

# Canadian armed forces under US Command

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## I INTRODUCTION

It has been revealed that negotiations are under way to place a substantial part of the Canadian armed forces – land and sea forces as well as air – under the operational control of a permanent, integrated, US-led command structure.<sup>1</sup> The announced creation of a “Northern Command”, unifying the continental US into a single military command, is a logical precursor to an expansion that would include Canada and Canadian forces.<sup>2</sup> As well, the joining of the Northern Command with the US command of NORAD (North American Aerospace Defence Command), while perfectly sensible, already draws Canada partially into the new structure. And yet many complex and overlapping questions are raised by the prospect of Canada engaging in closer military co-operation with its southern neighbour, either within or outside the context of the Northern Command.

What implications might the development of a closer military relationship have for Canadian sovereignty, for Canada’s claim to jurisdiction in the Arctic, and for Canada’s ability to maintain an independent foreign policy? What effects might it have on military expenditure, on Canada’s ability to participate in overseas peacekeeping, and on bilingualism, gender and sexual equality in the armed forces? What about Canada’s commitments under those treaties that the US has not ratified, including Protocol One Additional to the 1949 Geneva Conventions, the Ottawa Landmines Convention, and the Rome Statute of the International Criminal Court, some of which are, in addition, actively opposed by the US?

At present, these questions have not been answered; indeed the details of the proposed arrangement have not been released. In light of these uncertainties, this report canvasses some of the possible issues with a view to generating discussion about a seemingly imminent development that could reshape fundamental aspects of Canadian sovereignty, identity and foreign policy.

The report consciously adopts a “worst-case-scenario” approach, on the theory that any responsible debate on this matter must consider the range of possible eventualities. It goes without saying that the military partnership between Canada and the US is one of the most important in the world. Asking tough questions, proceeding cautiously on new initiatives and protecting against negative consequences will help to ensure that the partnership continues to operate to the benefit of both countries.

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<sup>1</sup> See: Paul Knox, “What does the Canadian military have to prove?” *Globe and Mail*, 9 January 2002, A9; Paul Koring & Daniel Leblanc, “Canada aims to join ‘Americas Command’,” *Globe and Mail*, 29 January 2002, A1; Jeffrey Simpson, “What matters is defence integration, not the Eggleton sideshow,” *Globe and Mail*, 2 February 2002, A15; Steven Chase, “Canadians concerned about threats, Cellucci says,” *Globe and Mail*, 27 March 2002, A9; Shawn McCarthy, “US plays down Northcom threat,” *Globe and Mail*, 19 April 2002, A14.

<sup>2</sup> See: Jeff Sallot, “U.S. plan raises questions for Canada,” *Globe and Mail*, 18 April 2002, A7; Shawn McCarthy & Paul Koring, “Canada opts out of American plan to defend continent,” *Globe and Mail*, 18 April 2002, A1; Stephen Handelman, “Who’s in Control? Canada will have to come to grips – discretely – with the new U.S. Northern Command,” *Time* (Canadian edition), 29 April 2002, p.18.

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In the same spirit of critical yet constructive analysis, the report seeks to define appropriate ways for how one might begin to restructure Canada-US military co-operation so as to protect better Canada's sovereignty and its commitments under international law, while furthering common interests with respect to security. In the end, Canadians might decide to support the creation of a US-led integrated command, or some less extensive or less formalised arrangement. But the consequences of that decision are so very significant and multifaceted that the decision should only be made after a full – and well-informed – debate.

This report, it should be noted, has been subject to an extensive consultation process involving three rounds of comments from more than twenty Canadian experts in defence studies, international relations, and international law. The names and affiliations of these experts are listed at the end of the report.

## II. DISTINGUISHING UN / NATO / NORAD OPERATIONS

The US and Canadian governments are contemplating an extension of the NORAD system to include land and sea forces. Such an arrangement would be significantly different from the UN and NATO operations in which Canada has, on previous occasions, placed soldiers and equipment under US command. It would also be different in several important respects from the current arrangements within NORAD.

Prior to 2001, Canadian soldiers have operated under US command in three kinds of situations:

### 1. UN-authorised operations

Canadian soldiers have operated under US command in a number of operations authorised by the UN Security Council. The first such operation was the US-led, UN-authorised 1950 intervention in Korea. Subsequent operations of this kind included the 1991 Gulf War and the intervention in the 1991-95 conflict in Bosnia-Herzegovina. Canada has also placed its soldiers under foreign command within peacekeeping operations authorised by the UN General Assembly. UN-authorised operations are not contentious: the Council and the Assembly operate on the basis of the UN Charter – a multilateral treaty that has been ratified by 190 states.<sup>3</sup> Although US commanders are sometimes in charge of day-to-day operations, they operate with the explicit, delegated authority of the international community. And these operations are temporary in scope.

### 2. NATO operations

As parties to the 1949 North Atlantic Treaty, Canada and the US are obligated to come to the assistance of any NATO member which is the victim of an armed attack.<sup>4</sup> This

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<sup>3</sup> See: < <http://www.un.org/aboutun/charter/index.html> >.

<sup>4</sup> See: < <http://www.nato.int/docu/basic/txt/treaty.htm> >.

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obligation, set out in Article 5, has only been invoked once – by the US following the September 11 attacks in New York and Washington – and even on that occasion NATO was never called upon to engage in military action.<sup>5</sup> Article 5 operations, if they occurred, would be very different from the US-led arrangement under discussion today. NATO is a defensive alliance whose structures remain largely dormant, and without authority, except in those specific instances where the members agree to engage them. Moreover, NATO, like the UN, is a multilateral organisation – in this case, composed of 19 member states. When a US commander is placed in charge of an operation, he acts as a NATO commander within the multilateral structure.

Outside the context of Article 5, NATO as an organisation has engaged in military action within the context of UN Security Council-authorized operations in Bosnia-Herzegovina. And in one instance – Kosovo – NATO acted without explicit Security Council approval. But even in that instance, the operation remained an operation of the multilateral organisation, subject to its authorisation and control. Every target and the authorisation to attack it had to be approved unanimously by all involved governments.

Finally, from a non-American perspective, part of the rationale for NATO is to restrain the US by integrating it into multilateral structures, thus making it more likely that its considerable power will be used to promote shared interests. This element of restraint could be undermined if Canada were to develop a closer bilateral military relationship with the US.

### 3. NORAD

NORAD was designed to provide a rapid response to incursions into Canadian or US airspace by Soviet nuclear bombers.<sup>6</sup> It is a surveillance system with the additional capability to deploy US and Canadian fighter jets (and refueling aircraft) on intercept missions. The integrated command structure of NORAD is limited to one very specific function – air defence – and involves a relatively small part of the Canadian armed forces. Since the end of the Cold War, the number of Canadian planes and pilots required for NORAD duties has decreased. A former minister of national defence, Paul Hellyer, has even suggested that a good case could be made for Canadian withdrawal from NORAD

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<sup>5</sup> Article 5 reads: “The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.”

<sup>6</sup> See: Agreement between the Government of Canada and the Government of the United States of America concerning the Organization and Operation of the North American Air Defence Command (NORAD), 1958 Canada Treaty Series 9. See also the various renewal agreements: 1968 CTS 5; 1973 CTS 17; 1975 CTS 16; 1980 CTS 7; 1981 CTS 32; 1986 CTS 34; 1991 CTS 19; 1996 CTS 36.

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since it no longer fulfils a necessary role.<sup>7</sup> In addition, pilots on intercept missions do not encounter many of the legal issues faced by ground and naval personnel, since they do not drop bombs, take prisoners or lay mines. But perhaps most importantly, the extension of the NORAD system to include land and sea forces would have implications for Canadian sovereignty of a scope and kind not raised by NORAD itself.

## III. POLITICAL ISSUES

### 1. Sovereignty

It is widely accepted that sovereignty in the 21<sup>st</sup> century is dramatically different from sovereignty in the 17<sup>th</sup>, 18<sup>th</sup> or 19<sup>th</sup> centuries. Sovereignty today is as much about the ability to represent and protect one's people and engage in international relations as it is about control over resources and territory. Under modern conceptions of sovereignty, there is nothing inconsistent about a sovereign state choosing to delegate legislative or police powers to supranational institutions such as the United Nations or European Community.<sup>8</sup>

In contrast to most countries, however, the US adheres to a narrower, more traditional concept of sovereignty whereby the "popular sovereignty" of the American people is considered paramount.<sup>9</sup> Under this conception, the US Constitution is regarded as the ultimate expression of the American people's consent to be governed – and any exercise of authority not expressly vested in the Constitution is illegitimate. International law and supranational institutions, which necessarily result from the joint law-making efforts of numerous countries, immediately attract suspicion.<sup>10</sup>

Under any conception of sovereignty, control over one's armed forces is regarded as a central quality of a sovereign state. Western European countries, for instance, have developed a common market with considerable supranational integration, including a single currency, but have yet to create an integrated military structure (except in one very limited respect).<sup>11</sup> The creation of a US-led integrated command, or even a less extensive or formalised arrangement, would thus constitute a major delegation of Canadian sovereignty.

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<sup>7</sup> Paul Hellyer, "Not since the British Empire have we been so prepared to surrender sovereignty," *Globe and Mail*, 4 February 2002, A11.

<sup>8</sup> See, e.g.: The Honourable Bill Graham, Minister of Foreign Affairs, "Affirming Canadian Sovereignty in an Interdependent World," (Notes for an Address to the Canadian Institute of International Affairs, 4 April 2002), < [http://webapps.dfaic-maeci.gc.ca/minpub/Publication.asp?FileSpec=/Min\\_Pub\\_Docs/105070.htm](http://webapps.dfaic-maeci.gc.ca/minpub/Publication.asp?FileSpec=/Min_Pub_Docs/105070.htm) >.

<sup>9</sup> See, e.g.: Paul W. Kahn, "Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order," (2000) 1 *Chicago Journal of International Law* 1.

<sup>10</sup> In 2001, US negotiators sabotaged a treaty designed to regulate the international trade in small arms, on the basis that it would violate the constitutional right to bear such weapons. See: Barbara Crossette, "Effort by U.N. To Cut Traffic In Arms Meets A U.S. Rebuff," *New York Times*, 10 July 2001, A8. At the same time, President George W. Bush dismissed international concern over the execution of juvenile and mentally handicapped offenders as impermissible interference in domestic affairs. See: Ewen MacAskill, "Bush talks a different language: President rebuffs critics on first stop of Europe tour," *Guardian*, 13 June 2001, p. 2.

<sup>11</sup> The development of a European "rapid reaction force" is designed to respond more effectively to humanitarian crises abroad – and until a crisis arises, and troops and equipment sent, those troops remain under the sole command of their home state. NATO, a defensive alliance, is similarly delegated soldiers and

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And to the degree that such an arrangement would compromise sovereignty, it would do so for one country only. Canada is being asked to surrender a central aspect of its sovereignty to a country that would not be prepared to give up any of its own. The true test of this assessment would be to insist on a system whereby the ultimate command rotated between US and Canadian generals. We know what the response would be. The US has always been highly reluctant to subject its own soldiers to foreign command. In the mid-1990s, legislation that would have prohibited the US government from subjecting its soldiers to foreign command came very close to being adopted by Congress.<sup>12</sup>

Some will argue – indeed, US Ambassador Paul Cellucci has already argued – that sovereignty is not at issue because Canada would, under the envisaged arrangement, retain command of its armed forces, with only “operational control” being assigned to the Northern Command. According to Cellucci, this means that Canada would receive a request whenever the participation of its forces was desired, and would have the option to decline that participation whenever it saw fit. Consequently, Cellucci asserts: “If Canada joins the US in a continental approach to security, Canadian sovereignty will not be infringed even one iota”.<sup>13</sup>

There are two problems with this argument. First, “operational control”, as defined in the 1958 exchange of notes which created NORAD, is a broad authority which includes many of the powers that civilians would envisage as falling within “command” – and thus as involving a delegation of sovereignty. The definition reads:

*“Operational Control” is the power to direct, co-ordinate, and control the operational activities of forces assigned, attached or otherwise made available. No permanent changes of station would be made without approval of the higher national authority concerned. Temporary reinforcement from one area to another, including the crossing of the international border, to meet operational requirements will be within the authority of commanders having operational control. The basic command organization for the air defence forces of the two countries, including administration, discipline, internal organization and unit training, shall be exercised by national commanders responsible to their national authorities.*<sup>14</sup>

Second, there is an important distinction between the theoretical ability and the real ability to withdraw from international commitments. The members of the European Union, United Nations, International Monetary Fund and World Trade Organisation are in theory

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equipment on an ad hoc and temporary basis. Military co-operation in Europe is a situation-specific, carefully regulated form of multilateralism between equals.

<sup>12</sup> Barbara Crossette, “U.N. Voices Concern Over a Bill to Limit U.S. Peacekeeping Role,” New York Times, 10 February 1995, A9.

<sup>13</sup> See: Ambassador Paul Cellucci, “North American Security,” Canadian Defence Industries Association CANSEC Dinner, 14 February 2002, Ottawa, < [http://www.cdia.ca/ambassador\\_cellucci.htm](http://www.cdia.ca/ambassador_cellucci.htm) >.

<sup>14</sup> Agreement between the Government of Canada and the Government of the United States of America concerning the Organization and Operation of the North American Air Defence Command (NORAD), 1958 Canada Treaty Series 9, p. 4 (emphasis added). The same definition has been used in the various NORAD renewal agreements.

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all able to withdraw from those organisations, just as all states are free – with appropriate notice – to withdraw from their obligations under international treaties. But nobody doubts that the members of the EU and other international organisations have delegated aspects of their sovereignties, sometimes in quite significant ways. The fact is that for most countries, withdrawal from many international mechanisms is simply not a practical option, given the political and economic costs that may result. Only the most powerful of countries retains this sovereign prerogative. In other words, what is at issue here is not Canada's legal sovereignty, but its *practical* sovereignty – its ability freely to make choices at the international level.<sup>15</sup>

Moreover, there is every reason to expect that the US might occasionally (and perhaps unintentionally) abuse any mechanisms designed to protect Canadian sovereignty. During the 1962 Cuban Missile Crisis, Canadian forces delegated to NORAD were raised to a heightened level of engagement after consultation with US political leaders only. Concerns about sovereignty cannot be overcome by the technical distinction between “command” and “operational control”.

There are several likely consequences of delegating a central aspect of Canadian sovereignty to the US while US sovereignty remains intact – consequences that do not arise, at least not on the same scale, as a result of the current co-operative air-defence arrangements. First, there is a very real possibility that Canada's standing in the international community would suffer. Canada's unique multilateral influence would be comprised the moment doubts were raised as to its status as a non-American voice. The situation might be compared to that of the Ukraine and Belarus within the former Soviet Union: both countries had separate UN seats, but everybody knew who called the shots. Already, in Europe and elsewhere, Canadian foreign policy on some issues is seen as largely inseparable from the US. Canadians need to be carefully consulted before anything is done which could further diminish their country's influence on the world stage.

As Foreign Minister Bill Graham recently said:

[D]efining what we mean by “sovereignty” and clearly articulating how we intend to affirm and promote it are more important to Canadians than ever. Important because in today's increasingly interdependent world it determines the choices that are available to us when we are making decisions about the way of life we wish to develop here in our own country and, equally importantly, it shapes the way we participate in the global community of which we are such an integral part.<sup>16</sup>

There is also the question of Canadian popular sovereignty, as expressed through the doctrine of parliamentary supremacy: the authority of elected and democratically

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<sup>15</sup> This reality has, however, not deterred Canada's Department of National Defence from arguing that closer integration would actually strengthen sovereignty, because Canada would be exercising a choice every time it decided not to withdraw its forces. See: *Leadmark: The Navy's Strategy for 2020* (Ottawa: 2001) 111-112.

<sup>16</sup> The Honourable Bill Graham, Minister of Foreign Affairs, “Affirming Canadian Sovereignty in an Interdependent World,” (Notes for an Address to the Canadian Institute of International Affairs, 4 April 2002), < [http://webapps.dfaic-maeci.gc.ca/minpub/Publication.asp?FileSpec=/Min\\_Pub\\_Docs/105070.htm](http://webapps.dfaic-maeci.gc.ca/minpub/Publication.asp?FileSpec=/Min_Pub_Docs/105070.htm) >.

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accountable representatives to make decisions on the people's behalf. What happens to popular sovereignty if important decisions concerning the use of Canadian armed forces are made by another country?

This concern is only heightened by the fact that sovereignty, however defined, is inextricably linked to concepts of national identity. And Canadians have a distinct identity – or at least distinct identities. Canada, rather than following the US lead in this instance, might be truer to itself if it focused the development of its armed forces on tasks central to its own conception of national mission.

## 2. Jurisdiction in the Arctic

The sovereignty issue – and the distinction between NORAD and the broader arrangement under consideration – is particularly acute with respect to the Arctic. Jurisdiction over the North-West Passage is one of the more prominent issues here.<sup>17</sup> The polar ice-cap is 40 per cent thinner than it was in the 1950s.<sup>18</sup> An ice-free North-West Passage could provide the US and other countries with a shorter and more secure route around North America, as well as easy access to the energy and other riches of Alaska and the Canadian North.<sup>19</sup>

Canada, however, has a long-standing claim to sovereignty over the Arctic islands and waters, and has serious concerns about the environmental impact of oil shipments on the fragile northern ecosystem.<sup>20</sup> The US insists that the North-West Passage is an international strait and therefore open to vessels from any country.<sup>21</sup> This claim has been backed up with action, for instance in the summer of 1985, when the US Coastguard icebreaker *Polar Sea* made the passage without Canada's permission.<sup>22</sup> Once the ice melts sufficiently to make commercial shipping viable, the US may well press its claim again.

US submarines already operate without permission in the Canadian Arctic.<sup>23</sup> It is therefore possible that the US might wish to take advantage of the shrinking ice sheet for the surface operation of US naval vessels. The creation of an integrated command could provide that

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<sup>17</sup> See generally: Mike Perry, "Rights of Passage: Canadian Sovereignty and International Law in the Arctic," (1997) 74 *University of Detroit Mercy Law Review* 657.

<sup>18</sup> See: James Brooke, "Arctic Shortcut for Shipping Raises New Fears in Canada," *New York Times*, 20 July 2000, A1; Alanna Mitchell, "The Northwest Passage thawed," *Globe and Mail*, 5 February 2000, A11.

<sup>19</sup> See: Jeff Sallot, "Military sees new peril in High Arctic," *Globe and Mail*, 8 December 2000, A1.

<sup>20</sup> See, e.g.: Christopher Wren, "U.S. Ship's Arctic Voyage Draws Heat in Canada," *New York Times*, 1 August 1985, A2; "Statement Concerning Arctic Sovereignty," (1985) 24 *International Legal Materials* 1723.

<sup>21</sup> See: James Brooke, "Arctic Shortcut for Shipping Raises New Fears in Canada," *New York Times*, 29 July 2000, A1. For a discussion of the legal issues, see: Donat Pharand, *Canada's Arctic Waters in International Law* (Cambridge: Cambridge University Press, 1988); Donald Rothwell, "The Canadian-U.S. Northwest Passage Dispute: A Reassessment," (1993) 26 *Cornell International Law Journal* 331.

<sup>22</sup> See: Christopher Wren, "U.S. Ship's Arctic Voyage Draws Heat in Canada," *New York Times*, 1 August 1985, A2. A similar incursion occurred in 1960, when the US oil tanker *SS Manhattan* made the passage. See: (1969-70) *Keesing's Record of World Events* 23759.

<sup>23</sup> See: Herbert H. Denton, "Sensing a U.S. Threat to Its Sovereignty, Ottawa May Buy Nuclear Submarines," *Washington Post*, 14 May 1987, A35.

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access without regular oversight and approval from the Canadian government. For example, would US commanders be able to send a US naval vessel into the Canadian Arctic without Canada's specific permission, on the basis that the mission was being conducted within the integrated command? In other words, would closer military cooperation entail, legally or practically, a delegation of Canada's right to determine, on an ongoing basis, access to the Canadian North? To what degree would a delegation of this kind – even if based upon a treaty, with a theoretical right to opt out – undermine Canada's claim to jurisdiction in the Arctic?

What would happen if, after the development of closer military relations, the US were to repeat its claims to unfettered access and send another non-military vessel through the North-West Passage without permission? Would the Canadian government, and the Canadian armed forces, be able to protect Canadian territory against the incursion?

Would the US military be subject to Canadian regulations – and the policing of those regulations – on, for example, environmental protection? Canada's actions to maintain sovereign control over the North-West Passage have long been linked to environmental concerns, as demonstrated by the adoption of the 1970 Arctic Waters Pollution Prevention Act.<sup>24</sup> Might the Canadian government come under pressure to change its position on the protection of the Arctic environment, perhaps even to revoke the Arctic Waters Pollution Prevention Act? How would Canadians feel if a US naval tender, sent into the Canadian Arctic by a US commander, were to break up and spill tens of thousands of barrels of oil?

Could an agreement with such potentially profound implications for sovereignty and environmental protection be concluded without very close consultation with Canada's native peoples? Surely they – and their governments – would need to be involved before any decisions are made? What would be the constitutional role of Nunavut, in terms of any requirement of consent to the creation and ongoing operation of an integrated command?

What would happen to the sovereignty operations (SOVOPS) conducted by the Canadian armed forces in the Arctic? Surely the US, if it could, would seek to prevent Canada from engaging in objective exercises of sovereignty designed specifically to support a legal claim to the territory and resources of the North? What would become of the Canadian Rangers who patrol the Arctic, again to the end of asserting sovereignty? What would this mean for the positive influence of the Canadian Rangers for First Nations Canadians? And what implications might an integrated command have in terms of weapons testing in the Arctic, to the possible detriment of the environment and First Nations communities?

Lastly, what would happen to Canada's successful efforts to promote multilateral cooperation in the protection of the Arctic? The Arctic Council is a Canadian initiative that has brought together eight countries, including the US, to provide a mechanism for

<sup>24</sup> R.S.C. 1985, vol.1, c.A12; reproduced in (1970) 9 International Legal Materials 543. See generally: Ronald St. J. Macdonald, G.L. Morris & D.M. Johnston, "The Canadian Initiative to Establish a Maritime Zone for Environmental Protection," (1971) 21 University of Toronto Law Journal 247.

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addressing the common concerns and challenges faced by the governments of those countries and the people of the Arctic.<sup>25</sup>

Article 1(a) of the 1996 Declaration on the Establishment of the Arctic Council states that the Council is established as a high level forum:

[To] provide a means for promoting cooperation, coordination and interaction among the Arctic States, with the involvement of the Arctic indigenous communities and other Arctic inhabitants on common arctic issues\*, in particular issues of sustainable development and environmental protection in the Arctic.<sup>26</sup>

Importantly, however, the \* [footnote] to Article 1(a) states: “The Arctic Council should not deal with matters related to military security.”<sup>27</sup>

Would the creation of an integrated command within North America have an impact upon “cooperation, coordination and interaction among the Arctic States ... in particular issues of sustainable development and environmental protection”, for example, by opening the Canadian Arctic to US military operations of a potentially environmentally-damaging kind? Would the development of closer bilateral military relations impede efforts to deepen and broaden the multilateral mechanisms established in 1996? Why not engage the Arctic Council (and NATO, which already has a defensive mandate in the area) on security issues in the North? These and other questions clearly need to be addressed before any agreement is concluded with the US.

At the least, and consistent with the established policy of the Government of Canada, any agreement on closer military co-operation should explicitly commit the other country to requesting Canada’s specific permission before its US soldiers or equipment enter the Arctic or North-West Passage.

### 3. Peacekeeping

Closer military co-operation with the US could have major implications for Canada’s freedom to allocate its military resources. Even with a massive increase in defence spending, participation in an integrated command would stretch Canada’s armed forces to their limits. Canada, after all, occupies more of the North American continent than the US, and may well be expected to bear a sizeable share of the defence burden. To what degree would the commitment to North American defence restrict Canada’s capacity to provide soldiers and equipment for peacekeeping and other multilateral missions overseas? Canada

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<sup>25</sup> See: < <http://www.arctic-council.org/> >. The Council was established on 19 September 1996 in Ottawa. The members are Canada, Denmark, Finland, Iceland, Norway, Russia, Sweden and the US. The Association of Indigenous Minorities of the North, Siberia and the Far East of the Russian Federation, the Inuit Circumpolar Conference, the Saami Council, the Aleutian International Association, Arctic Athabaskan Council and Gwich’in Council International are Permanent Participants in the Council.

<sup>26</sup> See: < <http://www.arctic-council.org/establ.asp> >.

<sup>27</sup> See: < <http://www.arctic-council.org/establ.asp> >.

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already participates in fewer peacekeeping missions than previously – due in part to limited military resources.

What implications would a continued reduction in peacekeeping have for Canada's standing and influence at the international level? Historically, Canada has punched above its weight, not because of a powerful military, but because of a willingness to take on its fair share of multilateral commitments – in pursuit of the international community's interests, not just its own. What implications would a continued reduction in peacekeeping have for Canadians' sense of national identity as constructive members of the international community?

Canada and the US will inevitably have different views with regard to certain foreign policy issues. They already do – for example, with respect to Cuba. Such differences in foreign policy might well come into conflict with Canada's obligations under an integrated command. What if Canada wished to send soldiers on a peacekeeping mission to which the US was strongly opposed? Would the integrated command enable the US to block such a deployment, or at least make it more difficult? This question, it should be noted, applies not only to ground forces, but also to Canada's naval fleet, with naval participation being an increasingly important aspect of peacekeeping – and with Canada's frigates destined to be an important part of the forces subject to the integrated command. It is one thing to say that Canada could opt out of its commitments to the integrated command in order to free up resources for overseas action, and a different thing to take such action once the structure is in place and the forces and equipment have been assigned.

Peacekeeping also raises issues of military expenditure.<sup>28</sup> Instead of duplicating high-tech naval, air and army capabilities that the US already has in abundance, Canada might actually acquire more influence for its investment, and better security, if it focused on building the capacity to deploy and lead middle-power expeditionary forces able to take on peacekeeping and peace-making missions overseas.<sup>29</sup>

## 4. Foreign Policy

It is likely that any agreement on closer military co-operation would seek to limit the scope of that arrangement to North America and surrounding waters. In reality, it is probably impossible to separate out the North American theatre. For example, US actions overseas that did not directly involve Canada could have automatic ramifications for Canadian troops and equipment in North America – for instance, requiring a higher level of defence (and more expense) – as the result of heightened antagonism against the US from abroad. Suppose that the US launched a major, unilateral military campaign against Iraq after an integrated command structure had been established between the US and Canada. The launching of the campaign would almost certainly result in US forces in North America

<sup>28</sup> For more on military expenditure, see discussion below, page 17.

<sup>29</sup> See: Douglas Bland, "Defences that impress friends and enemies," *National Post*, 28 February 2002, A21; Jeffrey Simpson, "Why we ended up dead," *Globe and Mail*, 20 April 2002, A15.

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being put on a higher level of alert, and in a substantial portion of those forces being transferred overseas. But suppose as well that the Canadian government did not wish to participate in – or was explicitly opposed to – the campaign.

Could Canada veto an alert? Could it exclude its forces? Would it even be consulted before its forces were put on a higher level of alert? During the Cuban missile crisis, and despite the integrated command structure of NORAD, the US raised the level of alert for NORAD without consulting Canada. Prime Minister Diefenbaker's subsequent refusal to allow Canadian participation, within the context of NORAD, in the US response to Cuba prompted a major diplomatic row with Washington. And if Canada were unable to veto or to exclude itself from an alert, or if the political price for doing so was too high, would more of the burden of protecting North America fall on Canada as a result of a unilateral US decision on military engagement elsewhere?

As a result of the potential consequences of US actions overseas for North American defence, should Canada have a say in what the US does abroad? Would the US give Canada any say? The US military, one should recall, has soldiers stationed in some 140 countries. This makes it unlikely that Canada would routinely be listened to – even though US actions overseas could in some cases have a significant impact on North American defence.

As Joel Sokolsky explains (in the context of naval co-operation), it is wrong to think that closer military co-operation will somehow enhance Canada's influence:

[C]onvincing allies to dispatch ships to join the USN, and encouraging them to be as interoperable as their budgets allow, is yet another manifestation of the American pursuit of global dominance. ... [E]ven when allies contribute forces and there is agreement on specific tasks, there is no concomitant expectation that smaller contributors, such as Canada, will therefore share in the higher strategic and political decisions associated with the operation. Interoperability may allow the Canadian navy to make a useful contribution at sea, but it is not likely to permit Ottawa greater voice or leverage in Washington.<sup>30</sup>

What if the actions taken by the US overseas violated international law? Would Canada's involvement in an integrated command compromise its ability to take a separate position on the issue? To what degree would closer military co-operation reduce Canadian foreign policy, in so far as it concerned peace and security issues, to a mere shadow of the foreign policy of the US?

In this context, it is important to remember that potential overseas military actions are not confined to the Middle East or Asia. They could well take place in the Western Hemisphere, in countries such as Columbia, Cuba and Nicaragua, where Canadian foreign policy has at times differed markedly from that of the US.

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<sup>30</sup> Joel J. Sokolsky, "Sailing in Concert: The Politics and Strategy of Canada-US Naval Interoperability," (April 2002) 8(2) Choices: National Security and Interoperability 2 at 14.

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## 5. Nuclear Weapons

The US is committed, at the political level, to maintaining a substantial nuclear arsenal. A secret Pentagon report, obtained by the New York Times in March 2002, even revealed plans to develop small new nuclear weapons for battlefield use (for example, to destroy deep and heavily fortified bunkers) and suggested that testing of nuclear weapons might need to be resumed.<sup>31</sup> The Pentagon has also indicated that it will retain rather than destroy nuclear missiles and warheads removed from active deployment as a result of arms negotiations with Russia.<sup>32</sup>

In the last few years, arms control treaties have been put under considerable pressure from the US. In October 1999, the Republican majority in the US Senate refused to give its consent to the ratification of the 1996 Comprehensive Test Ban Treaty.<sup>33</sup> In December 2001, the Bush Administration denounced the 1972 Anti-Ballistic Missile Treaty, raising fears of a new arms race.<sup>34</sup> Although the US remains a party to the 1968 Nuclear Non-Proliferation Treaty, its actions and words indicate that it has little intention of fulfilling the obligation, set out in Article 6, to negotiate the elimination of its own nuclear arsenal.<sup>35</sup> Finally, in 1995, the US led the handful of nuclear powers which argued, before the International Court of Justice, that international law had nothing to say about whether states are permitted to use – or to threaten to use – nuclear weapons.<sup>36</sup>

Canada, in contrast, has long been at the forefront of efforts at international arms control.<sup>37</sup> Its policy on these matters is as follows:

The objective of successive Canadian Governments has been and remains the complete elimination of nuclear weapons. Canada will continue to resist any movement to validate nuclear weapons as acceptable currency in international politics or any attempt - de jure or de facto - to legitimize any new nuclear-weapon state. Canada's approach to nuclear disarmament is based on the view that the most viable and practicable way forward is by a continuous step-by-step process to reduce and eliminate nuclear weapons through steadily advocating national, bilateral and multilateral steps.<sup>38</sup>

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<sup>31</sup> Michael R. Gordon, "U.S. Nuclear Plan Sees New Targets and New Weapons," *New York Times*, 10 March 2002, s.1, p.1.

<sup>32</sup> Patrick E. Tyler, "Russia Rejects U.S. Plan to Store Warheads," *New York Times*, 11 January 2002, A8.

<sup>33</sup> Eric Schmitt, "Senate Kills Test Ban Treaty in Crushing Loss for Clinton; Evokes Versailles Pact Defeat," *New York Times*, 14 October 1999, A1.

<sup>34</sup> David E. Sanger, "Bush Offers Arms Talks to China As U.S. Pulls Out of ABM Treaty," *New York Times*, 14 December 2001, A1.

<sup>35</sup> See discussion, below, page 34.

<sup>36</sup> See discussion, below, page 35.

<sup>37</sup> See generally: < <http://www.dfait-maeci.gc.ca/arms/nuclear-e.asp> >.

<sup>38</sup> See: < [http://www.dfait-maeci.gc.ca/arms/new\\_nuclear-e.asp](http://www.dfait-maeci.gc.ca/arms/new_nuclear-e.asp) >.

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Canada was one of the first countries to ratify the Comprehensive Test Ban Treaty and claims to be strongly promoting its ratification by others.<sup>39</sup> It plays a leading role in the UN Conference on Disarmament (which meets regularly in Geneva),<sup>40</sup> and has always refused to become a nuclear weapons state despite having the technological ability to do so.

Canada has always taken a cautious position on co-operation with the US in nuclear weapons matters. In the 1960s, Canada debated, accepted, and then rejected the positioning of Bomarc nuclear-armed anti-aircraft missiles in Canada.<sup>41</sup> In the early 1980s, Canada controversially allowed the testing of unarmed cruise missiles in Canadian airspace, after a year of negotiations that were kept quiet so as to avoid public debate.<sup>42</sup>

Placing Canadian soldiers under an integrated command entails working hand-in-glove, on an ongoing basis, with armed forces that possess a substantial nuclear component (as a cornerstone of overall US military and political strategy). This raises difficult legal questions – as will be examined below – concerning whether this might violate Canada's arms control obligations. It also raises difficult policy questions. Do Canadians wish to accord a degree of legitimacy to the US retention – and further development – of the nuclear option? Might Canadian soldiers be required to participate in operations in which nuclear weapons play a potential role? Would US commanders be able, in any foreseeable circumstance, to deploy nuclear weapons on Canadian territory? How does one protect against situations such as these developing, without Canada's consent, if US commanders think North America is under threat and feel the need to act quickly?

## 6. Ballistic Missile Defence

In 1983, President Ronald Reagan launched the Strategic Defence Initiative (SDI), the aim of which was to develop the capability to shoot down ballistic missiles launched at the US.<sup>43</sup> Work on the project continued through subsequent Administrations, and the necessary technology may soon be within reach. President George W. Bush is pushing ahead with the scheme, and has committed the US to constructing, at enormous cost, a Ballistic Missile Defence (BMD) system.<sup>44</sup> In December 2001, Bush denounced the 1972

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<sup>39</sup> See: < <http://www.dfait-maeci.gc.ca/arms/nuclear2-e.asp> >. For the text of the CTBT and other disarmament treaties, see: < <http://www.unog.ch/disarm/distreat/warfare.htm> >. Article 14 of the CTBT stipulates that the treaty will only enter into force after a number of specified states – including the US – have ratified. There is therefore no prospect that Canada could be bound to the CTBT without the US being similarly bound.

<sup>40</sup> See generally: < <http://www.unog.ch/disarm/disarm.htm> >.

<sup>41</sup> For a brief historical summary, see:

< [http://www.dnd.ca/menu/Fourth\\_Dimension/2002/feb02/05\\_fd\\_e.htm](http://www.dnd.ca/menu/Fourth_Dimension/2002/feb02/05_fd_e.htm) >.

<sup>42</sup> See: "A Missile Pact with Canada Near," *New York Times*, 19 October 1982, A4; Douglas Martin, "Canadians Approve Cruise Missile Tests; U.S. Voices Pleasure," *New York Times*, 16 July 1983, s.1, p.4.

<sup>43</sup> See: Charles Mohr, "New Vision for Reagan," *New York Times*, 24 March 1983, A21.

<sup>44</sup> On 3 February 2001, Secretary of Defense Rumsfeld asserted: "The United States intends to develop and deploy a missile defense ...." – Michael Gordon, "U.S. Tries Defusing Allies' Opposition to Missile Defense," *New York Times*, 4 February 2001, s.1, p.1. Three months later, in a speech to the National Defense University, President Bush said: "When ready, and working with Congress, we will deploy missile

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Anti-Ballistic Missile Treaty, which, in an effort to preserve mutual deterrence, had prohibited the development of BMD-type defences.<sup>45</sup> His Administration has pressed ahead with tests – several which have apparently been successful.

Canada's co-operation is essential if the system is to be implemented.<sup>46</sup> Any Russian, Chinese, North Korean or Iraqi missiles launched at the US would almost necessarily fly through Canadian airspace. Moreover, they would probably have to be destroyed while in Canadian airspace, which would in all likelihood mean that new radar stations – and probably intercept launchers – would have to be built on Canadian soil.<sup>47</sup>

During the Cold War, Canada and the US co-operated closely in defending the continent against Russian bombers. Radar stations were built in northern Canada and NORAD was created to provide an effective surveillance and intercept capability.

Air defence co-operation was clearly in Canada's interest; it is less obvious that the same could be said of BMD. A new arms race between the US, Russia and/or China would see Canada literally caught in the middle: by allowing missile defence installations to be built, it would make itself a target of any large-scale attack, although the "rogue states" seen as the justification for the scheme are unlikely to waste their few missiles on Vancouver or Toronto.

An integrated command would be a significant step forward in providing the operational capacity for missile defence. NORAD's website explicitly foresees that the organisation will be assigned the operational responsibility for BMD.<sup>48</sup> And the US ability to apply political pressure to support BMD could increase substantially once Canada is committed to other forms of closer military co-operation. In light of this, there is a significant risk that

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defenses to strengthen global security and stability." – "In Bush's Words: 'Substantial Advantages of Intercepting Missiles Early'," New York Times, 2 May 2001, A10.

<sup>45</sup> David E. Sanger, "Bush Offers Arms Talks to China As U.S. Pulls Out of ABM Treaty," New York Times, 14 December 2001, A1. The denouncing of the treaty was a blow to Canadian foreign policy. A 2001 policy statement from the Department of Foreign Affairs affirmed that "Canada regards the 1972 ABM Treaty as a cornerstone of global strategic stability, a vital component of the global nuclear disarmament and non-proliferation regime and the basis for a system that, for almost 30 years, has underpinned nuclear restraint and allowed for nuclear reductions." See: < [http://www.dfait-maeci.gc.ca/arms/new\\_nuclear-e.asp](http://www.dfait-maeci.gc.ca/arms/new_nuclear-e.asp) >.

<sup>46</sup> See: Jeff Sallot, "Canada's help on missile shield crucial, U.S. ambassador says," Globe and Mail, 13 June 2001, A11.

<sup>47</sup> Senior Canadian military officers have already suggested the Canadian Arctic as an alternative site for a key BMD radar station, should Denmark refuse permission for it to be constructed in Greenland. See: Jeff Sallot, "Canada won't cede priority to the U.S., Graham vows," Globe and Mail, 2 March 2002, A8.

<sup>48</sup> See: "'NORAD' into the 21st Century: Entering the 21<sup>st</sup> Century," < <http://www.norad.mil/21stcent.htm> > ("In a world of proliferating ballistic missile capabilities, subject to the agreement and tasking of the governments of the U.S. and Canada, NORAD may be the logical organization to have command and control of a ground based North American limited ballistic missile defense system.") See also: NORAD Vision 2010, < [http://www.norad.mil/vision\\_2010.htm](http://www.norad.mil/vision_2010.htm) >; Jeff Sallot, "Canada's help on missile shield crucial, U.S. ambassador says," Globe and Mail, 13 June 2001, A11. These assertions are all the more remarkable given that a 1968 exchange of notes, providing for the continued existence of NORAD, specifically states that "this Agreement will not involve in any way a Canadian commitment to participate in an active ballistic missile defence". See: 1968 Canada Treaty Series 5, page 1.

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a move to closer military co-operation with the US could pre-empt a full national debate over Canadian participation in BMD.

It is likely that Canada, as a participant in BMD, would be compelled to contribute towards its very substantial costs. During the Clinton Administration, the cost of a limited BMD system was already set at more than US \$60 billion dollars.<sup>49</sup> Having to pay even a fraction of that amount would distort Canadian military expenditure *and* divert resources away from other areas of government activity.

There is also reason to believe that BMD could lead into the eventual weaponization of space. Proponents of missile defence, including US Secretary of Defence Rumsfeld, have made it clear that the weaponization and domination of space by the US is the ultimate goal of BMD.<sup>50</sup> By agreeing to an integrated command, Canada might not only have difficulty resisting participation in BMD; it might also, subsequently, have difficulty resisting participation in the weaponization of space – again, without a full national debate on the matter.<sup>51</sup> This would directly contradict past Canadian policy. Starting in 1967, Canada has pushed strongly within the UN Conference on Disarmament for a Convention for the Non-Weaponization of Outer Space. As recently as 1998, Canada called for an Ad Hoc Committee to be formed within the Conference on Disarmament with a mandate to negotiate such a convention.<sup>52</sup>

Within this context, Canada might also find itself having to violate – or denounce – a number of international treaties. In its pursuit of BMD the Bush Administration has shown little compunction in denouncing the 1972 Anti-Ballistic Missile Treaty, which many regarded as the cornerstone of international efforts at arms control. Will it have much patience for Canada's adherence to other treaties – such as the 1967 Outer Space Treaty<sup>53</sup> – once Canadian soldiers and equipment are subject to its operational control?

## 7. Military Expenditure

Canadian participation in a US-led integrated command, or even some less extensive or less formalised arrangement, might well require increased military expenditure. Military

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<sup>49</sup> Eric Schmitt, "Testing a Missile And a Treaty," New York Times, 30 January 2000, Section 4, Page 4.

<sup>50</sup> See: Report of the Commission to Assess United States National Security Space Management and Organization, Washington, DC (Public Law 106-65), 11 January 2001 ("Rumsfeld Commission"), < <http://www.defenselink.mil/pubs/space20010111.html> >.

<sup>51</sup> For a report on secret documents concerning Canada's possible involvement in the weaponization of space, as obtained from the Department of National Defence under the Access to Information Act, see: Jeff Sallot, "Canada moves closer to U.S. orbit," Globe and Mail, 27 February 2002, A8.

<sup>52</sup> See: "The Canadian Position on Arms Control in Outer Space," at < <http://www.dfait-maeci.gc.ca/arms/outer3-e.asp> >. See also: Jeff Sallot, "U.S. global dominance prompting review of defence, foreign policies, Graham says," Globe and Mail, 15 April 2002, A4 (quoting Foreign Minister Bill Graham as saying "We are totally against the 'weaponization' of outer space.").

<sup>53</sup> Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, < <http://www.oosa.unvienna.org/> >. The Treaty does not prohibit the placing of non-nuclear defensive weapons in Earth orbit. It does, however, ban nuclear weapons in orbit (and anywhere else in space), as well as all weapons and military activity on celestial bodies.

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interoperability requires roughly equal levels of technology – and modern weapons technology comes at considerable price. At the moment, the US maintains a level of military expenditure that, as a percentage of gross domestic product (GDP), is more than twice that of Canada.<sup>54</sup> Indeed, its total military expenditure exceeds the military expenditure of the eight next highest spending states combined – even though its population is less than ten times that of Canada. Closer military co-operation could thus result in substantial and probably irresistible pressure on Canada to significantly increase defence spending.<sup>55</sup> Matching current US levels of expenditure would cost more than Cdn \$16 billion (US \$10 billion) in additional funds each year.

There clearly needs to be a full national debate, from the outset, concerning the possible implications of closer military co-operation on military expenditure. Otherwise, the move to closer co-operation could result in significant increases in defence spending by stealth. Canadians, once they have debated the matter fully, may well decide that they do not wish to spend as much as the US on their armed forces. They might prefer, instead, to spend that additional money on preventative measures, including foreign (non-military) aid, or on domestic priorities.

Any debate about spending also has to consider the kinds of soldiers and equipment Canada needs and wants. A move towards closer military co-operation could well divert money away from tasks, such as UN peacekeeping, that the US tends to avoid and in which Canada has traditionally specialised, and away from the equipment best suited for those tasks.<sup>56</sup> In this and other ways, Canadian taxpayers might find themselves supporting US rather than Canadian priorities.

## 8. Bilingualism in the Armed Forces

Nearly a third of Canadian armed forces personnel are Francophone. The Department of National Defence has stringent obligations under the Official Languages Act, and has

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<sup>54</sup> In 1999, Canada spent 1.3% of its GDP on its military; the same year the US spent 3.0%. By comparison, Mexico spent 0.6%, Japan 1.0%, Germany 1.5%, The Netherlands 1.8%, Sweden 2.1%, the United Kingdom 2.5%, and France 2.7%. These numbers should be read within their geopolitical context. Simply put, North America is a safer neighbourhood than either Europe or Asia. See: Jeff Sallot, "A foreign policy for the 1990s: Neighbourhood watch," *Globe and Mail*, 26 April 1997, D1. In 1999, Canada spent a total of US \$8 billion on its armed forces; the US a total of US \$275 billion. For the numbers, see: < <http://www.sipri.org> > (the website of the Stockholm International Peace Research Institute).

<sup>55</sup> For an early indication of this pressure, see: Ambassador Paul Cellucci, "North American Security," Canadian Defence Industries Association CANSEC Dinner, 14 February 2002, Ottawa, [http://www.cdia.ca/ambassador\\_cellucci.htm](http://www.cdia.ca/ambassador_cellucci.htm) ("[W]e in the US value the contributions that Canadian Forces make worldwide, so much so that we hope they will get the funding they need to continue. Without that funding, they will face constraints like the current shortage of strategic lift, both air and sea. I know DND has programs underway to address this shortfall, and we wish them success in doing so"). See also: Kenneth Gause, "US Interoperability with its High-End Allies," Paper written for the Center for Strategic Studies, Center for Naval Analyses, Arlington, VA, 2001, 9-10 ("To remain interoperable with the US on all levels, allied navies would require a large increase in their budgets.")

<sup>56</sup> See: Douglas Bland, "Canada and Military Coalitions: Where, How and with Whom?" (February 2002) 3(3) *Policy Matters / Enjeux publics* 1 at 32-41.

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sought to meet these obligations with carefully designed procedures ensuring an equal status to French and English. For example, the Department maintains the following policy statement:

To comply with the letter and spirit of the Official Languages Act, DND and CF must implement this Act in all components and are committed to:

- ensuring equality of status for the use of English and French throughout the organization; ...
- ensuring that, in bilingual units, the work environment is conducive to the effective use of both official languages;
- ensuring that Francophones and Anglophones have equal opportunity for employment and career advancement within DND and CF; ....<sup>57</sup>

Assuring the equality of the French language continues to be a challenge for the Canadian armed forces. The goal of linguistic equality will only become more difficult to achieve if land and naval forces are integrated into a US-led command. US commanders might have little patience for foreign procedures aimed at protecting the status of what, for them, is a foreign language. And the factual protection that a nearly one third share of personnel currently affords the French language would be greatly diminished if Francophone forces were, for all practical purposes, subsumed within the far larger, English-speaking armed forces of the US.

Canadian forces obviously have operated in conjunction with non-French speaking forces in the past, and continue to do so, without the use of the French language being subverted. But any agreement on closer military co-operation would have to include carefully designed mechanisms to ensure that the Canadian armed forces remain a truly bilingual institution.

## 9. Women in the Military

The Canadian Charter of Rights and Freedoms requires gender equality. As a result, the Canadian armed forces are engaged in an ongoing effort to create opportunities for women, and to prevent sexual harassment and assault.<sup>58</sup> Women are now allowed to serve in all capacities within the Canadian armed forces, including in combat roles.

<sup>57</sup> 30 January 1998, < [http://www.dnd.ca/admfines/subjects/daod/5039/0\\_e.asp](http://www.dnd.ca/admfines/subjects/daod/5039/0_e.asp) >

<sup>58</sup> See: Canadian Press, "Women, gays can make army better, general says," Globe and Mail, 2 March 1998, A3.

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The Canadian approach contrasts somewhat with that adopted in the US, where women are not allowed to serve in all capacities.<sup>59</sup> Moreover, it seems that the US military has more significant problems with sexual harassment and assault.<sup>60</sup>

Under an integrated command, Canadian military personnel would operate side-by-side with US personnel – indeed, interchangeably. As a result, the presence of women in certain roles may cause friction that proves uncomfortable, and perhaps even dangerous, to female Canadian personnel. It is also conceivable that a US commander in charge of an operation might decide to exclude female Canadian soldiers from certain aspects of it, in accordance with US policy but in violation of Canadian policy and, indeed, the Charter. In light of these possible problems, the US may put pressure on the Canadian government to bring its policy on female military personnel into line, so as to promote the more effective functioning of the two armed forces.

Any agreement on closer military co-operation would have to specify that Canada's policy on women in the armed forces remains unaffected. It would also have to include carefully designed procedures and protections to ensure that female personnel are not placed in uncomfortable or dangerous situations because of the two countries' somewhat different approaches to this issue.

### 10. Gay and Lesbian Military Personnel

In recent years, the issue of sexual minorities in the military has provoked controversy within several countries, including the US. The current policy in the US is “don't ask, don't tell”. In other words, homosexuality remains prohibited, but the witch-hunts of the past are no longer supposed to occur.<sup>61</sup> That said, the situation has arguably become worse rather than better for gay and lesbian US soldiers under the “don't ask, don't tell” policy, because they risk discharge if they complain about harassment or violence.<sup>62</sup>

Canada has taken a more liberal approach. Gay and lesbian personnel are benignly allowed – perhaps even encouraged on diversity grounds – subject to the same constraints on sexual activity that apply to all military personnel regardless of sexual orientation.<sup>63</sup> Same sex partners are accorded many of the benefits (e.g. bereavement leave, dental coverage,

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<sup>59</sup> See: Thomas E. Ricks & Steve Vogel, “‘Killed in Action’: Is Gender an Issue?; Lack of Specific Outcry Over Cole Women's Deaths Splits Experts,” *Washington Post*, 23 October 2000, A3.

<sup>60</sup> See: Francine D'Amico & Laurie Weinstein, *Gender Camouflage: Women and the U.S. Military* (New York: NYU Press, 1999); Linda Bird Francke, *Ground Zero: The Gender Wars in the Military* (New York: Simon & Schuster, 1997), esp. chapter 6, “The Military Culture of Harassment,” pp. 152-82.

<sup>61</sup> See: Roberto Suro, “Military's Differing Lesson Plans Reflect Unease on Gay Policy,” *Washington Post*, 4 March 2000, A1.

<sup>62</sup> See, e.g.: Roberto Suro, “Military's Discharges of Gays Increase; Army Base Where Anti-Gay Murder Occurred Had Record Number of Departures,” *Washington Post*, 2 June 2001, A20; Vernon Loeb, “1,250 Gays Left Forces in '01; Harassment Cited in Largest Exodus From Military Since '87,” *Washington Post*, 14 March 2002, A4.

<sup>63</sup> See: Canadian Press, “Women, gays can make army better, general says,” *Globe and Mail*, 2 March 1998, A3.

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relocation expenses) accorded to partners of different sexes.<sup>64</sup> This approach is the result of a 1992 Federal Court decision based on the Canadian Charter of Rights and Freedoms, which caused the Department of National Defence to revoke its previously discriminatory policy.<sup>65</sup>

What would happen to this liberal approach if Canadian forces were placed under a US-led integrated command? Would gay and lesbian soldiers be at risk of punishment from their US commanding officers? Would they be at risk of harassment (or worse) from US soldiers accustomed to an environment where (overt) homosexuality is proscribed? Would it be right (and would it be legal?) to subject gay and lesbian Canadian soldiers to US operational control if such questions have not fully been answered and strong protections put in place? Would the Canadian government come under pressure from the US to revise its policy on gays and lesbians in the armed forces? Would it not be more appropriate for the US to bring its policy into line with that of Canada, so as to provide the higher of the two levels of protection to gay and lesbian personnel?

Closer military co-operation could constitute a threat to Canadian gay and lesbian service members. The questions identified in this section need to be answered, and procedures and protections carefully designed, before Canada commits itself to any agreement with the US.

## 11. Safety of Soldiers

History suggests that a country placing its soldiers under the operational control of another country risks those soldiers being placed in somewhat greater danger than the soldiers of the country exercising operational control. Canadians remember well the slaughter on the beaches of Dieppe (2nd Canadian Division, especially the South Saskatchewan Regiment) and the capture of soldiers in Hong Kong (Winnipeg Grenadiers & Royal Rifles of Canada); New Zealanders and Australians the massive losses in Gallipoli. British commanders, some believe, regarded the lives of Commonwealth soldiers as less valuable than those of British soldiers, and gave the most dangerous tasks to them.

To some degree this kind of behaviour on the part of foreign commanders is understandable: generals and politicians are accountable to their own citizens, not the citizens of other countries, and there is little that plays worse at home than losses on the battlefield. The risk of such behaviour may be particularly acute with regard to the US in the 21st century. After the deaths of 18 US Rangers in Somalia in 1991, it became accepted wisdom that the US public would no longer tolerate body bags returning from abroad. After September 11, this accepted wisdom changed – though perhaps only temporarily. It is noteworthy that the US, once it started to lose soldiers in Afghanistan, immediately called in 1700 mountain-trained British marines.<sup>66</sup> When contemplating

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<sup>64</sup> See: <[http://www.forces.ca/hr/dcba/engraph/travel\\_removal/Same\\_Sex\\_Benefits\\_e.asp](http://www.forces.ca/hr/dcba/engraph/travel_removal/Same_Sex_Benefits_e.asp)>.

<sup>65</sup> Douglas v. Canada, (1992) 98 (4<sup>th</sup>) D.L.R. 129.

<sup>66</sup> See: Richard Norton-Taylor & Rory McCarthy, “British troops face elusive Afghan foe: Reinforcements sent to help struggling Americans catch Taliban and al-Qaida fighters who beat the bombing,” Guardian, 19 March 2002, p. 13.

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closer military co-operation, it bears asking whether this risk is worth bearing. To what degree might the US choose to focus its efforts on the relatively safe high-tech tasks of providing air and naval support, leaving the provision of ground troops, at least for the more dangerous missions, to Canada? To what degree might US commanders, consciously or unconsciously, provide lower quality air support for Canadian as opposed to US soldiers? To what degree might they assign Canadian soldiers to tasks for which they are insufficiently trained or equipped? It is impossible to answer these questions in the abstract, or to secure foolproof protection through assurances that could, in the heat of battle, fall by the wayside. The key question here is, do Canadians trust US commanders to treat the lives of Canadian soldiers with as much care as they treat the lives of their own soldiers?<sup>67</sup>

Lastly, what if Canadian soldiers do not wish to risk receiving injections that the US military deems necessary (e.g. anti-Anthrax)? Today, Canadian military culture and policy respects the individual soldier far more than is the case in the US. Under an integrated command, who will make these determinations? What pressures might be placed on Canada to conform?

## 12. Promotion of the National Interest

A country's national interest might not be the top priority of the foreign army to which it has given operational control of its soldiers. In 1967, King Hussein of Jordan saw his troops, which he had placed under Egyptian command, ordered into combat in Jerusalem and the West Bank, thus opening a second front in the Six Day War. Jordan lost the Old City of Jerusalem and the West Bank as a result.<sup>68</sup> In any military conflict, commanders have to assign priorities with respect to the deployment of soldiers and equipment, to choose where to advance, where to make a stand, and where to retreat. As Canada contemplates entering into an integrated command, it will have to ask whom the command is really designed to protect. Will American commanders accord the same priority to protecting the residents of St. John's as they accord to protecting the residents of Raleigh, NC? Or might Canadian soldiers and their equipment be diverted away from the task of protecting Canada towards a new task of protecting the US?<sup>69</sup>

It is true that the Canadian armed forces do not currently have the soldiers or equipment to protect Canada against a significant military attack. In such an (unlikely) situation, Canada would be heavily reliant on the US. But the Canadian armed forces do have the capacity to protect the country against many threats, and may – depending on the financial support they receive – become even more capable in future.

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<sup>67</sup> See generally: Paul Knox, "The risks of collaboration," *Globe and Mail*, 19 April 2002, A13; Jeffrey Simpson, "Why we ended up dead," *Globe and Mail*, 20 April 2002, A15.

<sup>68</sup> See: Avi Shlaim, *The Iron Wall: Israel and the Arab World* (London: Allen Lane / Penguin Press, 2000) 244.

<sup>69</sup> See similarly: Desmond Morton, "Who stands on guard for us?" *Globe and Mail*, 31 December 2001, A9.

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Were the Canadian armed forces unable to deal with an attack on their own, the US and the other members of NATO are already obligated to come to Canada's assistance under the 1949 North Atlantic Treaty.<sup>70</sup> It is therefore possible that, by placing a significant part of its armed forces under US operational control, Canada could be losing rather than gaining security. There is no way one could guarantee that, faced with a crisis situation, the US would not do what Egypt did in 1967: i.e. sacrifice the national interest of its ally in favour of its own. And yet Canadians will want to be able to rely, absolutely and without condition, on their soldiers being available to protect Canada. Structuring an agreement with the US in a way that securely protects Canada's national interest is a major challenge.

### **13. Safety of Canadian Civilians**

Canadians should also be concerned about the implications of closer military co-operation for their own personal safety. Around the world, Canadians benefit from considerable goodwill. Canadian passports are welcomed at immigration booths around the world. Canadians are rarely the deliberate targets of terrorist attacks – and if they are, it is not because they are Canadian.

As a result of the United States' position in the world, and certain aspects of its foreign policy, Americans do not benefit from the same degree of goodwill. They are sometimes the targets of terrorist attacks simply because they are American. If Canada were to become more closely identified with the US, and particularly with its military and foreign policy, Canadian citizens might encounter greater risks when travelling.

It is also possible that closer co-operation with the US could increase the risk of terrorist attacks on Canadian soil. The United Kingdom felt the need to increase domestic security after its participation, with the US, in the enforcement of the no-fly zones in Iraq and repeated bombings of Baghdad. Prime Minister Blair's unequivocal and highly public support for the US since September 11 has necessitated a further, even more dramatic increase in security.<sup>71</sup> London – not Paris, Berlin or Montreal – is now widely seen as a leading target for global terrorists. Are Canadians willing to pay the price of greater fear and risk, and suffer the inconveniences and expenditures associated with heightened security, that might result from closer bilateral military co-operation?

Military co-operation in multilateral contexts does not carry the same risks. For more than half a century, Canada has been a NATO partner without being perceived as inextricably linked to the US. On numerous occasions, Canada has placed its soldiers under temporary US command in UN Security Council-authorized operations – again, without paying the price of being perceived as a satellite state. In terms of not becoming a target, even a trilateral arrangement that included Mexico would be preferable to a closer bilateral relationship with the US.

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<sup>70</sup> Also known as the "Washington Treaty". See: < <http://www.nato.int/docu/basic/txt/treaty.htm> >.

<sup>71</sup> See, e.g.: Owen Bowcott & Audrey Gillan, "Allies try to calm fears of terrorist retaliation: Worldwide warning to US citizens," *Guardian*, 8 October 2001, Page 4 ("An extra 1,000-plus officers have been on the capital's streets since last month's attacks in Washington and New York on September 11.").

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## IV. LEGAL ISSUES

In addition to the political issues raised by the prospect of closer military co-operation, a number of legal issues must be considered. Many of these issues could be dismissed as “hypothetical”: indeed, this was the position taken by Prime Minister Chrétien in January 2002 with respect to the possible detention of terrorist suspects by Canadian soldiers operating under US command in Afghanistan.<sup>72</sup> Subsequent events quickly proved him wrong.<sup>73</sup>

It is noteworthy that all of the issues identified below have implications with respect to the Canadian Defence Act.<sup>74</sup> Simply put, it is an offence for any member of the Canadian armed forces to obey an unlawful order. Canadian soldiers undoubtedly do their best to fulfil their obligations under the Defence Act when placed under the operational control of another country. This report does not call into question that commitment. Nor does it focus on possible violations of domestic or international law by individual soldiers. The focus of this section is, rather, the ability of the Canadian armed forces as an institution, and of Canada as a country, to abide by their legal obligations.

### 1. Canadian Charter of Rights and Freedoms

The Canadian armed forces are required to abide by the 1982 Canadian Charter of Rights and Freedoms, even when involved in operations outside the country. Section 32(1) of the Charter reads, in part: “This Charter applies ... a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament ....”

A violation of the Charter may have occurred when Canadian forces in Afghanistan transferred Taliban or Al’Qaeda suspects to the US without the Canadian Government having first obtained assurances that, if those suspects were convicted of terrorist or other offences, the death penalty would not be applied. In April 2001, the Canadian Supreme Court ruled that Canada could not extradite two men accused of murder in the US, unless US authorities guaranteed that they would not face execution if convicted.<sup>75</sup> Such assurances, the Court held, were constitutionally required in all but exceptional cases.

Since the Charter does not distinguish extradition from other forms of transfer, it is likely that the Court would adopt the same approach to the transfer of suspects detained during combat. And though the crimes the suspects in Afghanistan were thought to have

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<sup>72</sup> Hugh Winsor, “Eggleton isn’t off to a good start with the PM,” *Globe & Mail*, 30 January 2002, A4.

<sup>73</sup> Shawn McCarthy & Steven Chase, “Handover of captives by Canadian troops sparks Ottawa storm,” *Globe and Mail*, 30 January 2002, A1.

<sup>74</sup> R.S. 1985, c. N-5, < <http://laws.justice.gc.ca/en/N-5/index.html> >.

<sup>75</sup> *Burns v. United States* [2001] 1 SCR 283, < [http://www.scc-csc.gc.ca/judgments/index\\_e.html](http://www.scc-csc.gc.ca/judgments/index_e.html) >. The case was decided on the basis of Section 7, which reads: “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.”

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committed may have constituted exceptional cases, the suspects had the right to have a Canadian court determine the issue. Article 24(1) of the Charter reads: “Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.”

Any agreement that placed Canadian soldiers under US operational control, either temporarily or permanently, should stipulate that any individuals detained by Canadian soldiers would, if transferred to US authorities, not be subject to capital punishment – unless the Canadian courts had first determined that the circumstances were exceptional.<sup>76</sup>

## 2. 1949 Geneva Convention III

In January 2002, it became clear that certain political and legal issues had not fully been considered prior to Canadian soldiers being placed under US command in Afghanistan. Differing interpretations of certain treaties – and differing degrees of commitment to those treaties – created the possibility of Canadians being ordered, by their US commanders, to perform actions in violation of Canada’s obligations under international law.<sup>77</sup>

The most obvious potential conflict concerned the US refusal to apply Article 5 of the 1949 Geneva Convention III Relative to the Treatment of Prisoners of War, to detainees in Afghanistan and the US naval base at Guantanamo Bay, Cuba.<sup>78</sup> Article 5, which concerns the determination of PoW status rather than the treatment of detainees, reads, in part:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy [are prisoners of war] ... such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

The International Committee for the Red Cross (ICRC), the UN High Commissioner for Human Rights, Amnesty International, Human Rights Watch and a number of European political leaders expressed the opinion that at least some of the detainees were prisoners of war.<sup>79</sup> It is difficult to see how the opinions of these groups and individuals – especially the ICRC, whose role with respect to PoWs is expressly recognised in Geneva Convention III – could not but raise a reasonable doubt as to the status of the detainees. Even the US government, after considerable hesitation, accepted that the Taliban detainees were covered

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<sup>76</sup> See: Paul Koring & Alan Freeman, “American Taliban fighter avoids fate of foreign cohorts,” *Globe and Mail* – Online Edition, 16 January 2002.

<sup>77</sup> See: Alan Freeman, “Legal expert sees trouble in war role,” *Globe and Mail*, 15 January 2002, A1; Daniel LeBlanc, “PoW storm intensifies, troops join U.S. force,” *Globe and Mail*, 18 January 2002, A1.

<sup>78</sup> See: < <http://www.icrc.org/ihl> >.

<sup>79</sup> See: John Mintz, “Treatment of Detainees in Cuba Questioned; Human Rights Groups Urge U.S. to Declare Taliban, Al Qaeda Members POWs,” *Washington Post*, 16 January 2002, A13; T.R. Reid, “U.S. Pressed on Detainees’ Treatment; Concern Grows Abroad About Rights of Al Qaeda, Taliban Fighters Held in Cuba,” *Washington Post*, 17 January 2002, A15.

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by the Geneva Conventions, though it refused either to accept that they were PoWs, or to convene the tribunals required by Article 5.<sup>80</sup>

The Canadian Department of National Defence initially adopted a position that differed from the US with respect to Article 5. On 17 January 2002, a DND spokesperson was reported as saying:

All the individuals ... captured or detained will be afforded humane treatments, according to the standards that are applicable to PoWs, and that's according to international law. ...

If there is any doubt as to whether or not they are entitled to that treatment, they will be treated as such until a special tribunal, or a properly constituted tribunal, has determined that this person is or isn't a PoW.<sup>81</sup>

However, it soon became clear that Canadian special forces were handing suspected Taliban or Al'Qaeda members over to the US – at a time when the US was publicly refusing to apply Article 5.<sup>82</sup>

The fact that the Canadian soldiers were under US operational control in no way absolves Canada of the apparent treaty violation. Article 12 of Geneva Convention III reads:

Prisoners of war may only be transferred by the Detaining Power to a Power which is a Party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. ...

[I]f th[e receiving] Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall [...] take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with.<sup>83</sup>

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<sup>80</sup> See: John Mintz & Mike Allen, "Bush Shifts Position on Detainees; Geneva Conventions to Cover Taliban, but Not Al Qaeda," Washington Post, 8 February 2002, A1; Statement by Defense Secretary Donald Rumsfeld, <[http://www.defenselink.mil/news/Feb2002/t02072002\\_t0207sd.html](http://www.defenselink.mil/news/Feb2002/t02072002_t0207sd.html)>; Statement by White House Spokesman Ari Fleischer, <<http://www.whitehouse.gov/news/releases/2002/02/20020207-6.html>>.

<sup>81</sup> Daniel Leblanc, "Canada defies U.S. on PoWs," Globe and Mail, 17 January 2002, A1.

<sup>82</sup> Shawn McCarthy & Steven Chase, "Handover of captives by Canadian troops sparks Ottawa storm," Globe and Mail, 30 January 2002, A1.

<sup>83</sup> See: <<http://www.icrc.org/ihl>>. Canada normally takes its obligations under Geneva Convention III very seriously, as evidenced by the Geneva Conventions Act (R.S. 1985, c. G-3, <<http://laws.justice.gc.ca/en/G-3/>>) which implements the four 1949 Geneva Conventions and the two Additional Protocols of 1977 (all of which are included as schedules to the Act). Moreover, Section 12 of the Prisoner-of-War Status Determination Regulations reaffirms Article 5: "A detainee whose entitlement to prisoner-of-war status is in doubt shall be treated as a prisoner of war until a tribunal determines that the detainee is not entitled to that status and, where a review of the tribunal's determination is requested under subsection 17(1), until the completion of the review." – SOR/91-134, as updated by SOR/96-85, s. 7(F), <<http://laws.justice.gc.ca/en/G-3/SOR-91-134/122288.html>>. The Regulations also set out detailed procedures for the establishment and operation of Article 5 tribunals. Canada's commitment to the Geneva Conventions is also apparent in DND's own manual on operational law. See: Office of the Judge Advocate General, *The Law of Armed Conflict at the Operation and Tactical Level* (Ottawa: Department of National Defence, 1999), esp. sections 1(2) & 10. Available at <[http://www.forces.ca/jag/operational\\_pubs\\_e.html#top](http://www.forces.ca/jag/operational_pubs_e.html#top)>.

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Other possible violations of Geneva Convention III flow from the apparent violations of Articles 5 and 12. For example, the US is proposing to prosecute at least some of the detainees before special military commissions having different rules of evidence and procedure from regular US military or civilian courts.<sup>84</sup> Yet Article 102 of Geneva Convention III states: “A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power ...” Canada, as the country responsible for the apprehension of some of the detainees in Afghanistan, might come into violation of Article 102 if any of those particular detainees are tried, convicted and sentenced by a special military commission.

As this very brief analysis demonstrates, Canada risks violating international law whenever Canadian soldiers under US command detain and transfer individuals to the US during the course of hostilities.

It is important to note that the issue of prisoners of war – along with all the other issues identified in this report – could well arise within the North American context. For example, a Canadian frigate under US operational control could detain terrorist suspects on a vessel within the 500-mile offshore zone assigned to the Northern Command. Any agreement on closer military co-operation should therefore stipulate that any detainees transferred by Canadian soldiers to US authorities have to be accorded the full protections of the Geneva Conventions – as interpreted by Canada.

### 3. 1977 Additional Protocol I

The 1977 Additional Protocol I to the Geneva Conventions of 1949 sets out a series of obligations with respect to the protection of civilians during international armed conflict.<sup>85</sup> Canada has ratified Protocol I; the US has not.<sup>86</sup> Canadian soldiers consequently operate under more stringent treaty obligations than US soldiers when it comes to the protection of civilians and other non-combatants. During the Kosovo air campaign, the difference in legal obligations was taken into account in the assignment of targets and the configuration of forces. Canadian fighter pilots, for instance, were not assigned as wingmen to US fighter pilots because of their more stringent restraints on targeting, which meant that they could not be counted on to respond to certain threats in the same way as US pilots. Similar arrangements would have to be made – and encased in a legally-binding agreement – to

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<sup>84</sup> For the Presidential Order providing for the creation of special military commissions, see: President George W. Bush, Military Order of 13 November 2001, ‘Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism,’ *Federal Register*, Washington, DC, vol. 66, no. 222, 16 November 2001, p. 57,833, < [http://www.access.gpo.gov/su\\_docs/aces/aces140.html](http://www.access.gpo.gov/su_docs/aces/aces140.html) >. The rules governing the operation of the Commissions were published as Department of Defense Military Commission Order No. 1, 21 March 2002, < <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf> >.

<sup>85</sup> See: < <http://www.icrc.org/ihl> >.

<sup>86</sup> A table of states parties is available at: < <http://www.icrc.org> >.

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ensure that Canadian soldiers under US operational control would not be ordered to engage in actions which, while legal for US soldiers, might not be legal for Canadian soldiers.

The question also arises as to whether Canadians want their military personnel to be under the operational control of a country that has not accepted the same level of legal obligations regarding target selection. For example, in the Kosovo campaign the US targeted and destroyed several water filtration plants.<sup>87</sup> Had the US ratified Protocol I, this might have been a violation of Article 52(2), which reads:

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

Canadians, having considered the matter, might feel that targeting of water filtration plants is unacceptable – not simply as a matter of Canada’s obligations under international law, but also as a policy approach on the part of a country wishing to exercise control over a substantial part of their armed forces.

#### 4. Weapons that cause unnecessary suffering

In addition, Protocol I prohibits the use of weapons that cause unnecessary suffering.<sup>88</sup> This prohibition is also contained in Article 23(1)(e) of the regulations annexed to the 1907 Hague Convention IV, to which the US is a party, and which is unanimously considered as reflective of customary international law.<sup>89</sup> However, the US has a very restrictive interpretation of what the term “unnecessary” means.

It is possible that Canada’s obligations could be violated if Canadian soldiers used some of the weapons in the US arsenal. Prominent here are concerns about the possible effects of depleted uranium. Although the use of depleted uranium in munitions has not yet been proven dangerous, the issue has caused considerable concern.<sup>90</sup> A credible argument can be made that, in this situation of uncertainty, Canada should take a “precautionary approach” and not put its soldiers in positions where they might employ these weapons.

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<sup>87</sup> See: Marcus Gee, “Death of innocents,” *Globe and Mail*, 11 March 2000, A14.

<sup>88</sup> Article 35(2) reads: “It is prohibited to employ weapons, projectiles and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.”

<sup>89</sup> See: <http://www.icrc.org> ; Adam Roberts & Richard Guelff, *Documents on the Laws of War* (3<sup>rd</sup> edn) (Oxford: Oxford University Press, 2000) 68.

<sup>90</sup> Associated Press, “NATO warned about risks of ammunition; Germans were advised in 1999 of possible toxic threat from depleted-uranium rounds,” *Globe and Mail*, 8 January 2001, A13; Andrew Mitrovica, “Canadians to be tested for depleted uranium: Ottawa quietly sending two doctors to check up to 300 civil servants in Balkans,” *Globe and Mail*, 17 February 2001, A10; Richard Norton-Taylor, “Cancer risk ‘hard to avoid in battle’,” *Guardian*, 13 January 2001, p.9.

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Similar concerns exist with respect to cluster bombs. Although cluster bombs are probably not prohibited by existing international law, the dangers caused for civilians – as a result of the sizeable percentage of “bomblets” that do not explode – can be significant. Pressure is growing, especially within the NGO community, for a treaty banning their use.<sup>91</sup> Canada, given its leadership in the development of the Ottawa Landmines Convention, could in normal circumstances be expected to lend its support to such a treaty. But the US is the country that relies most heavily on cluster bombs. Would closer military co-operation with the US affect the position that Canada would take on this issue? If Canada ratified a treaty banning cluster bombs, could its soldiers participate in operations involving their use – especially if those soldiers were under US operational control? This would, it should be noted, also be a naval issue, since cluster bombs are sometimes mounted on Tomahawk cruise missiles. Could a Canadian frigate form part of a US carrier group that was employing cruise missile-mounted cluster bombs, if Canada had ratified a treaty banning the use of cluster bombs?

## 5. Ottawa Landmines Convention

Canada has ratified the 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction.<sup>92</sup> The US has not; its military continues to use anti-personnel landmines in Korea and retains the option of using them elsewhere.<sup>93</sup> If Canadian soldiers were to participate in the use, stockpiling or transfer of landmines – even if ordered to do so by a US commander – they would violate Canada’s treaty obligations. Article 1 of the Convention states:

Each State Party undertakes never under any circumstances:

- (a) to use anti-personnel mines;
- (b) to develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, anti-personnel mines;
- (c) to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.

In January 2002, a Canadian Forces spokesperson said that Canadian soldiers would not be involved at all in using anti-personnel landmines in Afghanistan. But she was unable to explain how Canadian soldiers could work with US forces if they were using landmines.<sup>94</sup>

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<sup>91</sup> See: “Unexploded ordnance– a global legacy as lethal as landmines says new report,” at < <http://www.landmineaction.org/news124.asp> >. The report itself is available at < <http://www.landmineaction.org/resources.asp> >.

<sup>92</sup> See: < <http://www.mines.gc.ca/menu-e.asp> >.

<sup>93</sup> For a list of parties to the Conventions, see: < <http://www.mines.gc.ca/convention-e.asp> >.

<sup>94</sup> See: David Pugliese, “Troops could be charged for landmines violations,” *The Ottawa Citizen*, 30 January 2002.

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According to Canada's implementing legislation for the Ottawa Convention, Canadian soldiers can participate in military activities with the armed forces of a state that is not a party to the Convention, and using landmines, provided that the participation "does not amount to active assistance in that prohibited activity".<sup>95</sup> But the legislation may itself be based on an overly narrow interpretation of Canada's obligations. A broader interpretation, one that prohibited reliance on landmines laid by allied forces, would seem more consistent with the "ordinary meaning" of Article 1 in its context and in light of the Convention's "object and purpose" – this being the interpretative approach required by Article 31 of the 1969 Vienna Convention on the Law of Treaties.<sup>96</sup>

Even if the implementing legislation is compatible with the Ottawa Convention, the question arises as to whether Canadians want their soldiers to be under the direct command of a country that continues to retain anti-personnel landmines within its arsenal and as part of its military planning. Canada has gained considerable moral stature, influence and self-confidence as a result of its largely successful effort to promote a global ban on landmines. What will happen to these gains if it places a substantial part of its armed forces under the operational control of a country that continues to defy the international community on this crucial humanitarian issue?

In addition, Article 9 of the Ottawa Convention obligates Canada to prevent any activity prohibited under the Convention from taking place on its territory. US forces operating on Canadian territory could therefore not have anything to do with landmines. A clear agreement to this effect would be necessary before US soldiers were allowed to operate on Canadian territory. The simplest way to do this would be for Canada, the US and Mexico to declare North America an anti-personnel landmine-free zone, thus ensuring that soldiers defending the continent were not at risk of involvement with landmines.<sup>97</sup> Such a declaration would be consistent with the US position on landmines, in that its objection to the Ottawa Convention is based on an assertion that it requires the landmine option in certain overseas theatres only, most notably Korea.

### **6. 1995 Additional Protocol IV on Blinding Laser Weapons**

Canada has ratified the 1995 Additional Protocol IV on Blinding Laser Weapons; the US has not. Protocol IV, which follows on from the 1980 UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, states in Article 1:

It is prohibited to employ laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight

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<sup>95</sup> Anti-Personnel Mines Convention Implementation Act (1997, c. 33), < <http://laws.justice.gc.ca/en/A-11.5/index.html> >, s. 6(3)(d).

<sup>96</sup> (1980) CTS 37. Canada acceded to the Vienna Convention in 1970.

<sup>97</sup> Mexico ratified the Convention on 9 June 1998.

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devices. The High Contracting Parties shall not transfer such weapons to any State or non-State entity.<sup>98</sup>

Such was Canada's commitment to the prohibition on blinding laser weapons that it entered the following "reservation" to the Protocol:

It is the understanding of Canada that the provisions of the Additional Protocol which by their contents or nature may also be applied in peacetime, shall be observed at all times.<sup>99</sup>

Until 1995, the US was developing laser weapons that, if used by Canadian soldiers, would have breached Canada's obligations under Article 1.<sup>100</sup> The development program was suspended by the Clinton Administration but could well be revived.<sup>101</sup> Any agreement on closer military co-operation should therefore specify that Canada's obligations under Protocol IV would, in all instances, be upheld. In addition, the question again arises as to whether Canadians really want their soldiers to be under the operational control of a country that has refused to commit itself to such a clearly important and uncontroversial humanitarian treaty.

### 7. Rome Statute of the International Criminal Court

On 11 April 2002, the 1998 Rome Statute of the International Criminal Court (ICC) received its sixtieth state ratification.<sup>102</sup> The Rome Statute will come into effect on 1 July 2002, at which point Canada, which is among the ratifying states, will be bound to its obligations. The US, however, and the Bush Administration in particular, is implacably opposed to the ICC.<sup>103</sup>

The Rome Statute applies to the nationals of its states parties, which means that Canadian forces are potentially subject to the jurisdiction of the ICC, whether they are acting under Canadian or US command, and whether in a UN, NATO or joint Canada-US operation. Canada, if it does not wish the ICC to take jurisdiction, will therefore have to make good faith efforts to investigate and, where appropriate, prosecute its personnel should they ever stand accused of crimes within ICC jurisdiction. Given US resistance to the Rome Statute, this raises potentially serious practical concerns for joint actions. Consider the crime of knowingly causing excessive "collateral damage" in a military attack (Article 8(2)(b)(iv)). This crime is one of several key concerns of the US military, which does not wish its

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<sup>98</sup> See: <http://www.icrc.org>

<sup>99</sup> See: <<http://www.icrc.org>>.

<sup>100</sup> See: Joel Achenbach, "Dodging Photons In the Heat of Battle," Washington Post, 23 September 1994, F5 (quoting an Army colonel in charge of the program as saying "Laser weapons are as moral, if not more moral, than systems which blow someone to bits.").

<sup>101</sup> See: Bradley Graham, "Army Laser Weapon Becomes First Casualty of New Policy," Washington Post, 13 October 1995, A4.

<sup>102</sup> See: <http://www.un.org/law/icc>

<sup>103</sup> See, e.g.: Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues, "Address at the Peace Palace in The Hague, 19 December 2001," <<http://www.state.gov/s/wci/rls/rm/8053.htm>>.

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command decisions to be second-guessed by an international institution that Canada fully supports. What would happen if Canadian soldiers, acting under US operational control, were accused of taking part in such an attack? Would Canadian military or civilian courts find Canadian nationals responsible for war crimes while their US commanders remained free of investigation? If the Government of Canada had the right to withhold Canadian troops from particular assignments and received regular information on ongoing operations, would Canadian military and civilian superiors be criminally responsible for failing to prevent the crime (Article 28)? Given the way that such proceedings could reflect on US commanders, the potential for tension with Washington and adverse pressure on Canada is significant indeed.

Some of the more prominent obligations in the Rome Statute are those set out in Part 9 on international co-operation and judicial assistance. These include the obligation to co-operate with the investigation and prosecution of crimes, for instance by providing documentation (Article 87), and by surrendering to the ICC any persons requested by it who are found within the territory of requested state party (Article 89). In particular, if a state party receives competing requests – i.e. a request for surrender from the ICC and an extradition request from another country – it must give priority to the ICC request (Article 90).

Canadian soldiers operating under US operational control might end up detaining a suspect who is wanted both by the ICC and by US authorities. For example, Canadian soldiers patrolling the US-Canada border might detain an individual who is accused by both the ICC and the US of having committed terrorist acts of a severity amounting to crimes against humanity. In such a situation, Canadian soldiers could be placed in the position of having to choose between orders to hand the accused over to US authorities, and Canada's obligations under the ICC Statute. Or, to provide an even more difficult example, what would happen if the ICC requested the transfer of a US soldier deployed in Canada, who it wished to prosecute for war crimes or crimes against humanity?

US concerns with ICC jurisdiction led to the negotiation of Article 98(2) of the Rome Statute, which allows a state party to refuse surrender of a foreign national to the ICC where another agreement would prevent this; this provision was intended to take into account agreements such as the NATO Status of Forces Agreement, which grants the state of nationality primary criminal jurisdiction with respect to their nationals stationed on the territory of another states. US concerns with the ICC can be expected to lead it to press for the inclusion of such a "no surrender" clause in any future agreement with Canada. Yet such agreements, while a standard part of NATO and UN coalition-building, have been highly controversial as instruments for limiting the jurisdiction of the ICC, and it is not clear whether, and in what form, Canada should agree to such an arrangement. This issue deserves careful study in light of the potential scenarios for ICC involvement before any decision is made.

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Further problems could arise if the American Servicemembers' Protection Act of 2001 (or similar legislation) were enacted into law.<sup>104</sup> The Act, if passed in its most virulent form, would prevent US co-operation with the ICC by restricting the operation of mutual legal assistance treaties (including extradition treaties), prohibiting investigations by ICC agents on US territory, and prohibiting the transfer of classified national security information to the ICC. The Act would also prohibit the provision of US military assistance to parties to the Rome Statute, albeit with an exception for the closest allies of the US (including Canada). Despite the exemption, however, US commanders could well interpret the Act (or similar legislation) as requiring them to ensure that none of the soldiers under their operational control – Canadians included – co-operated with the ICC in any way. And what effect might closer military co-operation have on the ability of the Canadian government – as distinct from the Canadian armed forces – to co-operate with the ICC? Would Canada feel free to transfer classified information to the ICC if some or all of its armed forces were under US operational control?<sup>105</sup> Would ICC agents be permitted to conduct investigations in Canada if the Canadian land mass was designated part of a North American security zone under a US-led integrated command?

These are clearly difficult questions, which are rendered even more difficult by the fact that Canada played a leading role in the development of the ICC and continues actively to campaign on its behalf.<sup>106</sup> Any agreement with the US on closer military co-operation would have to spell out that, in the event of any conflict of obligation or interest, Canada's obligations under the Rome Statute would prevail, and to commit US commanders to protecting those obligations.

### 8. Child Soldiers

Canada has ratified the 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, which entered into force in February 2002.<sup>107</sup> Article 1 reads:

States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.

The Canadian armed forces permit voluntary recruitment at the minimum age of 16 years. By ratifying the Optional Protocol, Canada has therefore taken on the legal obligation to keep certain members of its armed forces out of combat.

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<sup>104</sup> The full text of the (revised) ASPA is available at <http://www.wfa.org/issues/wicc/revised-aspa.html>.

<sup>105</sup> It is noteworthy that, under Article 72 of the Rome Statute, the transfer of "national security information", while subject to a process of consultation and redaction, falls within the Article 87 requirements concerning the provision of documentation to the ICC.

<sup>106</sup> See: < [http://www.dfait-maeci.gc.ca/foreign\\_policy/icc/welcome-en.asp](http://www.dfait-maeci.gc.ca/foreign_policy/icc/welcome-en.asp) >.

<sup>107</sup> See: < <http://www.unhcr.ch/html/menu2/6/protocolchild.htm> >.

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The US opposed the negotiation of the Optional Protocol. It subsequently signed but did not ratify the instrument. This raises an important question: would US commanders with operational control over Canadian forces respect Canada's obligations with respect to under-age soldiers and do everything within their power to keep those soldiers out of combat? Any agreement establishing an integrated command, or other, less extensive arrangement, would have to specify that Canada's obligations under the Optional Protocol must be upheld.

## 9. Nuclear Non-Proliferation Treaty

Although the US remains a party to the 1968 Nuclear Non-Proliferation Treaty, its actions and words indicate that it has little intention of fulfilling the obligation, set out in Article 6, to negotiate the elimination of its nuclear arsenal.<sup>108</sup> Article 6 reads:

Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.

Given recent statements and reports concerning US nuclear weapons policy, it is possible that the US is in violation of Article 6.<sup>109</sup> Canada will want to consider the legal and political implications of entering into closer military co-operation with a country that is in possible breach of one of the more important arms control treaties.

Particular attention should be paid to Article 2 of the Non-Proliferation Treaty, which reads:

Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.

Clearly, Canada would violate Article 2 if its soldiers were placed in control of US nuclear weapons. But perhaps more importantly, since the obligation not to receive a transfer extends to *indirect* possession or control, it is possible that the mere creation of a US-led integrated command, the participation of Canadian soldiers in operations involving nuclear weapons, or at least the deployment of US nuclear weapons on Canadian territory, would bring Canada into violation of the treaty.

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<sup>108</sup> See: < <http://www.unog.ch/disarm/distreat/warfare.htm> >.

<sup>109</sup> See discussion, above, page 14.

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Any agreement with the US on closer military co-operation would have to spell out, at minimum, that Canadian soldiers are never to be placed in control of nuclear weapons. In addition, any such agreement should probably stipulate that Canadian soldiers are never to participate in operations involving nuclear weapons, and that nuclear weapons are never to be deployed on Canadian territory. One could then be at least reasonably certain that Canada's obligations under the Non-Proliferation Treaty – and its commitment to nuclear disarmament – were being securely and transparently preserved.

## 10. International Court of Justice Advisory Opinion on Nuclear Weapons

In 1995, the US led the handful of nuclear powers which argued, before the International Court of Justice, that international law had nothing to say about whether states are permitted to use – or to threaten to use – nuclear weapons in self-defence.<sup>110</sup>

The International Court, however, held that customary international law prohibited the threat or use of nuclear weapons in all but the narrowest of circumstances:

[T]he threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake  
...<sup>111</sup>

Statements and reports from the US indicate that the Bush Administration and the Pentagon do not feel themselves bound by the tight restrictions identified in the Advisory Opinion.<sup>112</sup> This raises the possibility that closer military co-operation could cause problems for Canada with respect to its obligations under customary international law. For example, what would happen if Canadian soldiers under US operational control were ordered to participate – even in a strictly supporting capacity – in the use of tactical nuclear weapons? Again, any agreement on closer military co-operation would have to include carefully designed rules and procedures to ensure that Canadian soldiers were in no way involved in the possible use of nuclear weapons.

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<sup>110</sup> See: Oral Pleadings, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 15 November 1995, UN Doc. CR95/34, pp. 55-81, < <http://www.icj-cij.org/icjwww/icasess/iunan/iunanframe.htm> >.

<sup>111</sup> (1996) ICJ Reports 226 at 266, paragraph 105 (paragraph E of the *dispositif*).

<sup>112</sup> See discussion, above, page 14.

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## V. RECOMMENDATIONS

The threat of global terrorism is frequently put forward – most notably by US ambassador Paul Cellucci<sup>113</sup> – as an overriding justification for the development of closer military co-operation between Canada and the US. But it is not clear that closer military co-operation would actually do much to protect Canadian citizens. Would it have prevented the attacks of September 11? Would the creation of a fortress North America really improve Canadian security in a world where the greatest risks may well involve suicide hijackers, suitcase bombs, and letters contaminated with anthrax?

What is clear, is that any decision on closer military co-operation should involve the following nine principles:

### (1) Conduct a full public debate before taking a decision

Any decision on closer military co-operation should be preceded by a full public debate, and involve a well-defined role for Parliament. Such a debate would likely establish that the proposed assignment of “operational control” to US generals does indeed have consequences for Canadian sovereignty, and that the establishment of the Northern Command is more than a simple reorganisation of the US military. The debate should involve Canada’s northern peoples. It should take place on a Canadian timetable – and not be rushed because of outside pressure.

### (2) Strengthen NATO, the UN and the Arctic Council

The alternatives to a closer bilateral relationship must be considered. Strengthening the existing global framework through the UN, the North Atlantic framework through NATO, and the northern framework through the Arctic Council, would be a better approach. The problems and solutions concerning security matters are not limited to continental North America but extend across oceans. Strong multilateral institutions already exist and consistently work in Canada’s favour. Canada should work with countries around the world – including the US – to strengthen those institutions yet further. It should not undermine them, even unintentionally, by developing a closer military relationship with one country alone.

### (3) Support non-military approaches

In addition to multilateral military co-operation, Canada should focus its efforts on a broader, multifaceted approach to security. Such an approach would, for instance, seek to link together a global network of intelligence, police and judicial co-operation, designed to collaboratively impede terrorist planning and ensure the detention and prosecution of those who seek to perpetrate such crimes. Canada’s strong backing for the International Criminal

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<sup>113</sup> See, e.g.: Steven Chase, “Canadians concerned about threats, Cellucci says,” *Globe and Mail*, 27 March 2002, A9; John Gray, “Cellucci’s megaphone diplomacy,” *Globe and Mail*, 20 April 2002, F3.

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Court is but one example of how it has previously supported non-military, multilateral approaches. Greater support for the anti-terrorism efforts of the UN should be a priority.

## **(4) Include Mexico**

Within the North American context, Mexico should be included within any co-operative security arrangement. As Mexican Foreign Minister Jorge Castaneda has pointed out, Mexico shares many of Canada's interests, concerns and vulnerabilities and could be a valuable ally within any North American security structure.<sup>114</sup> Instead of both countries negotiating bilaterally with the US on security matters, it makes considerable sense, from a Canadian or Mexican perspective, for negotiations to occur trilaterally.

Concerns about maintaining a "special relationship" with the US should be dismissed out of hand. At least eleven other countries – Australia, Britain, Ireland, Israel, Japan, Germany, Italy, Mexico, the Philippines, South Korea and Taiwan – have as legitimate a claim as Canada has, to a "special relationship" with the US.

## **(5) Develop detailed rules for military co-operation**

Before the Canadian Government engages in further military co-operation with other countries, or with international organisations, it should develop a basic national regime setting out conditions and procedures for the placement of Canadian soldiers and equipment in coalition with foreign armed forces. These "Canadian Rules", as Professor Douglas Bland has termed them, would have to be detailed enough to ensure: (a) that concerns about sovereignty were fully taken into account; and (b) that Canada remained fully able to respect its domestic and international legal obligations, as well as its current policies on matters such as bilingualism, gender and sexual equality in the armed forces.

## **(6) Conclude detailed, legally-binding and transparent agreements**

Should the decision be made to develop a closer military relationship, any such move should be conditioned on the conclusion of a detailed, legally-binding and transparent agreement. Given the importance of the subject matter, and the potential implications for Canadian sovereignty and foreign policy, a brief exchange of notes or memorandum of agreement would be insufficient. In 1958, NORAD was established on the basis of an exchange of notes, which meant that Parliament was bypassed in the creation of what became a permanent feature of Canadian defence policy. The mistake should not be repeated.

## **(7) Make the agreements time-limited**

Any agreement on closer military co-operation should be time-limited. NORAD exists on a five-year renewable basis. Such an approach leaves Canadian governments the option of not renewing Canada's involvement if circumstances or policies change.

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<sup>114</sup> Jorge Castaneda, "It takes three to tango," *Globe and Mail*, 4 March 2002, A11.

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**(8) Insist on recognition of the need for specific permission before foreign forces can enter the Canadian North**

Consistent with the established policy of the Government of Canada, any agreement on closer military co-operation should explicitly commit the other country to requesting Canada's specific permission before its soldiers or equipment enter the Arctic or North-West Passage. This will ensure that Canada's claim to sovereignty remains intact.

**(9) Develop Canada's capacity to protect itself and to engage in peacekeeping**

Military expenditure should be based on Canadian priorities and designed to further Canadian interests and values. Although military co-operation with the US remains important, it should not detract from the development of a Canadian capability to patrol and protect Canadian territory – including the Arctic – and to mount peacekeeping operations overseas. It is important that the Canadian military develop an improved capacity for lift, logistics and intelligence gathering. A moderate increase in defence spending may be required to achieve these aims.

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