservient to the state, operating only on order by the state.

As with the social contract writ large for citizens of the state, the social contract for members of the CAF involves duties, obligations, and rights. As Snider *et al* have argued: “Those who answer the call for service incur special moral obligations... What justifies these obligations is that they are necessary if the state is to be properly defended.”¹⁵³ However, for members of the armed forces, such moral obligations do not cease once their contract with the state has expired. The duty to serve is not simply a matter of time in or military service more generally. The social contract between the soldier and the state does not end once one is no longer serving in the military. This is due to the specialized knowledge which one obtains as part of their service in the armed forces. Inherent to the soldier’s social contract with the state, both explicitly and implicitly, is the obligation to not assist an adversary. Explicitly, the NDA details offences relating misconduct regarding the enemy.¹⁵⁴ Implicitly, the moral and ethical standards which are persistent throughout CAF ethical doctrine prohibit behaviour which aid an adversary by arguing that it is a breach of the ethical code of conduct of CAF service. It is unconscionable that such moral norms which exist throughout the CAF would end once one’s employment with the CAF ends.

¹⁴⁹ Krieg, 23.

¹⁵⁰ Krieg, 25.

¹⁵¹ Don M. Snider, John A. Nagl, Tony Pfaff, and Army War College Strategic Studies Institute, Carlisle Barracks PA. *Army Professionalism, the Military Ethic, and Officership in the 21st Century*. 1999. 29.

¹⁵² Krieg, 23-24.

¹⁵³ Snider et al, 30.

¹⁵⁴ Section 74 NDA details the Offences by any person in the presence of the enemy. Enemy is defined as an adversary that actively seeks the defeat of another’s forces and against which the legal use of force is authorized. Government of Canada, Terminology Data Bank. Section 2, NDA defines enemy to include armed mutineers, armed rebels, armed rioters and pirates.

From Citizen Soldier to Contractor

The increasing reliance on state's use of private military companies or contractors challenges this narrative of an implicit social contract in exchange for state security. The lack of formal relationship, expressed through a social contract, does not exist in the same way with a PMC as it does with the armed forces of a state. In Western societies, the use of PMCs for the conduct of military manoeuvre operations is less prevalent.¹⁵⁵ PMCs are predominantly used in roles such as the provision of local security for military installations, logistics, provisions of goods and services. Domestically, PMCs are used for training of armed forces, contracted to the military as a training aid to create and run exercises.¹⁵⁶ Contractual relationships involving PMCs are typical business contracts regulated by contract law, with terms and conditions that must be fulfilled, with either side able to sue for breach of contract. PMCs do not have social contracts with the state, as members of the armed forces do. This creates the possibility that a moral hazard exists, which creates a climate where adherence to the implicit social contract is abandoned. Moral hazard is a term used in economics to describe loss-increasing behaviour which occurs under insurance.¹⁵⁷ Generally, the term can be used as a trend in increasing risk when risk is shared with another entity. Here, private contractors may have an increased risk to moral hazard, in the form of breaches of ethical standards of conduct, when operating for a private military company who does not share the same standards of ethical behaviour, in the form of a social contract. While at risk of such a moral hazard, it is important that former-CAF members remember their obligations under the implied social contract, and to act ethically. The legislative approach and the resulting rules and regulations which would be developed resulting from such legislation, to be discussed in Chapter 4, would serve as a mitigating solution to such moral hazards.

Among the ethical principles detailed in *Trusted to Serve*, loyalty is identified as the premiere military value of CAF Ethos.¹⁵⁸ In *Trusted to Serve*, loyalty is described as a personal allegiance to Canada, but also as a “reciprocal relationship between the military institution and its people, between leaders and followers, and amongst peers.”¹⁵⁹ In effect, the notion of reciprocity signals an implicit social contract. The virtue of loyalty, closely linked with trust, is an expectation of military members throughout the course of their service. Loyalty is based on trust, and develops over time: “Loyalty... becomes the mark

¹⁵⁵ This is to be contrasted with examples of use of PMCs for military operations and in less of a support role, as observed in the Ukraine-Russian war with Russia's use of Wagner Group for military operations. See for example, Martin, Kimberly. “Russia's use of Semi-State Security Forces: The Case of the Wagner Group.” *Post-Soviet Affairs* 35, no. 3 (2019): 181-204.

¹⁵⁶ For example, Calian Group Limited is a provider of military training and simulation to the CAF, NATO and NATO member countries, assisting and developing in synthetic training environments for the Canadian Army Simulation Centre. Their services are used extensively across tactical level simulation training in the Canadian Army. Calian employs a large number of former CAF members in the execution of this training.

¹⁵⁷ David Rowell and Luke B. Connelly, “A History of the Term ‘Moral Hazard’,” *The Journal of Risk and Insurance* 79, no. 4 (2012): 1051-1052.

¹⁵⁸ Canadian Armed Forces. *Trusted to Serve*. 22.

¹⁵⁹ Canadian Armed Forces. *Trusted to Serve*. 22.

of the professional, as well as a crucial virtue that must be internalized if one is going to be a full and authentic member of the group.”¹⁶⁰

As members of the profession of arms, CAF members operate as moral agents, trained in ethics. Moral agency is the ability to make decisions based ethical decisions based on right and wrong. A moral agent is a person who is able to distinguish right from wrong, make ethical decisions based on this, and have a moral responsibility to not cause unjustified harm: “By expecting people to act as moral agents, we hold people accountable for the harm they cause others.”¹⁶¹ Ethical training received by all members of the CAF enables them as individual moral agents. Individual military personnel operate as moral agents, responsible for their behaviour and “capable of rational deliberation, moral reflection and moral change.”¹⁶² As rational moral agents, members of the armed forces are obligated to act ethically. In the context of this research paper, that involves not assisting an adversarial country in strengthening their military capabilities utilizing the knowledge and skills gained during employment.

As this chapter has outlined, Hobbes, Locke and Rousseau all theorized that parties to the social contract implicitly consent: “By relying on consent, social contract theory seemed to suppose a voluntarist conception of political justice and obligation depends on what people agree to.”¹⁶³ By enrolling in the CAF, members are agreeing to another kind of social contract, the obligations of which exist beyond one’s service in the CAF. Given the nature of the work, the type of information which is obtained during service, and the nature of our adversaries in the contemporary operating environment, the extension of the social contract obligation is warranted by the ongoing interest and requirement of national security.

¹⁶⁰ Pauline M. Kaurin, *The Warrior, Military Ethics and Contemporary Warfare: Achilles Goes Asymmetrical*. (Abingdon, United Kingdom: Ashgate Publishing, 2014), 33.

¹⁶¹ University of Texas, Ethics Unwrapped. “Moral Agent.”

<https://ethicsunwrapped.utexas.edu/glossary/moral-agent>. Accessed 16 April 2023.

¹⁶² Jessica Wolfendale, “What is the Point of Teaching Ethics in the Military,” in *Ethics Education in the Military*, ed. Paul Robinson (Aldershot, England: Ashgate, 2008), 171.

¹⁶³ Stanford Encyclopedia of Philosophy. *Contemporary Approaches to the Social Contract*. 6.

CHAPTER 4 – THE WAY AHEAD: ENFORCING THE CAF SOCIAL CONTRACT

As detailed in Chapter 1, the national security conditions which exist in the contemporary geopolitical environment warrant a review of the manner in which we view the persistence of ethical norms beyond CAF employment. Chapter 2 established that there exists an implicit social contract between the state and those who serve in the CAF. This implicit social contract extends beyond one's service in the Canadian Armed Forces. Therefore, using one's skills and knowledge gained through employment with the CAF for contracted work with an adversarial or near-adversarial country is an ethical breach of the implicit social contract between CAF members and the Government of Canada. An additional problem space exists because there is no current recourse for this ethical breach of the implicit social contract. This chapter looks at legislative options for enforcement of this social contract, and issues of extraterritorial jurisdiction in enforcing the ethical norms expected of CAF and former-CAF members.

Freedom of contract is not a constitutionally guaranteed right in Canada, and is not protected under the Canadian Charter of Rights and Freedoms.¹⁶⁴ Restriction on post-employment exists, examples include franchise agreements, labour agreements, and non-compete clauses which can be a condition of employment.

Extraterritorial Jurisdiction – A Legislative Approach

A legislative approach to this problem frame involves codifying into law the ethical standards of behaviour for individuals post-CAF employment. Because the *National Defence Act* only applies to serving members of the CAF, it is not enforceable to personnel beyond their employment with the state. Therefore, additional federal legislation is required to codify the requirement of adhering to the ethical standards of behaviour for former CAF members, including restrictions on countries and state organizations which they are permitted to work or contract for.

Jurisdiction is defined as the “power to exercise authority over persons, conduct and events” and is recognized by the Supreme Court of Canada as a quintessential feature of state sovereignty.¹⁶⁵ Jurisdiction describes the legal limits with which a state has to create and enforce rules of conduct on their citizens.¹⁶⁶ Stephen Coughlan *et al* describe three categories of purposes for extra-territorial action by governments: to control or affect the behaviour of individuals, to control or affect the behaviour of corporations, or

¹⁶⁴ Section 7 of the Canadian Charter of Rights and Freedoms states “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” The Supreme Court of Canada has ruled that liberty under Section 7 does not protect freedom to contract or the freedom to choose a particular career. *Chaoulli v. Quebec (A.G.)*, [2005] 1 S.C.R. 791, at paras 201-202. Department of Justice Canada, Charterpedia, Section 7. <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art7.html>

¹⁶⁵ *R v Hape* [2007] 2 S.C.R. 292 at para 41, 2007 SCC 26.

¹⁶⁶ Stephen Coughlan, Robert Currie, Hugh Kindred, and Teresa Scassa. “Global Reach, Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalization.” *Canadian Journal of Law and Technology* 6: 1 (2007): 29-59. 30.

to control or effect the behaviour of other states.¹⁶⁷ There are five means to extend Canadian jurisdiction extraterritorially: legislation, executive action of the government, judicial process, bilateral agreement, and multilateral agreement.¹⁶⁸ There exist three sub-categories of extraterritorial legislation: over extraterritorial subject matter only, extraterritorial persons only, and extraterritorial acts by extraterritorial actors.¹⁶⁹

The Canadian government is not restricted from enacting laws with extraterritorial reach.¹⁷⁰ Precedent exists in Canada for laws which apply extraterritorially, a condition where “it does not matter where the crimes are committed or for whom they are committed.”¹⁷¹ Examples include Canadian laws prohibiting terrorist activity, the commissions of war crimes or crimes against humanity.¹⁷² This is in alignment with the legal approaches of both the United States and the United Kingdom. The *United States Code* contains several sections of laws which are enforced extraterritorially, including prohibitions on biological and chemical weapons, conspiracy to kill in a foreign country, genocide, hostage taking, piracy, and torture.¹⁷³ The UK has universal jurisdiction over the crimes of torture, hostage-taking and war crimes in international armed conflicts.¹⁷⁴

The legislative approach to the issue of ex-military contracting to foreign militaries is not without precedence. Following the initial public reporting of former RAF pilots training in October 2022, the UK Minister of Defence publicly announced that, despite the fact that such pilots had not broken the UK *Official Secrets Act*, there would be a change in law to restrict foreign military recruiting of former members of the UK armed forces.¹⁷⁵ The UK Ministry of Defence further indicated that it would seek to include such restrictions as part of the changes of the new *National Security Bill*. First introduced into the UK House of Commons on 11 May 2022, the Bill is an expansive piece of legislation aiming to modernization UK national security laws by updating how the UK legislatively approaches modern attempts at foreign influence on UK government institutions.¹⁷⁶ It introduces a foreign influence registration scheme, which compels anyone acting for a foreign power to declare any political involvement on order from a foreign government. Lord Andrew Sharpe, UK Parliamentary Under Secretary of State, stated that the key aim of the *National Security Bill* is deterrence: “This legislation will help us deter, detect and disrupt that state actors who seek to harm the UK by covertly

¹⁶⁷ Coughlan et al, 32.

¹⁶⁸ Coughlan et al, 34-38.

¹⁶⁹ Coughlan et al, 34.

¹⁷⁰ Coughlan et al, 33.

¹⁷¹ Tyler Wentzell, “The Canadians Fighting in Ukraine.” *Canadian Military Journal* 22, no. 3 (2022): 36.

¹⁷² Wentzell, “The Canadians Fighting in Ukraine,” 36.

¹⁷³ Congressional Research Service: “U.S. Nationals & Foreign Military Service”. Washington, D.C.: Targeted News Service 2022. <https://crsreports.congress.gov/product/pdf/IF/IF12068>. 2.

¹⁷⁴ Parliament of the United Kingdom. Human Rights Joint Committee. *Closing the Impunity Gap: UK law on genocide and related crimes*. Twenty-Fourth Report, Session 2008-09.

<https://publications.parliament.uk/pa/jt200809/jtselect/jtrights/153/15305.htm>. Accessed at 1 May 2023.

¹⁷⁵ British Broadcasting Corporation, “Ex-UK pilots lured to help Chinese military, MoD says.” 18 October 2022.

¹⁷⁶ *National Security Bill – Explanatory Notes*, Part 1.16.H, (UK)

<https://publications.parliament.uk/pa/bills/cbill/58-03/0007/en/220007en.pdf>

targeting our national interests, sensitive information, trade secrets and democratic way of life.”¹⁷⁷

Amendments to the *National Security Bill* debated in the UK House of Commons on 30 January 2023 contain provisions which aid in the prosecution of former members of the armed services “who use their knowledge and expertise to train foreign militaries prejudicial to the interests of the UK.”¹⁷⁸ The *National Security Bill* makes it an offence to disclose protected information, defined as information which, in the interests of protecting the safety or interests of the United Kingdom, access is restricted in any ways, or it is reasonable to expect that access to the information would be restricted in any way.¹⁷⁹ It also prohibits the sharing of information which is not generally known by, or available to persons with knowledge of or expertise in the field to which it relates.¹⁸⁰ The Bill also creates a new state threats aggravating factor “to ensure that where individuals commit offences other than those in this Bill with a proven link to a foreign power, the state threat link is appropriately recognized.”¹⁸¹ The Bill also allows for its extraterritorial application, relevant to the context of this paper, as most of the actual activities take place in foreign countries. The UK Secretary of State for Defence also indicated to the House of Commons that after the issuing of guidance to UK armed forces personnel on their duty to protect sensitive and protected information, that reporting of suspicious activity had increased.¹⁸² This is indicative of the effect which action, legislative, policy or otherwise, have on breaches of ethical conduct. The UK’s approach is a model for Canadian legislation which would give statutory authority for enforcement on restrictions on use of military skills in service of adversarial countries.

Enforceability

The power of the state to enforce legislation are dependant on the state having jurisdiction over both the act and the actor.¹⁸³ The problem frame examined in this paper, is where private military contractors work overseas, often for intermediary consulting firms, as is the case of the former RAF pilots: UK citizens, working for a South African consulting company, contracted to the People’s Republic of China and the PLAAF. In a Canadian context, the Government of Canada has jurisdiction over Canadian citizens, and can enforce legislation on their return to Canada. Enforceability is a key factor in considering the effectiveness of such proposed legislation.

¹⁷⁷ UK Home Office, “Amendments laid to strengthen National Security Bill.” 23 February 2023. <https://www.gov.uk/government/news/amendments-laid-to-strengthen-national-security-bill>. Accessed 05 May 2023.

¹⁷⁸ House of Commons, *Parliamentary Debate*, Volume 727, 30 January 2023 (Ben Wallace, UK Secretary of State for Defence.) (UK).

¹⁷⁹ Bill 115 *National Security Bill*, House of Commons, Session 2022-23. (UK) <https://bills.parliament.uk/publications/50211/documents/3093>

¹⁸⁰ Bill 115 *National Security Bill*, House of Commons, Session 2022-23. (UK)

¹⁸¹ *National Security Bill – Explanatory Notes*, Part 1.16.H, <https://publications.parliament.uk/pa/bills/cbill/58-03/0007/en/220007en.pdf>

¹⁸² House of Commons, *Parliamentary Debate*, Volume 727, 30 January 2023 (Ben Wallace, UK Secretary of State for Defence.) (UK).

¹⁸³ Coughlan et al, 34.

Enforcement of extraterritorial actions is challenging. Reporting, gathering of evidence, and prosecution are all challenges in the enforcement of restrictions on post-CAF employment. There is value in the passing of such legislation as a norm forcing function, and is still worth pursuing. Its enactment would enable the CAF and DND to enact rules and regulations reinforcing the idea of the implicit social contract, and would permit more strict reminders as to obligations to not engage in contractual behaviour with an adversarial state using knowledge and skills gained through CAF employment. The training process would involve educating CAF members as to their ethical responsibilities under the implicit social contract must continue throughout CAF ethics training, and be incorporated into protocols for release of members from the CAF. This would serve as an important timing point, as one is just about to depart the CAF, for a reminder as to the federal legislation restricting post CAF employment activities. In accordance with the legislation, there would have to be a published list which would educate CAF members as to the countries which warrant restrictions. As this list changes and is updated, it is the responsibility of each former CAF member to be informed as to the countries with which they are restricted from working for or with.

No law ever fully prevents a breach of that law, but the effects of that law, for example the implementation of secondary rules and regulations, and the enforcement mechanisms, are avenues which assist in increasing the laws effectiveness. Legislation restricting former-CAF members contracting for adversarial countries achieves this in two respects. First, it brings awareness to the ethical standard which is to be followed, and enables subordinate organizations (here, the CAF and DND) to create regulations and orders in response to it.

The codification of ethical norms has value. It influences normative behaviour within an organization. By legislating ethical norms, it influences self-sanctioning effects where citizens (those subjected to the law) “internalize the legal rule and are deterred by the prospect of guilt.”¹⁸⁴ Robert E. Scott describes three orders of effects which law has on social norms.¹⁸⁵ First, direct, targeting the action of the individuals subjected to the law. Second, in direct or second-order, empowers citizens to use social pressure as an enforcement technique. Finally, the third-order effects of self-sanctioning, the internalization of legal rules and deterrence by the prospect of guilt and shame. Further, it enables the use of existing enforcement mechanisms in support of this legislation. Legislating ethical behaviour gives enforcement options. While it cannot completely prevent the act of working for an adversarial country completely, it can punish those who do by targeting their financial assets and freedom of movement on return to Canada. Mutual Assistance Treaties are multilateral agreements which enable the gathering of evidence, witness statements or testimony, and search and seizure of evidence in support of a national investigation. This is an avenue to assist in the gathering of required evidence in support on an investigation.

The 2020 amplification of the CAF approach to hateful conduct contained in DAOD 5019-0, which expanded definitions of hateful conduct and unit training

¹⁸⁴ Robert E. Scott “The Limits of Behavioral Theories of Law and Social Norms.” *Virginia Law Review* 86, no. 8 (2000): 1603-1604.

¹⁸⁵ Scott, 1603-1604.

requirements, serve as an example where a codification of an ethical norm has value. The additions to existing policy such as the training and reporting requirements contained in DAOD 5019-0, amplified existing policy and reinforced this ethical standard of behaviour. The associated training required and reporting conditions contained in DAOD 5019-0, both reinforce the ethical behaviour of CAF personnel by reminding them of their ethical obligations.

The issue of private military contracting by former CAF members for adversarial or near adversarial states is a problem which is larger than the CAF, therefore requires federal legislative intervention.

CHAPTER 5 – CONCLUSION

The manner in which retired service members utilize their transferrable skills and qualifications gained from their employment in the armed forces varies widely. Although there is no constitutional right to freedom to contract in Canada, there are accepted social norms which permit CAF members to use their skills for employment following the end of their contract with the CAF. Of key concern, however, is the contracting of those with exclusively military skills, such as combat or military-specific qualifications, for adversary or near-adversary benefit. This opens up larger questions regarding the ethics of such employment, as well as legal restrictions or implications of such actions.

Hobbes theorized that the social contract ends when one of the sides stops providing their end of the contractual obligations, that is, a return to the state of nature. But Hobbes also theorized that the social contract endures through past, present and future: “because he hath already received the benefit for which he promiseth, is to be understood as if he intended the right should pass: for unless he had been content to have his words so understood, the other would not have performed his part first.”¹⁸⁶ Once a member completes their service with the CAF, it is not possible to fully return to the state of nature. This is because the knowledge and skills gained through CAF remain, it is an enduring ethical obligation to not use this to the advantage of an adversary of Canada. The Government of Canada’s obligation under the social contract, to continue to provide veterans benefits, including a pension, uphold their end of the social contract. Service in the CAF implicit social contract between the state and CAF-members exists beyond one’s service.

Using one’s military skills in service of an adversarial country is unethical. It is both a breach of both the ethics of the CAF and the implicit social contract between the CAF and those who serve. New federal statutory provisions are required in order to formalize restrictions on post-CAF military employment. Such statutory provisions will formalize the ethical expectations of former CAF members, by targeting their financial assets and freedom of movement on return to Canada.

Extraterritorial enforcement of such legislation is not without difficulty, and reliance on Mutual Legal Assistance treaties, where foreign governments assist in the acquisition of evidence, may be required. But just because investigation and enforcement may be difficult, does not mean that such legislative action should not be taken. The effect this legislation would have on the CAF to educate members as they prepare to depart the CAF, as both a part of the release process and as a part of CAF ethical training, would inform and remind CAF members of their ethical obligations upon release. It becomes a forcing function to the ethical norms which are expected of CAF members, including beyond their time of service with the CAF. Federal legislation would enable the CAF and DND to produce regulations in line with it, which is a practical tool to both educate and enforce such ethical norms.

¹⁸⁶ Hobbes and Oakeshott, 107.

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