

Canadian armed forces under United States command

IN JANUARY 2002, IT BECAME APPARENT that negotiations were 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 command structure under United States leadership.¹ The creation of a 'Northern Command' in April 2002 unified the continental United States into a single military command and provided a logical precursor to an expansion that would include Canada and Canadian forces.² A number of difficult questions will have to be answered before the Canadian government could responsibly embark on closer military co-operation of this kind.

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¹ Paul Knox, 'What does the Canadian military have to prove?' *Globe and Mail* (Toronto), 9 January 2002, A9; Paul Koring & Daniel Leblanc, 'Canada aims to join "Americas Command,"' *ibid.*, 29 January 2002, A1; Jeffrey Simpson, 'What matters is defence integration, not the Eggleton sideshow,' *ibid.*, 2 February 2002, A15.

² Jeff Sallot, 'u.s. plan raises questions for Canada,' *Globe and Mail*, 18 April 2002, A7; Shawn McCarthy, 'US plays down Northcom threat,' *ibid.*, 19 April 2002, A14; 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, 18.

UNITED NATIONS/NATO/NORAD OPERATIONS

Canadian soldiers have in the past functioned under United States command in operations authorized by the United Nations, the North Atlantic Treaty Organization (NATO), and in the North American Aerospace Defence Command. The first operation authorized by the United Nations Security Council was the 1950 intervention in Korea. Subsequent operations include the 1991 Gulf War and the intervention in Bosnia-Herzegovina in 1991-5. Canada has also placed its soldiers under foreign command within peacekeeping operations authorized by the General Assembly. Those operations are not contentious: the Council and the Assembly operate under the United Nations Charter - a multilateral treaty ratified by 190 states. Although American commanders are sometimes in charge of day-to-day operations, they have the explicit, delegated authority of the international community behind them. And these operations are, in any case, temporary in scope.

As parties to the 1949 North Atlantic Treaty, Canada and the United States are obligated to assist any NATO member country subject to an armed attack. This obligation, set out in article 5, has been invoked only once - by the United States following the 11 September 2001 attacks in New York and Washington. Even then NATO was not called upon to engage in military action. Article 5 operations would be very different from that which is contemplated today. NATO structures remain largely dormant and without authority, except in those specific instances in which the members agree to activate them. Moreover, NATO, like the United Nations, is a multilateral organization - in this case composed of 19 states. When an American 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 participated in operations authorized by the Security Council in Bosnia-Herzegovina. And in one instance - Kosovo - NATO acted without explicit United Nations approval. But even then, the operation was that of a multilateral organization, subject to its authorization and control. Every target had to be approved unanimously by all involved governments.

NORAD was designed to enable rapid responses to incursions into Canadian or United States airspace by Soviet bombers. Its integrated command structure is limited to one specific function - air defence - and involves a relatively small part of the Canadian forces. Since the

end of the cold war, the number of Canadian planes and pilots required for NORAD duties has decreased. And pilots on intercept missions do not encounter many of the legal issues faced by ground and naval personnel, since they do not, for example, take prisoners or lay mines. Perhaps most importantly, the extension of the NORAD system to land and sea forces would have implications for Canadian sovereignty of a scope and kind not raised by NORAD itself.

POLITICAL ISSUES

Sovereignty

Sovereignty in the 21st century is different from sovereignty in the 17th, 18th, or 19th centuries. Today, it 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. There is nothing inconsistent today about a sovereign state choosing to delegate legislative or police powers to supranational institutions such as the United Nations or the European Community.³ Nevertheless, under any conception, control over one's armed forces is a central attribute of a sovereign state. Western European countries, for instance, were able to develop 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).⁴

The American ambassador to Canada, Paul Cellucci, has argued that sovereignty is not at issue because Canada would retain command of its armed forces; only 'operational control' would be assigned to the Northern Command. To Cellucci, this means that Canada would receive a request for the participation of its forces but could decline to participate if it so chose. Consequently, 'if Canada joins the US in a continental approach to security, Canadian sovereignty will not be infringed even one iota.'⁵

3 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); available at http://webapps.dfait-maeci.gc.ca/minpub/Publication.asp?FileSpec=/Min_Pub_Docs/105070.htm

4 The European 'rapid reaction force' is designed to respond more effectively to humanitarian crises abroad. Until a crisis arises, and troops and equipment are sent, those troops remain under the sole command of their home state.

5 Paul Cellucci, 'North American Security,' Canadian Defence Industries Association CANSEC Dinner, 14 February 2002, Ottawa; available at www.cdia.ca/ambassador_cellucci.htm.

There are two problems with this argument. First, the definition of 'operational control' in the 1958 exchange of notes that created NORAD is broad and includes many of the powers civilians would envisage as falling within 'command' - and thus as involving a delegation of sovereignty: "*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.⁶

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 Organization are in theory all able to withdraw from those organizations, 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 organizations have delegated aspects of their sovereignty, sometimes in quite significant ways. The fact is that for most countries, withdrawal from many international mechanisms is hardly a practical option. At issue here is not Canada's legal sovereignty, but its practical sovereignty - its ability freely to make choices at the international level.⁷

Moreover, the United States might occasionally abuse mechanisms designed to protect Canadian sovereignty. During the 1962 Cuban missile crisis, for example, Canadian forces delegated to NORAD were raised to a heightened level of engagement after consultation with US

6 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, 4 (emphasis added). The same definition has been used in the various NORAD renewal agreements.

7 This reality has not stopped Canada's Department of National Defence from arguing that closer integration would strengthen sovereignty, since Canada would be exercising a choice every time it decided not to withdraw its forces. See, for example, Department of National Defence, Directorate of Maritime Strategy, *Leadmark: The Navy's Strategy for 2020* (Ottawa: DND, 2001), 111-12.

political leaders only, much to the consternation of Canadian authorities. Concerns about sovereignty cannot be overcome by the technical distinction between 'command' and 'operational control.'

Delegating a central aspect of sovereignty to the United States would have a number of likely consequences. For instance, Canada's international standing and multilateral influence might suffer. Already, in Europe and elsewhere, Canadian foreign policy on some issues is seen as largely inseparable from that of the United States. Canadians need to think carefully before doing anything that might further diminish their country's influence on the world stage.

As the minister of foreign affairs, Bill Graham, recently said: 'defining 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.'⁸

Jurisdiction in the Arctic

The sovereignty issue is acute in the Arctic, where jurisdiction over the Northwest Passage is the most prominent concern. The polar icecap is 40 per cent thinner than in the 1950s.⁹ An ice-free Northwest Passage would provide the United States and other countries not only with a short and relatively secure shipping route around North America but also easy access to the energy and other riches of Alaska and the Canadian north.

Canada has a long-standing claim to sovereignty over the Arctic islands and waters and serious concerns about the environmental impact of oil shipments on the fragile northern ecosystem. The United States insists that the Northwest Passage is an international strait, open to vessels from any country,¹⁰ and has backed its claim with action, for

8 Graham, 'Affirming Canadian sovereignty.'

9 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.

10 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,' *Cornell International Law Journal* 26(no 2, 1993), 331.

instance in 1985 when its icebreaker, *Polar Sea*, made the passage without Canada's permission.¹¹ Once the ice melts sufficiently to make commercial shipping viable, the United States may press its claim again.

American submarines already operate without permission in the Canadian Arctic,¹² and it is possible that the United States will want to take advantage of the melting ice for the surface operation of its naval vessels. Could American commanders claim that sending a naval vessel into the Canadian Arctic without Canada's specific permission was allowed under the integrated command? In other words, would closer military co-operation 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 on a treaty, with a theoretical right to opt out - undermine Canada's sovereignty claim? And what would happen if, after the development of closer military relations, another non-military vessel were to enter the Northwest Passage without permission? Would Canada be able to prevent the incursion?

And what about environmental protection? Would the US military be subject to Canadian laws, including the 1970 Arctic Waters Pollution Prevention Act?¹³ Could an agreement with profound implications for sovereignty and environmental protection be concluded without close consultation with Canada's native peoples? What would Nunavut's constitutional role be, 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) of the Canadian forces in the Arctic? Surely the US would, if it could, prevent exercises designed specifically to support Canada's legal claim to the territory and resources of the north? What would become of the Canadian Rangers who patrol the Arctic to assert sovereignty? And what would happen to the Arctic Council, a Canadian initiative that brings together eight countries, including the US, to address the common concerns

11 Christopher Wren, 'U.S. ship's Arctic voyage draws heat in Canada,' *New York Times*, 1 August 1985, A2. There was a similar incursion by the US oil tanker *SS Manhattan* in 1969.

12 Herbert H. Denton, 'Sensing a U.S. threat to its sovereignty, Ottawa may buy nuclear submarines,' *Washington Post*, 14 May 1987, A35.

13 R.S.C. 1985, vol1, c.A12; reproduced in *International Legal Materials* 9(1970), 543.

of the countries and people of the Arctic? Would closer bilateral military relations impede efforts to deepen and broaden those multilateral mechanisms? Why not engage the Arctic Council on security issues?

All of these questions should be addressed before agreeing to closer military co-operation. A requirement of any such agreement should be an explicit US commitment to ask Canada's permission before any US soldiers or equipment enter the Arctic or the Northwest Passage.

Peacekeeping

Closer military co-operation could also have implications for Canada's freedom to allocate its military resources. Even with a large increase in defence spending, Canada's armed forces would be stretched to the limit. Canada, after all, occupies more of the continent than does the US and may well be expected to carry a sizeable share of the defence burden. Would a commitment to North American defence restrict Canada's capacity to provide soldiers and equipment for peacekeeping and other multilateral missions overseas? Canada already participates in fewer peacekeeping missions – in part because of its limited military resources.

What implications would a continued reduction in peacekeeping have for Canada's international influence? Historically, Canada has punched above its weight in part because of a willingness to take on its fair share of multilateral commitments. 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 United States already and inevitably have different views on certain foreign policy issues, for example over Cuba. Such differences could conflict with Canada's obligations under an integrated command. What if Canada wanted to send soldiers on a peacekeeping mission to which the US was opposed? Would the US be able 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, as naval participation becomes increasingly important in 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, but quite another 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. Instead of duplicating high-tech capabilities that the US has in abundance, Canada might acquire more influence for its investment, and better security, if it focused on the capacity to deploy and lead middle-power expeditionary forces able to take on peacekeeping and peacemaking missions overseas.¹⁴

Foreign Policy

Even if an agreement on closer military co-operation sought to limit itself to North America and surrounding waters, in reality, it is impossible to separate out the continental theatre. For example, United States action overseas might not directly involve Canada, but it could, nonetheless, have ramifications for Canadian troops and equipment in North America because heightened antagonism against the US from abroad would require a higher level of defence at home (and greater expense). Suppose there was an integrated command in place today and the US launched a unilateral military campaign against Iraq. United States forces in North America would be placed on high alert, and a substantial portion of those forces would be transferred overseas. But suppose that Canada did not wish to participate in - or was explicitly opposed to - the campaign. Could it veto an alert? Could it exclude its forces? Would it even be consulted before its forces were put on alert? 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?

Given the potential consequences of US actions for North American defence, should Canada have a say in what the US does abroad? Would the US allow it any say? As Joel Sokolsky explains (in the context of naval co-operation), it is wrong to think that closer military co-operation will enhance Canada's influence: 'convincing 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 ... Even when allies contribute forces and there is agreement on specific tasks, there is no

¹⁴ 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.

concomitant expectation that smaller contributors, such as Canada, will therefore share in the higher strategic and political decisions associated with the operation. Interoperability may well 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.¹⁵

And 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?

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, revealed plans to develop small new nuclear weapons for battlefield use and suggested that nuclear weapons testing might have to resume.¹⁶ The Pentagon has also indicated that it will retain rather than destroy nuclear weapons removed from active deployment as a result of arms negotiations with Russia.¹⁷

In the last few years, arms control treaties have been under considerable pressure from the US. In October 1999, the Republican majority in the Senate refused to give consent to the ratification of the 1996 Comprehensive Test Ban Treaty. In December 2001, the Bush administration denounced the 1972 Anti-Ballistic Missile Treaty.¹⁸ The US remains party to the 1968 Nuclear Non-Proliferation Treaty, but its actions and words indicate that it has little intention of eliminating its nuclear arsenal. Finally, in 1995, the US argued before the International Court of Justice that international law said nothing about whether states are permitted to use - or to threaten to use - nuclear weapons.

Canada has long been at the forefront of efforts at arms control: 'The objective of successive Canadian Governments has been and

15 Joel J. Sokolsky, 'Sailing in concert: the politics and strategy of Canada-US naval interoperability,' *Choices: National Security and Interoperability* 8 (April 2002), 14.

16 Michael R. Gordon, 'U.S. nuclear plan sees new targets and new weapons,' *New York Times*, 10 March 2002, s1, 1. See, more recently, National Strategy to Combat Weapons of Mass Destruction, December 2002, available at www.whitehouse.gov/response/index.html.

17 Patrick E. Tyler, 'Russia rejects U.S. plan to store warheads,' *New York Times*, 11 January 2002, A8.

18 David E. Sanger, 'Bush offers arms talks to China as U.S. pulls out of ABM Treaty,' *ibid*, 14 December 2001, A1.

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.¹⁹ Canada was one of the first countries to ratify the Comprehensive Test Ban Treaty and strongly promotes its ratification by others.²⁰ It plays a leading role in the United Nations Conference on Disarmament and has no desire to acquire nuclear weapons, despite having the ability to do so. And it has long been cautious about co-operating with the US on nuclear weapons issues.

Participation in a US-led integrated command would mean working hand-in-glove, on an ongoing basis, with armed forces that have a substantial nuclear component. This raises difficult legal questions - as will be examined below - concerning Canada's arms control obligations. It also raises difficult policy questions. Do Canadians wish to confer a degree of legitimacy on US retention - and further development - of the nuclear option? Would Canadian soldiers have to participate in operations in which nuclear weapons play a potential role? Are there any foreseeable circumstances in which US commanders would be able to deploy nuclear weapons in Canada? How does one protect against such situations developing without Canada's consent if US commanders think North America is under threat and that they have to act quickly?

Ballistic Missile Defence

In 1983, President Ronald Reagan launched the Strategic Defence Initiative, the aim of which was to develop the capability to shoot down ballistic missiles launched at the US. President George W. Bush is pushing ahead with the scheme and has committed the US to a Ballistic Missile Defence (BMD) system. In December 2001, he denounced the

19 www.dfait-maeci.gc.ca/arms/new_nuclear-e.asp.

20 See www.dfait-maeci.gc.ca/arms/nuclear2-e.asp. Article 14 of the CTBT stipulates that the treaty will enter into force only after a number of specified states - including the US - have ratified. There is, therefore, no prospect that Canada could be bound to the CTBT unless the US was similarly bound.

1972 Anti-Ballistic Missile Treaty, which, in an effort to preserve mutual deterrence, had prohibited the development of such defences.²¹

Canada's co-operation is essential if the system is to be implemented.²² Any Russian, Chinese, North Korean, or Iraqi missiles launched at the United States are not only likely to cross over Canadian territory but would probably have to be destroyed there, which means new radar stations - and probably intercept launchers - on Canadian soil.²³

During the cold war, radar stations were built in northern Canada, and NORAD was created to provide an effective surveillance and intercept capability because air defence co-operation was clearly in Canada's interest; that is less obviously the case with BMD. A new arms race between the US, Russia, and/or China would see Canada literally caught in the middle. In allowing missile defence installations to be built, it would become a target of any large-scale attack - though the 'rogue states' used to justify the scheme are unlikely to waste their few missiles on Vancouver or Toronto.

An integrated command would make Canadian participation in BMD significantly more likely. NORAD's website explicitly foresees that NORAD will be given operational responsibility for BMD.²⁴ Moreover, US ability to apply pressure to support BMD will increase once Canada is committed to other forms of close military co-operation. The agreement could thus pre-empt a full national debate over this additional, difficult matter.

As a participant in BMD, Canada would likely be compelled to contribute to its substantial costs. During the administration of Bill Clinton, the cost of a limited system was estimated at more than US\$60 billion.²⁵ Paying even a fraction of that amount would distort

21 Michael Gordon, 'u.s. tries defusing allies' opposition to missile defense,' *New York Times*, 4 February 2001, 51, 1; 'In Bush's words: "Substantial advantages of intercepting missiles early,"' *ibid*, 2 May 2001, A10.

22 Jeff Sallot, 'Canada's help on missile shield crucial, u.s. ambassador says,' *Globe and Mail*, 13 June 2001, A11.

23 Senior Canadian military officers have already suggested the Canadian Arctic as an alternative site for a key BMD radar station if Denmark refuses permission for its construction in Greenland. See Jeff Sallot, 'Canada won't cede priority to the u.s., Graham vows,' *Globe and Mail*, 2 March 2002, A8.

24 "'NORAD" into the 21st century: entering the 21st century,' at www.norad.mil/21stcent.htm; NORAD Vision 2010, at ww.norad.mil/vision_2010.htm.

25 Eric Schmitt, 'Testing a missile and a treaty,' *New York Times*, 30 January 2000, 5 4, 4.

Canadian military expenditure and divert resources from other areas of government activity.

Proponents of BMD, including the US secretary of defense, Donald Rumsfeld, have indicated that the weaponization of space is their ultimate goal.²⁶ Agreement on an integrated command could thus be the first step towards Canadian participation in the weaponization of space - again, without a full national debate,²⁷ even though as recently as 1998, Canada called for a committee within the Conference on Disarmament to negotiate a convention banning all weapons from space.²⁸

Military Expenditure

Canadian participation in a US-led integrated command, or even some less extensive or less formalized arrangement, would likely entail increased military expenditure. Military interoperability requires roughly equal levels of technology - and modern weapons' technology comes at considerable price. The US maintains a level of military expenditure that, as a percentage of gross domestic product (GDP), is more than twice that of Canada.²⁹ Indeed, its total military expenditure exceeds that of the eight next highest spending countries combined. Closer military co-operation could thus result in substantial, perhaps irresistible, pressure on Canada to increase spending significantly.³⁰ Matching US levels would cost more than \$16 billion (US\$10 billion) in additional funds each year. In the absence of a full national debate on the implications of closer military co-operation for military expenditure, the result could be significant increases in defence spending by stealth.

Any debate about spending should also consider the kinds of soldiers and equipment Canada needs and wants. A move towards closer

26 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'), at www.defenselink.mil/pubs/space20010111.html.

27 For a report on secret government documents concerning Canada's possible involvement in the weaponization of space, see Jeff Sallot, 'Canada moves closer to U.S. orbit,' *Globe and Mail*, 27 February 2002, A8.

28 See 'The Canadian position on arms control in outer space,' at www.dfait-maeci.gc.ca/arms/outer3-e.asp; Jeff Sallot, 'U.S. global dominance prompting review of defence, foreign policies, Graham says,' *Globe and Mail*, 15 April 2002, A4.

29 In 1999, Canada spent US\$8 billion (1.3 per cent of its GDP) on its military; the US spent US\$275 billion (3.0 per cent of its GDP). Figures available at www.sipri.org.

30 For an early indication of pressure, see Cellucci, 'North American security.'

military co-operation could divert money away from tasks, such as United Nations peacekeeping, that the US tends to avoid and in which Canada has traditionally specialized, and away from the equipment best suited for those tasks.³¹

Bilingualism in the Armed Forces

Nearly a third of Canadian forces personnel are francophone. The Department of National Defence has sought to meet stringent obligations under the Official Languages Act with procedures ensuring equal status to French and English.³² Nonetheless, assuring equality for the French language remains a challenge and will become even more difficult within a US-led integrated command. United States commanders lack patience for foreign procedures aimed at protecting the status of a foreign language. And the factual protection that their size affords francophone personnel would be diminished if those forces were subsumed, to one degree or another, within the far larger, English-speaking forces of the US. Any agreement on closer military co-operation would have to include carefully designed mechanisms to ensure that the Canadian forces remain a truly bilingual institution.

Women in the Military

The Charter of Rights and Freedoms requires gender equality. As a result, the Canadian forces are engaged in an ongoing effort to create opportunities for women and to prevent sexual harassment and assault. Women are now allowed to serve in all capacities, including combat roles. This is not the case in the United States, which also seems to have more significant problems with sexual harassment and assault.³³

Under an integrated command, Canadian personnel would operate side-by-side with US personnel. The presence of women in certain roles may cause friction that would be uncomfortable, perhaps even dangerous, to female Canadian personnel. A US commander might want to exclude female Canadian soldiers from certain aspects of an operation,

31 See Douglas Bland, 'Canada and military coalitions: where, how and with whom?' *Policy Matters/Enjeux publics* 3 (February 2002), 32-41.

32 See, for example, www.dnd.ca/admfincs/subjects/daod/5039/o_e.asp.

33 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).

in accordance with US policy but in violation of Canadian policy and the Charter of Rights and Freedoms. The US might put pressure on Canada to bring its policy into line, so as to promote the more effective functioning of the two armed forces. Therefore, any agreement on closer military co-operation would have to specify that Canada's policy on women in the armed forces would not be affected.

Gay and Lesbian Military Personnel

The issue of sexual minorities in the military has provoked controversy in several countries. The current US policy is 'don't ask, don't tell' – homosexuality is still prohibited, even if the witch-hunts of the past are no longer supposed to occur.³⁴ Nonetheless, gay and lesbian soldiers in the US risk discharge if they complain about harassment or violence.³⁵

Canada's approach is more liberal. 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 personnel regardless of sexual orientation.³⁶ A 1992 Federal Court decision based on the Charter of Rights and Freedoms means that same sex partners are accorded many of the same benefits as partners of different sexes.³⁷

What would happen to this approach if Canadian forces were placed under a US-led integrated command? Would gay and lesbian soldiers be at risk of punishment from their commanding officers? Would they risk harassment from US soldiers accustomed to an environment in which overt homosexuality is proscribed? Would it be right (would it be legal?) to subject gay and lesbian Canadian soldiers to US operational control if such questions had not been fully answered and strong protections put in place? Would Canada come under pressure to revise its policy? These questions all need to be answered, and procedures and protections have to be designed carefully, before Canada commits itself to any agreement with the United States.

34 Roberto Suro, 'Military's differing lesson plans reflect unease on gay policy,' *Washington Post*, 4 March 2000, A1.

35 Roberto Suro, 'Military's discharges of gays increase; army base where anti-gay murder occurred had record number of departures,' *ibid*, 2 June 2001, A20; Vernon Loeb, '1,250 gays left forces in '01; harassment cited in largest exodus from military since '87,' *ibid*, 14 March 2002, A4.

36 'Women, gays can make army better, general says,' *Globe and Mail*, 2 March 1998, A3.

37 www.forces.ca/hr/dcba/engraph/travel_removal/Same_Sex_Benefits_e.asp; *Douglas v Canada*, 98 Dominion Law Reports 129 (1992).

Safety of Soldiers

A country that submits its soldiers to the operational control of another country risks putting those soldiers in somewhat greater danger. Canadians remember the slaughter on the beaches of Dieppe and the capture of soldiers in Hong Kong; 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 thus gave the most dangerous tasks to them. Such behaviour is somewhat understandable: generals and politicians are accountable to their own citizens, not to the citizens of other countries, and there is little that plays worse at home than losses on the battlefield.

After 18 US Rangers were killed in Somalia in 1991, it became accepted wisdom that the US public would no longer tolerate the deaths of service personnel abroad. After 11 September 2001, this accepted wisdom changed - though perhaps only temporarily. Once it began to lose soldiers in Afghanistan, the US immediately called in 1700 mountain-trained British marines.³⁸

Is the risk worth bearing if the US were to focus its efforts on the relatively safe high-tech tasks of air and naval support while Canada provided ground troops, at least for the more dangerous missions? Would US commanders, consciously or unconsciously, provide lower quality air support for Canadian than for US soldiers? Would they assign Canadian soldiers to tasks for which they are inappropriately 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?

Promoting 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. 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

³⁸ 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, 13.

Jerusalem and the West Bank as a result.³⁹ In any military conflict, commanders have to assign priorities for the deployment of soldiers and equipment. As Canada contemplates closer military co-operation, it will have to ask who that co-operation is designed to protect. Are US commanders likely to give the same priority to protecting the residents of St John's, Newfoundland, as to the residents of Raleigh, North Carolina? Is it possible that Canadian soldiers and equipment would be diverted from the task of protecting Canada and towards protecting the US?

Canada clearly does not have the soldiers or the equipment to protect itself against a major military attack. In this unlikely situation, Canada would be heavily reliant on the US. But Canadian forces are able to protect the country against many threats, and may - depending on the financial support they receive - become even more capable in future.

If Canada was unable to deal with an attack on its own, the other members of NATO, including the US, are obligated to come to its assistance under article 5 of the North Atlantic Treaty. 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. Structuring an agreement with the US that securely protects Canada's national interest would be a major challenge.

Safety of Civilians

Canadians should be concerned about the implications of closer military co-operation for their personal safety. Around the world, Canadians benefit from considerable goodwill. They are rarely the deliberate targets of terrorist attacks - and when they are, it is not because they are Canadian.

As a result of the position of the US in the world, and 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, particularly with its military and foreign policy, they might be subject to the same kinds of attacks.

Closer military co-operation might also increase the risk of terrorist attacks on Canadian soil. Britain felt the need to increase domestic

39 Avi Shlaim, *The Iron Wall: Israel and the Arab World* (London: Allen Lane/Penguin 2000), 244.

security after it participated with the US in the enforcement of no-fly zones in Iraq and repeated bombings of Baghdad. Prime Minister Tony Blair's highly public support for the US since 11 September has meant even further, more dramatic, security measures.⁴⁰

Military co-operation in multilateral contexts does not carry the same risks. For half a century, Canada has been a NATO partner without being perceived as inextricably linked to the US. Canada has placed its soldiers under temporary US command in operations authorized by the United Nations - again, without being perceived as a US satellite. To avoid becoming a target, even a trilateral arrangement involving Mexico is preferable to a closer bilateral relationship with the US.

LEGAL ISSUES

Under the Canadian Defence Act, it is an offence for any member of the Canadian forces to obey an unlawful order.⁴¹ However, this article does not focus on possible violations of domestic or international law by individual soldiers. My concern is with the ability of the Canadian forces as an institution, and of Canada as a country, to abide by their legal obligations.

Charter of Rights and Freedoms

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

The Charter was probably violated in January 2002 when Canadian forces in Afghanistan transferred Taliban or Al-Qaeda suspects to the United States without obtaining assurances that the death penalty would not be applied if those suspects were convicted of terrorist or other offences.⁴² 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

⁴⁰ See, for example, Owen Bowcott & Audrey Gillan, 'Allies try to calm fears of terrorist retaliation: Worldwide warning to US citizens,' *Guardian*, 8 October 2001, 4.

⁴¹ Revised Statutes 1985, c. N-5, available at <http://laws.justice.gc.ca/en/N-5/index.html>.

⁴² Shawn McCarthy & Steven Chase, 'Handover of captives by Canadian troops sparks Ottawa storm,' *Globe and Mail*, 30 January 2002, A1.

convicted.⁴³ Such assurances, the Court held, were constitutionally required in all but exceptional cases.

Because 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 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 on closer military co-operation should stipulate that individuals detained by Canadian soldiers would, if transferred to US authorities, not be subject to capital punishment - unless the Canadian courts first determined that the circumstances were exceptional.

1949 Geneva Convention III

In January 2002, it became clear that differing interpretations of certain treaties, and differing degrees of commitment to those treaties, raised the possibility that Canadian soldiers could be ordered by their US commanders to perform actions in violation of Canada's obligations under international law.⁴⁴

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 at the US naval base at Guantanamo Bay in Cuba. The article 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.'

In the opinion of the International Committee of the Red Cross (ICRC), the United Nations High Commissioner for Human Rights,

⁴³ *Burns v United States* [2001] 1 Supreme Court Reports 283, available at www.scc-csc.gc.ca/judgments/index_e.html.

⁴⁴ 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,' *ibid.*, 18 January 2002, A1.

Amnesty International, Human Rights Watch, and a number of European leaders at least some of the detainees were prisoners of war (PoWs).⁴⁵ It is difficult to see how these opinions could not but raise doubt about the status of the detainees.

Canada initially adopted a position on article 5 that differed from that of the US. On 16 January 2002, a Department of National Defence spokesperson said: '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.'⁴⁶ However, it soon emerged that Canadian soldiers handed Taliban or Al-Qaeda suspects over to the US at a time when the US publicly refused to apply article 5.⁴⁷

The fact that the Canadians were under US operational control does not absolve 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 ... if 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.'⁴⁸

Other possible violations 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 that have different rules of evidence and procedure from regular US military or

45 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,' *ibid*, 17 January 2002, A15.

46 Quoted in Daniel Leblanc, 'Canada defies u.s. on pows,' *Globe and Mail*, 17 January 2002, A1.

47 Shawn McCarthy & Steven Chase, 'Handover of captives.'

48 Available at www.icrc.org/ihl.

civilian courts.⁴⁹ Yet article 102 of the Convention 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, might be in violation of article 102 if any of them are tried, convicted, and sentenced by a special military commission.

The issue of PoWs, along with all the other issues identified in this article, could easily arise within the North American context. For example, a Canadian frigate under US operational control could detain foreign combatants 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 to US authorities must be accorded the full protections of the Geneva Conventions - as interpreted by Canada.

1977 Additional Protocol I

The 1977 Additional Protocol I to the Geneva Conventions of 1949 concerns the protection of civilians during international armed conflict. Canada has ratified protocol I; the US has not. Canadian soldiers consequently operate under more stringent treaty obligations than US soldiers with regard to the protection of civilians. During the Kosovo campaign, those differences in obligations were taken into account in assigning targets and configuring 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 respond to certain threats in the same way. Any agreement on closer military co-operation would have to include similar arrangements, of a legally binding character, to ensure that Canadian soldiers were not ordered into actions that, while legal for US soldiers, might be illegal for Canadians.

There is also the question of whether Canadians want their soldiers under the operational control of a country that has not accepted the

49 See George W. Bush, Military Order of 13 November 2001, 'Detention, treatment and trial of certain non-citizens in the war against terrorism,' *Federal Register* 66(16 November 2001), 57,833, available at 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, at www.defenselink.mil/news/Mar2002/d20020321ord.pdf.

same level of obligations for the protection of civilians. For example, in the Kosovo campaign the US targeted water filtration plants.⁵⁰ Had the US ratified protocol I, this might have been in violation of article 52(2): '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.' For Canadians, targeting water filtration plants might be unacceptable, not simply because of Canada's obligations, but also as a policy approach by a country wanting to exercise control over its armed forces.

Weapons that Cause Unnecessary Suffering

Protocol I prohibits the use of weapons that cause unnecessary suffering.⁵¹ 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 to reflect customary international law. However, the US has a very restrictive understanding of what the term 'unnecessary' means.

Canada's obligations could be violated if Canadian soldiers used some US weapons, such as munitions containing depleted uranium. Although the danger of depleted uranium has yet to be proved, its use has caused considerable concern.⁵² A credible argument can be made that, in situations of uncertainty, Canada should take a 'precautionary approach' and not put its soldiers in positions where they might employ such weapons.

Ottawa Landmines Convention

Canada has ratified the 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel

50 Marcus Gee, 'Death of innocents,' *Globe and Mail*, 11 March 2000, A14.

51 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.'

52 '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,' *ibid*, 17 February 2001, A10; Richard Norton-Taylor, 'Cancer risk "hard to avoid in battle,"' *Guardian*, 13 January 2001, 9.

Mines and on Their Destruction. The US has not, and continues to use landmines. 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 obligations under article 1: '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.'

Under article 9, Canada is obligated to prevent any prohibited activity from taking place on its territory. United States forces operating in Canada could therefore have nothing to do with landmines. Any agreement with the US should include this specific limitation.

Finally, Canada gained international influence as a result of its largely successful effort to ban landmines. What will happen if it decides to place a substantial part of its armed forces under operational control of a country that continues to defy the international community on this key humanitarian issue?

Rome Statute of the International Criminal Court

Canada has ratified the 1998 Rome Statute of the International Criminal Court (ICC); the US is implacably opposed to this new institution.⁵³ The ICC has jurisdiction over war crimes and crimes against humanity committed by the nationals of its states parties, including Canadian forces regardless of whose command they are under. If ever Canadian soldiers are accused of such crimes, Canada, if it does not want the ICC to exercise its jurisdiction, will have to make good faith efforts to investigate and, where appropriate, prosecute those soldiers. This raises potentially serious practical concerns for closer military cooperation with the US.

Consider one of the US concerns - the crime of knowingly causing excessive 'collateral damage' in a military attack (article 8(2)(b)(iv)). The US does not want the ICC to second-guess command decisions. What would happen if Canadian soldiers, acting under US operational

⁵³ See, for example, Pierre-Richard Prosper, ambassador-at-large for war crimes issues, 'Address, The Hague, 19 December 2001,' at www.state.gov/s/wci/rls/rm/8053.htm.

control, were accused of taking part in such an attack? Would Canadian courts or the ICC find Canadian nationals responsible even as their US commanders remained free of investigation? If Canada had the right to withhold Canadian troops from the assignments, and did not do so, would Canadian military and civilian superiors be criminally responsible for failing to prevent the crime (article 28)?

Or consider part 9 of the Rome Statute, which sets out stringent obligations on international co-operation and judicial assistance. These include co-operation in 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 the requested state party (article 89). In particular, if a state party receives both a request for surrender from the ICC and an extradition request from another country, it must give priority to the ICC (article 90).

Canadian soldiers under US operational control might detain someone wanted by both the ICC and US authorities. Those soldiers might then have to choose between operational orders and Canada's obligations under the Rome 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?

Article 98(2) allows a state party to refuse to surrender a foreign national to the ICC if another agreement prevents this. The provision was included at the insistence of the US, which will now likely press for the inclusion of 'no surrender' clauses in all its status of forces agreements. Such agreements have become 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 a clause. This issue deserves careful study before any decision on closer military co-operation is made.

What effect might closer military co-operation have on the ability of the Canadian government - as distinct from the Canadian forces - to co-operate with the ICC? Would Canada feel free to transfer classified information to the ICC if a significant portion of its armed forces were under US operational control? Would ICC agents be allowed to conduct investigations in Canada if the country were part of a North American security zone under a US-led integrated command?

These questions are rendered more difficult by the fact that Canada played a leading role in the development of the ICC and continues to

campaign actively on its behalf.⁵⁴ Any agreement with the US would have to spell out that, in the event of any conflict of obligation or interest, the Rome Statute would prevail.

Nuclear Non-Proliferation Treaty

Article 6 of the 1968 Nuclear Non-Proliferation Treaty states that: '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.'⁵⁵ Recent statements and reports suggest that the US, which has ratified the NPT, is violating article 6. Canada will want to consider the implications of closer military co-operation with a country in possible breach of this key arms control treaty.

Attention should also be paid to article 2: '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.' Canada would be in violation if its soldiers were placed in control of US nuclear weapons. More importantly, since the prohibition extends to indirect possession or control, the participation of Canadian soldiers in operations involving nuclear weapons, or at least the deployment of such weapons on Canadian territory, might bring Canada into violation.

Any agreement with the US should stipulate that Canadian soldiers are never to be placed in control of nuclear weapons, that they are never to participate in operations involving such weapons, and that such weapons are never to be deployed in Canada.

CONCLUSIONS

A decision on closer military co-operation with the US should be preceded by a full public debate and should involve a well-defined role for parliament. Such a debate would likely establish that the proposed assignment of 'operational control' to US generals has consequences for

54 www.dfait-maeci.gc.ca/foreign_policy/icc/welcome-en.asp.

55 www.unog.ch/disarm/distreat/warfare.htm.

Canadian sovereignty, and that establishing a Northern Command is more than a simple reorganization of the US military. The debate should involve Canada's northern peoples and should not be rushed by outside pressure.

Alternatives to a closer bilateral relationship should be considered. Strengthening the existing global framework through the United Nations, the north Atlantic framework through NATO, and the northern framework through the Arctic Council would be a better approach. Security matters are not limited to continental North America. Strong multilateral institutions exist and consistently work in Canada's favour. Canada should work with countries around the world, including the United States, to strengthen those institutions, not undermine them, even unintentionally, by developing a closer military relationship with one country.

Canada should focus on a broader, multifaceted approach to security such as a global network of intelligence, police, and judicial co-operation, designed collaboratively to impede terrorist planning and detain and prosecute those who would perpetrate such crimes. Canada's strong backing for the ICC is one example of its support for non-military, multilateral approaches. Greater support for United Nations anti-terrorism efforts should be a priority.

Mexico shares many of Canada's interests and concerns and could be a valuable ally within a North American security structure. It makes considerable sense for Canada, Mexico, and the United States to negotiate security matters trilaterally. Concerns about maintaining a 'special relationship' with the US should be dismissed. The claims of many countries - Australia, Britain, Ireland, Israel, Japan, and so on - are just as legitimate as Canada's.

The Canadian government 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 Douglas Bland calls them, would have to be detailed enough to ensure that concerns about sovereignty were fully taken into account and that Canada remained fully able to respect its domestic and international legal obligations and policies on matters such as bilingualism, gender, and sexual equality in the armed forces.

Given the potential implications for Canadian sovereignty and foreign policy, a brief exchange of notes or memoranda of agreement with

the US is not enough. In 1958, NORAD was established through an exchange of notes. In other words, parliament was bypassed in the creation of what became a permanent feature of Canadian defence policy. That mistake should not be repeated.

NORAD exists on a five-year renewable basis. Such an approach gives Canadian governments the option of not renewing if circumstances or policies change.

Specific permission must be granted before foreign forces can enter Canada's north. This will ensure that Canada's claim to sovereignty remains intact.

Military expenditure should be based on Canadian priorities, interests, and values. Military co-operation with the United States is obviously important, but it should not detract from Canada's ability to patrol and protect Canadian territory - including the Arctic - and to mount peacekeeping operations overseas. It is also 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 those aims.