

## Archived Content

Information identified as archived on the Web is for reference, research or record-keeping purposes. It has not been altered or updated after the date of archiving. Web pages that are archived on the Web are not subject to the Government of Canada Web Standards.

As per the [Communications Policy of the Government of Canada](#), you can request alternate formats on the "[Contact Us](#)" page.

## Information archivée dans le Web

Information archivée dans le Web à des fins de consultation, de recherche ou de tenue de documents. Cette dernière n'a aucunement été modifiée ni mise à jour depuis sa date de mise en archive. Les pages archivées dans le Web ne sont pas assujetties aux normes qui s'appliquent aux sites Web du gouvernement du Canada.

Conformément à la [Politique de communication du gouvernement du Canada](#), vous pouvez demander de recevoir cette information dans tout autre format de rechange à la page « [Contactez-nous](#) ».

CANADIAN FORCES COLLEGE / COLLÈGE DES FORCES CANADIENNES  
CSC 29 / CCEM 29

MASTER OF DEFENCE STUDIES

**TOUGH CHOICES IN TOUGH TIMES – ETHICAL AND LEGAL CHALLENGES TO  
CANADIAN INVOLVEMENT IN US-LED DEFENCE INITIATIVES AND MILITARY  
OPERATIONS**

By/par Maj C.A. Davis

*This paper was written by a student attending the Canadian Forces College in fulfilment of one of the requirements of the Course of Studies. The paper is a scholastic document, and thus contains facts and opinions which the author alone considered appropriate and correct for the subject. It does not necessarily reflect the policy or the opinion of any agency, including the Government of Canada and the Canadian Department of National Defence. This paper may not be released, quoted or copied except with the express permission of the Canadian Department of National Defence.*

*La présente étude a été rédigée par un stagiaire du Collège des Forces canadiennes pour satisfaire à l'une des exigences du cours. L'étude est un document qui se rapporte au cours et contient donc des faits et des opinions que seul l'auteur considère appropriés et convenables au sujet. Elle ne reflète pas nécessairement la politique ou l'opinion d'un organisme quelconque, y compris le gouvernement du Canada et le ministère de la Défense nationale du Canada. Il est défendu de diffuser, de citer ou de reproduire cette étude sans la permission expresse du ministère de la Défense nationale.*

## **Abstract**

Despite the common history that unites Canada and the United States of America, in the post September 2001 period, a significant number of ethical and legal fault lines have emerged that threaten Canada's participation in various US-led defence initiatives and future operations. Canada's unwillingness to openly support the war in Iraq was the first formal victim of the ethical and legal disparity emerging on the North American continent but it is unlikely to be the last. In considering the other major defence initiatives proposed by the US to include Northcom, NMD and a preemptive policy intended to bolster continental defence, ethical and legal concerns are playing a significant part in developing Canadian policy. Canada's final decisions are still pending and these are tough choices in tough times. There are no easy answers, however, in the current political climate, Canada's traditional commitment to multilateralism, national values and international law present legitimate barriers to Canada's participation in US defence initiatives and operations. As a direct result, Canada's future participation in American-led military initiatives and operations will be increasingly difficult to secure and will be influenced by the growing disparity between the two nations along ethical and legal fault lines.

## Table of Contents

I. Introduction .....	4
II. Tough Choices in Tough Times .....	8
Emerging Fault Lines in Canadian-US Relations.....	10
III. Ethical Fault Lines in Canadian-US Defence Relations.....	13
Like-Minded Multilateralism vs Exceptionalism and Unilateralism.....	14
One Continent – Two Voices.....	16
Northcom and National Missile Defence.....	18
Preemption and the War on Iraq .....	20
Challenges, Concerns and the Costs of Compromising Canadian Values.....	26
IV. Legal Fault Lines in Canadian-US Defence Relations.....	30
The International Legal Framework - Canadian and American Perspectives .....	32
International Law: Treaties and Conventions.....	34
The Ottawa Convention - Landmines.....	36
Prisoners of War and the International Criminal Court.....	37
National Missile Defence.....	42
Anti-Ballistic Missile (ABM) Treaty.....	42
Non-Proliferation Treaty (NPT) and the Comprehensive Test Ban Treaty (CTBT).....	43
The Space Treaty .....	45
The United Nations.....	46
Preemption and the War on Iraq .....	47
Challenges, Concerns and the Costs of Legal Compromise.....	48
V. Conclusion .....	51

Canada cannot join other states or take obligations that flow from coalitions without regard for national laws, costs, domestic politics and policies and the need to maintain public support for foreign policy.<sup>1</sup>

Douglas Bland

## **I. Introduction**

Canada and the United States have shared the responsibilities for the defence of North America, their common allies and their common values for over 60 years. World War II and the Ogdensburg Declaration of 1940 marked the official beginning of this new era in Canadian-American politics and in the defence of North America as, increasingly isolated from Europe and the United Kingdom by the war, Canada looked much closer to home in charting a course for the defence and economic welfare of Canada.<sup>2</sup> Over sixty years later, the Canada-US partnership fostered during World War II has served both nations well since and Canada's short history in the area of military cooperation with the United States has been marked by close cooperation and improved interoperability.

Following the war, Canada found itself a central figure in the United Nations (UN), the North Atlantic Treaty Organization (NATO) and in North American Aerospace Defence (NORAD) alongside the United States of America. Collectively, NORAD, NATO and the UN played a vital role in continental, allied and international security ultimately contributing to the collapse of the Soviet Union. Following the end of the Cold War, Canada continued to soldier in solidarity with the US, be it as a partner in peace

---

<sup>1</sup> Douglas Bland, "Canada and Military Coalitions: Where, How and with Whom?", *Policy Matters*, Vol 3, No 3, February 2002, p 42.

<sup>2</sup> R.D. Cuff and J.L. Granastein, Canadian-American Relations in Wartime (Toronto: Hakkert, 1975), p 101.

support operations or as one of 34 nations who participated in the UN approved and US-led coalition against Iraq to liberate Kuwait in 1991.<sup>3</sup>

With few exceptions, during the first 50 years following the Ogdensburg Declaration, Canada and the US were united on most major defence issues and both pursued defence and foreign policy that reflected the common values and commitment to the rule of law reflected in the UN Charter and the Washington Treaty.<sup>4</sup> In the turbulent decade since the end of the Cold War, Canada-US defence relations have been shaped by missions in Somalia, Haiti, Rwanda and Bosnia and more recently by the terrorist attacks of 11 September 2001. Rather than unite Canada and the US on issues of defence and foreign policy issues, the period following the attacks of the World Trade Center and the Pentagon, has exposed ethical, moral and legal fault lines in the North American relationship forcing both governments to reassess the core values and international laws that help guide continental and international defence policy.

In a new environment, dominated by these fault lines and the fluid nature of current events, Canada is now being asked to clearly articulate its role in the defence of North America and in support of the United States' international agenda. Whereas Canada may support the desired end states of the various initiatives to include continental Ballistic Missile Defence and military operations being conducted under the auspices of the War on Terrorism, Canada has been hard pressed to support the means proposed or employed by the US to achieve these end states. This is not a new trend but rather an underlying concern that has been central to Canada-US relations for the past six decades:

---

<sup>3</sup> "Security Council Resolutions – 1991" [<http://www.un.org/Docs/sc/>]. 15 January 2003. Site includes all UN Security Council Resolutions dating back to 1946 to include UNSCRs 712 and 715 dealing with the Iraq crisis of 1991.

<sup>4</sup> NATO, NATO Handbook, Brussels: NATO Office of Information and Press, 2001), p 527.  
5/58

The nature of the US relationship has given rise to a number of problems between the US and its much less powerful associates and allies, including Canada. Many of the problems result from the not unnatural desire of the US to obtain support of other countries for its policies and from a lack of sophistication in the message employed. This in itself would not be too serious if Canada and other countries could always be convinced of the soundness of policies proposed (very often imposed) by the US. The fundamental problem in the current relation between Canada and the US...is our underlying fear that the Americans will not be patient enough, especially as their military strength increases. The impulsive methods of the US sometimes show up in a willingness to apply a long-term solution to a short-term problem.<sup>5</sup>

Privy Council 1951

Little has changed in this regard since 1951 and despite calls from the Bush Administration for Canada to join the US in the Global War on Terrorism, the US-led coalition against Iraq, Northcom and the National Missile Defence programme, Canada has been reluctant to commit unconditionally to any of these initiatives. The immediate challenge for Canada is to define and harmonize the desired end states with the means to be employed; a challenge accurately captured by analysts from the Directorate of Strategic Analysis Policy Planning Division:

Unlike in the previous decade, the world must now contend with an activist United States which feels threatened and which will not permit the niceties of diplomacy, alliance practices, arms control agreements or international legal norms to stand between it and its objective of providing for its own security, and that of its friends and allies.<sup>6</sup>

---

<sup>5</sup> Joel Sokolsky, "Canada-US Security Cooperation" from David Rudd, Jim Hanson, and Adam Stinson, ed, Playing in the 'Bush-League': Canada-US Relations in a New Era, (Toronto: The Canadian Institute of Strategic Studies, 2001), pp 65-66.

<sup>6</sup> Directorate of Strategic Analysis Policy Planning Division Policy Group, "Strategic Assessment 2002", (Ottawa: Department of National Defence Canada 2002), p 11.

As Canada ponders its future role in various US-led operations and initiatives, Ottawa again finds itself struggling to find the balance between the American methods proposed to meet short-term objectives in the aftermath of 911 and its longstanding commitment to international standards and international law. Difficult questions surface as Canada attempts to deal with this dilemma. Firstly, can Canada support the US despite these concerns? Secondly, will Canada choose the immediate economic and security advantages of a strong Canada-US defence partnership over the advantages of promoting international peace and security through the values and international law? Finally, will Canada abandon its longstanding commitment to multilateralism and willingly violate treaties and international law that it has helped craft in order to participate as a full partner in the defence of North America?

In considering American options on Ballistic Missile Defence, Northcom, preemption, and the conflicts in Iraq and Afghanistan, these are the fundamental questions policy makers must address. There are no easy answers, however, in the current political climate, Canada's traditional commitment to multilateralism, national values and international law present legitimate barriers to Canada participation in US defence initiatives and operations.<sup>7</sup> As a direct result, Canada's future participation in American-led military initiatives and operations will be increasingly difficult to secure and will be influenced by the growing disparity between the two nations along ethical and legal fault lines.

---

<sup>7</sup> Department of Foreign Affairs and International Trade, "Freedom From Fear – Canada's Foreign Policy for Human Security", (Ottawa: Department of Foreign Affairs and International Trade, 2002), p 1. Comments extracted from Message from Canada's Minister of Foreign Affairs.



## **II. Tough Choices in Tough Times**

To date, Canada's reservations with respect to the complex ethical and legal issues associated with current US defence policy appear to be having little effect. Rather than prompt continental debate on the moral and legal merits of recent US actions and proposed activities, Canada's reservations on the War on Terrorism, Iraq and NMD have only served to alienate the US. Overwhelmingly, commentary from US politicians, academics and media suggest that the US does not believe Canada is committed to the war on terrorism, immigration and refugee system reforms and is angered by Canadian complaints of 'national profiling'.<sup>8</sup> Furthermore, the US is concerned that Canada is not pulling its weight militarily at home or abroad and was angered by Canada's refusal to commit to the US's call for regime change in Iraq and Canada's refusal to take part in ballistic missile defence or Northcom.<sup>9</sup> These observations succinctly summarize the breadth and complexity of the defence and security challenges facing both Canada and the US. Historically, Canadian governments have been caught between their support for collective defence, which has made military cooperation with the US essential and popular fears that national sovereignty and independence would be compromised by too close an association with the nuclear-armed giant to the south.<sup>10</sup> How then does Canada deal with these significant defence and security issues and which criteria will ultimately dictate the way ahead?

In the opinion of many who have studied this issue, the advantages of strong Canada-US ties are paramount and various reports recommend full participation with the

---

<sup>8</sup> Kevin Michael Grace, "Playing to the home crowd", *The Report*, Vol 29, No 24, 16 December 2002, p 9.

<sup>9</sup> Ibid.

<sup>10</sup> Joseph Jokel and Joel Sokolsky, "The End of the Canada-US Defence Relationship", Occasional Paper Series, (Kingston: Queens' Centre for International Relations, 1996), p 4.

US in Northcom, BMD and the war on terrorism. Fewer studies have raised serious ethical and legal concerns with unconditionally joining the US in pursuit of its defence and security agenda. Although economic and continental security have tended to dominate the debate in comparison with the importance of Canadian values and international law, all of these considerations are central to the complex nature of the Canada-US defence partnership. The economic advantages of Canada's close ties with the US cannot be completely overlooked with 85% of our exports destined to American markets but equal attention should be paid to Canada's national values and commitment to the rule of law.<sup>11</sup> The potential tension in this partnership, based on divergent national values and differing interpretations of international law, is a relatively new phenomena making tough choices all the more difficult. Whereas the economic and defence benefits of a strong defence partnership with the US have been well researched, this paper will focus on the emerging moral and legal issues associated with continental and international defence. Specifically, ethical and legal issues will be explored in an effort to highlight the barriers to Canadian participation in US-led defence initiatives as well as the potential costs of following the US defence and security agenda, an ambitious agenda that has been accelerated in the aftermath of the terrorist attacks on New York City and Washington in September 2001.

Increasingly, the choices which confront Canada force Ottawa to choose between the benefits of the Canadian-US partnership and the cost of compromising traditional values and the rule of law. The Canadian government can no longer assume that American policies will reflect the shared values and commitment to the rule of law of the

---

<sup>11</sup> J.L. Granastein, "A Friendly Agreement in Advance: Canada-US Defence Relations Past, Present, and Future, C.D Howe Institute Commentary, No 166, June 2002, p 6.  
9/58

past. Moreover, Canada must understand the underlying ethical and legal issues associated with the decision to follow the US's lead. The legitimate ethical and legal obstacles to Canadian participation in various US-led initiatives and operations are significant and will have a direct influence on Canada's final decisions regarding NMD, Operation Iraqi Freedom and all future military operations. Understanding these obstacles is paramount to ensure Canadian policy makers chart a path which strikes a balance between the benefits of cordial relations with the US and protecting Canadian values and its commitment to international law.

### **Emerging Fault Lines in Canadian-US Relations**

In an ideal scenario, Canada and the US would be like-minded on all major defence and security issues. In practice, these occasions have been rare in the last part of the 20<sup>th</sup> century and the early part of the 21<sup>st</sup> century. The immediate response to the terror attacks of September 11<sup>th</sup> is a recent and rare example of North American unity. Following the horrific attacks by Al Qaeda terrorists on the World Trade Centre and the Pentagon, Canada condemned the attacks and offered support to the US, indicative of the long tradition of cooperation in the defence of North America. On 14 September 2001, as Canadian Forces stood ready to work with the US to defeat terrorism, Prime Minister Chretien declared: "Our Friendship has no limit. Side-by-side, we have lived through many dark times, always firm in our shared resolve to vanquish any threat to freedom and justice."<sup>12</sup> From an American perspective, Chretien's comments might have suggested that Canada would be a staunch ally in the various US-led operations that would follow. This assumption would not prove to be the case.

Apart from modest contributions to the initial campaign in Afghanistan, the post September 2001 period can be characterized by Canada's hesitance or outright refusal to support various US-led defence initiatives. Although Canada would not be the only traditional ally to reject American solutions to the War on Terrorism and Operation Iraqi Freedom, Canada's unwillingness to openly support the war in Iraq was the first major defence issues to fall victim of the ethical and legal disparity emerging on the North American continent but it is unlikely be the last.<sup>13</sup> Despite the limitless friendship referred to by Prime Minister Chretien, every relationship must have well defined limits and, for the current Canadian Liberal Government, these limits are becoming clearer as every effort is being made to minimize the risk of having to compromise its ethical stand on critical issues or to violate international laws in a very fluid and ambiguous environment.

The emerging 'ethical' fault lines between Canada and the US encompass the morals, values and beliefs held by the sitting governments and the peoples of the two nations. The 'legal' fault lines include national and international laws found in legislation, treaties and conventions as well as the lawful authority of various international bodies to include NATO and the United Nations. These parameters are acknowledged as not being all inclusive of the complex ethical and legal frameworks that shape national and international policy. They do; however, provide a comprehensive basis on which to quantify the challenges Canada now faces in its considerations relating to its future role in various US-led military initiatives. The net result is that while Canada may support the desired end state of these various initiatives, Canada may disapprove of

---

<sup>12</sup> "Canada and the United States: A Strong Partnership" [<http://www.dfait-maeci.gc.ca/can-am/menu-en.asp>] 1 Nov 2002.

the methods employed or proposed by the US to achieve these aims. Although many of the means proposed are driven by a commitment to US national interests to include strong continental defence, Canada's unconditional participation in US operations is hindered by legitimate ethical and legal challenges that are inconsistent with the Canadian government's traditional approach to defence and security policy. Consequently, Canada is reluctant to participate in various US-led and sponsored activities under their current constructs. As the deliberations on where, when, why, and how to defend North America or to wage war continue, Bland argues "Canada cannot join other states or take obligations that flow from coalitions without regard for national laws, costs, domestic politics and policies and the need to maintain public support for foreign policy."<sup>14</sup> While Canada seeks to articulate clear policy, the American policy has been clearly defined in the 2002 National Security Strategy - notwithstanding the values, judgments and interests of their friends and allies, the US will be prepared to act apart when US interests require.<sup>15</sup>

Harmonizing Canadian and American methodologies raises many ethical and legal issues and given the tough choices Canada faces, "the political dimensions of military interoperability [and cooperation] with the United States may now warrant more attention than they would have tended in the past to receive."<sup>16</sup> These political dimensions do indeed warrant due consideration and must include the associated ethical and legal considerations. As a result, despite the ties that bind the two nations, what the

---

<sup>13</sup> "Crisis in Iraq" [[http://www.dfait-maeci.gc.ca/foreign\\_policy/iraq\\_crisis/menu-en.asp](http://www.dfait-maeci.gc.ca/foreign_policy/iraq_crisis/menu-en.asp)] 7 April 2003.

<sup>14</sup> Bland, p. 42.

<sup>15</sup> "The National Security Strategy of the United States of America", [<http://www.whitehouse.gov/nsc/nss.html>], 15 December 2002, p 31.

<sup>16</sup> Danford W. Middlemiss and Denis Stairs, "The Canadian Forces and the Doctrine of Interoperability: The Issues", *Enjeux Publics*, Vol 3, No 7, June 2002, p. 13.

US would like Canada to do and what Canada is willing to do are frequently at odds; due in large measure to underlying ethical and legal disagreement.

### **III. Ethical Fault Lines in Canadian-US Defence Relations**

During the last sixty years of Canadian-US relations, an underlying and shared ethical and moral foundation played a central and all-important role in the development of Canada-US defence and security relations from the outset. These ties are singled out in the 1994 White Paper on Defence which stresses “the common political, economic, social and cultural values Canada and the United States share.”<sup>17</sup> Indeed, these principles have long been touted as the foundation of the Canadian-American partnership and were recently reaffirmed by Deputy Prime Minister Manley, who observed: “A key factor that unites our countries is deeply held values, a belief in democracy, free markets, human rights... all in abidance with the rule of law.”<sup>18</sup>

More specifically Canadian values are formally guided by the principles to respect the dignity of all persons, to serve Canada before self, and to obey and support lawful authority.<sup>19</sup> Similarly, the United States of America “will always stand firm for the non-negotiable demands on human dignity: the rule of law, ... equal justice and religious tolerance.”<sup>20</sup> In addition to complying with national values, Canadian participation in military operations should further comply with the related defence obligations of integrity, loyalty, courage, honesty, fairness and responsibility. These values do not

---

<sup>17</sup> “1994 White Paper on Defence”,

[[http://www.forces.gc.ca/site/Minister/eng/94wpaper/white\\_paper\\_94\\_e.html](http://www.forces.gc.ca/site/Minister/eng/94wpaper/white_paper_94_e.html)] 10 December 2002.

<sup>18</sup> John Manley, “The View from Ottawa” from David Rudd, Jim Hanson, and Adam Stinson, ed, *Playing in the ‘Bush-League’: Canada-US Relations in a New Era*, (The Canadian Institute of Strategic Studies: Toronto, 2001), p 7.

<sup>19</sup> Defence Ethics Program, “Ethics and Conduct”, (Ottawa: Department of National Defence, 2000).

<sup>20</sup> State of the Union 2002, [<http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>], 29 January 2002.

deviate significantly from the values of the United States which include duty, integrity, ethics, honor, courage and loyalty.<sup>21</sup>

<u>Canadian Values</u>	<u>American Values</u>
Integrity	Integrity
Loyalty	Loyalty
Courage	Courage
Responsibility	Duty
Honesty	Ethics
Fairness	Honor

Table 1 – Comparison of Canadian and American Defence Values

Notwithstanding subtle differences reflecting American patriotism, the similarities of the core defence values are striking. As these similar lists suggest, both Canada and the US appear committed to common values. In practice, however, the ethics and common values that have bound the two North American nations in the past are not reflected in the recent paths charted by the two respective governments, specifically in the national policies adopted related to the War in Iraq and NMD.

### **Like-Minded Multilateralism vs Exceptionalism and Unilateralism**

In the aftermath of the attacks on the World Trade Centre and the Pentagon, the world has witnessed an aggressive American agenda that Canada has been at pains to support as the common values and basic assumptions of the past that contributed to North American unity and a common approach to continental defence and security matters are

---

<sup>21</sup> “We instill values” [<http://www.defenselink.mil/>], 2 February 2003.

now under scrutiny. As a result of this scrutiny, differing views on the role of multilateralism and international norms have surfaced in Ottawa and Washington. Historically, Canada has managed these differences well with little challenge to its self-determination and sovereignty. A new challenge; however, is emerging, namely dealing with increased US frustration with international bodies and related treaties, international law and alliances, compounded by the US's willingness to go it alone.

Notwithstanding the trend towards American unilateralism, the US has long acknowledged the benefit of partnerships and international bodies. America's commitment to multilateralism officially dates back to 1948 and the introduction of the Vandenberg Declaration. Approved on 11 June 1948, the Vandenberg Declaration states that it is "the policy of the United States to achieve international peace and security through the United Nations so that armed forces shall not be used except in the common interest."<sup>22</sup> This commitment to multilateralism and the lawful authority of the UN guided both the US and the West throughout the Cold War period.<sup>23</sup> With memories of the Cold War quickly fading, the current Bush Administration's frustration with NATO, the UN, unsupportive allies, and Canada undermines the spirit of the Vandenberg Declaration and puts the notion of US international cooperation into question. On concern for Canada, the 2002 American National Security Strategy states that "...while the United States will strive to enlist the support of the international community, we will not hesitate to act alone..."<sup>24</sup> Canada is unlikely to follow suit, given the public commitment to multilateralism articulated by Minister Grahmam : "[Canada] believes

---

<sup>22</sup> "Senate Resolution 239, 80<sup>th</sup> Congress, 2<sup>nd</sup> Session, 11 June 1948"  
[[www.nationalalliance.org/NA\\_Treaty/vandy.res.htm](http://www.nationalalliance.org/NA_Treaty/vandy.res.htm)] 3 February 2003. Resolution 239 was proposed by US Senator Arthur Vandenberg and adopted 11 June 1948.

<sup>23</sup> Ibid.



strongly in building legal-based, multilateral reactions to problems in the world and would ask the US to accept that.”<sup>25</sup> As a result, Canada’s views and its continued longstanding commitment to multilateralism and the lawful authority of the UN are at odds with the views of the US and present the first of many barriers to cooperative Canadian-American defence initiatives.

### **One Continent – Two Voices**

Despite the contrast between Canada’s firm commitment to multilateralism and the US trend towards exceptionalism and unilateralism, many international observers outside North America may erroneously conclude that Americans and Canadians are alike. Although Canada has been subject to Americanization over several decades, Canadians still view themselves as a separate and unique people with its own voice on defence and security issues.

Looking at the findings of the 2002 MacLean’s end year poll, a poll of more than 1200 Canadians found that only 7% see Canadians and Americans as being similar. Testimony to the scope of the gap between the two countries, close to half of those polled described Canadians and Americans as being friends but not especially close while a further 25% considered the relationship as cordial but distant.<sup>26</sup> Historically, MacLean’s found Canadians eager to define themselves by what they were not, namely not American. 11 September 2001 has also served as a wake up call for Canada. In the aftermath, rather than imitate the US, pollsters now see a trend towards Canadians seeing themselves in terms of what Canadians themselves are and to deflect American

---

<sup>24</sup> “The National Security Strategy of the United States of America”, [\[http://www.whitehouse.gov/nsc/nss.html\]](http://www.whitehouse.gov/nsc/nss.html), 15 December 2002, p. 6.

<sup>25</sup> CBC News: Canada’s Stand on an Iraq Attack, Jan 8, 2003.

<sup>26</sup> Jonathan Gatehouse, “Why So Cranky?” *MacLean’s*, Vol 115, No 52, 30 December 2002, p 34.  
16/58

hegemony. As a result Canadians are proudly defining themselves in what the US is not and finding that contrary to popular belief the differences are real and are inevitably manifested in, amongst other things, national defence and security policy. In over simplified terms there is a popular consensus among Canadians that the US is warlike whereas they continue to view Canada as peaceful despite the common history of cooperative defence. Whether these views are justified, they do have influence over the defence and security policies being developed in both nations.

In response to the new perceived threat environment consuming North America, defence spending in the US has soared as the Bush Administration strives to establish Fortress America. In contrast to the significant and single largest increase to the US defence budget witnessed in 2002 and the more than \$100 billion dollar price tag anticipated for the war in Iraq, the Canadian Forces enjoyed only a modest increase to defence spending, suggesting the perceived threat to Canada has changed little from September 2001.<sup>27</sup> This view appears to be shared by the majority of Canadians as only 7% of Canadians polled in late 2002 supported an increase in military spending. Overall defence remained a distant third priority behind health care (59%) and child poverty (25%).<sup>28</sup> Even in the perceived absence of a credible threat and without the benefit of a formidable military force, Canadians still appear eager to play a significant role in global affairs. Without discounting the unique role and challenges the United States face as the lone superpower, Canada is a sovereign nation with its own unique threat environment and a critical role to play in global events. Despite US criticism of the Canada's foreign

---

<sup>27</sup> Valerie Lawton, "The big spenders", *The Toronto Star*, 19 February 2003. The most recent budget provided the Department of Defence with an additional \$800 million dollars, well below the figure requested by DND.

<sup>28</sup> Gregg, p 35.

and defence policy, "...foreign policy matters to Canada. They have deep rooted values they carry over into the role they want Canada to play - nurturing dialogue and compromise, promoting democracy, human rights..."<sup>29</sup> It may be beneficial for the US to understand these differences, noting that "the most underestimated differences in our two countries is politics. Our political cultures attract different kinds of politicians, have unique constitutional elements and produce very different ideas of a citizen's duty."<sup>30</sup> With few politicians with previous military service, charged with the running of a middle power dominated by the world's lone superpower to the south, these differences are understandable. As a consequence, Canada is culturally and politically different than its American neighbours, and Canada's unique moral and ethical foundation ultimately manifests itself in the expression of national security and defence policy. Granted, as America's neighbour, Canada may be in a position where they can afford to place morals ahead of defence and security considerations; however, a study of current Canadian policies on the more pressing issues of 2003 reinforce Canada's sovereign approach to defence and security and further serves to define the ethical and moral disparity and the growing chasm between Canada and the US that threatens Canadian participation in joint defence activities.

### **Northcom and National Missile Defence**

Northcom and National Missile Defence, two recent American proposals for enhanced continental defence, have met with Canadian resistance. In the wake of 11 September 2001, the United States moved quickly and with unshakable conviction to establish a Homeland Defence strategy to defend Americans in all 50 States. Far from a

---

<sup>29</sup> Jokel and Sokolsky, p 11.

<sup>30</sup> John Cruickshank, "We're not like Americans", MacLean's, Vol 115, No 52, 30 December 2002 p 39 . 18/58

new concept, the horrors of 911 prompted the Bush Administration to commit seemingly boundless resources to the defence of the homeland. Part of this strategy includes the creation of Northcom with the mandate “to preserve the Nation’s security by defending the American people where they live and work, and support civilian authorities as needed.”<sup>31</sup> In associated activities, Strategic Command has been combined with Space Command, placing NORAD and America’s significant nuclear arsenal under one commander. In a complementary activity, the National Missile Defence (NMD) program has been revitalized under Space Command’s leadership with a view to fielding a functional National Missile Defence capability as soon as possible. This capability is predicated on the eventual weaponization of space which, from a Canadian perspective, raises a host of ethical issues and is in violation of several existing international treaties. Considered a full partner in continental defence, Canada has been invited to participate in both Northcom and NMD. These issues are complex issues and present ethical challenges to the Canadian government. These include the integration of Canadian and American forces, the weaponization of space, and a significant financial commitment to suspect technologies. It is difficult to consider NMD and Northcom in complete isolation as the integrated command structures of NORAD, Strategic Command and Space Command make it difficult to exclude the Canadian Forces from the realities of these fast moving initiatives. Moreover, Canada does not have the luxury of time in formalizing its policy as President George W. Bush has directed that the US Department of Defence field initial missile defense capabilities beginning in 2004.<sup>32</sup>

---

<sup>31</sup> “US Northern Command” [<http://www.northcom.mil>] 24 Mar 03.

<sup>32</sup> “The Ballistic Missile Defence System” [<http://www.acq.osd.mil/bmdo/bmdolink/pdf/approach.pdf>] 28 January 2002.

A programme endorsed by both Democrats and Republicans, and with the memories of 11 September 2001 still fresh, BMD remains at the top of US defence priorities. Although the Canadian Defence Department may be eager to participate in this programme, the Canadian Department of Foreign Affairs remains in favour of “robust multilateral non-proliferation, arms control and disarmament regimes.”<sup>33</sup> Although Canada remains willing to consider a role in NMD, Canada’s full participation is questionable on the heels of recent comments made by Bill Graham, Canada’s Minister of Foreign Affairs who declared "Canada's clear policy is we're against weaponization of space and we'll continue to make that position forcefully with the Americans.”<sup>34</sup> Fundamentally, Canada has no desire or interest in the weaponization of space and is understandably reluctant to spend significant funds to participate in the inevitable weaponization of space and being party to the next arms race regardless of the defensive benefit a successful NMD might bring. Ignoring these principles may prove difficult to overcome. Although a final decision is not anticipated for several months, the ethical and moral issues associated with NMD will be central to the ensuing debate and may, in and of themselves, prevent Canadian endorsement and participation in the continental missile defence programme.

### **Preemption and the War on Iraq**

The American reaction to the terrorist attacks has not been limited to purely continental and homeland defence. As part of the broader US strategy which has emerged in the post September 2001 era, there is a renewed commitment to forward presence and

---

<sup>33</sup> Phillippe Lagasse, “Coming Home to Roost: Canadian Indecision on BMD and the Eclipse of Canada-US Space Cooperation”, *On Track*, p 19.

<sup>34</sup> “Canada opposed to weapons in Space”, *The Toronto Star*, 7 May 2003.

preemptive action.<sup>35</sup> Just as Canada's full participation in the defence of North American under the auspices of NMD and associated initiatives pose considerable ethical and moral challenges, so too would Canadian participation in the full spectrum of US actions related to the war on terrorism. The central ethical issue is the concept of preemption. "The United States has long maintained the option of preemption... even if uncertainty remains as to the time and place of the enemy's attack".<sup>36</sup>

Confronted with an American policy of preemption, the world was polarized and galvanized over the crisis in Iraq. The US eagerness to wage war on Iraq was largely motivated by the premise of preemption. Although tied to UNSCR 1441, the American objectives in Iraq appear much broader than the original objectives to disarm and limit Iraqi military capabilities.<sup>37</sup> Regrettably, the issue of regime change became synonymous with the campaign in Iraq. Canada was among the majority of UN and NATO nations opposing the American strategic objective to remove Saddam Hussein under the auspices of UNSCR 1441. Specifically, opposition in Canada has been voiced at the highest level; Prime Minister Chretien calling regime change without a new UNSCR wrong; concerned that this would establish a dangerous precedence.<sup>38</sup> Just as Canada opposed regime change, Canada finds itself at odds with the US over the notion of preemptive action in Iraq. Whereas the US was convinced that the timing and motivation for preemptive action in Iraq launched on 19 March 2003 was justified, Canada remained committed to a peaceful resolution brokered through international multilateralism and the UN Security Council. In the end, international diplomacy failed and the world witnessed the first

---

<sup>35</sup> "The National Security Strategy of the United States of America", [<http://www.whitehouse.gov/nsc/nss.html>], September 2002, p 6.

<sup>36</sup> Ibid, p 15.

major US-led war of the 21<sup>st</sup> century, a war that included US, British and Australian soldiers but one without Canadian support and without Canadian troops.

Canada was not alone in its reluctance to follow the US into Baghdad. As one of 34 former coalition partners in the War on Iraq in 1991, in response to the invasion of Kuwait, Canada chose not to be a member of the 2003 coalition. The most recent US-led coalition numbered forty-nine nations although much of this support was political because only a handful are actually providing military forces.<sup>39</sup> In many respects, the support of these nations represented more a lack of formal objection to the war in Iraq rather than tacit support, as collectively the forty-nine nations do not reflect the traditional like-minded nations of the Cold War period.<sup>40</sup> Although ten of the nineteen NATO nations officially support the Coalition, much of this support came from Eastern European nations seeking NATO membership.<sup>41</sup> In addition, only 5 of the 15 current UN Security Council members expressed support for military action against Iraq.<sup>42</sup> Perhaps of greater concern to Canada, Canada is the lone ABCA partner not to contribute forces to the war in Iraq.<sup>43</sup> Regardless of the support offered or withheld by other nations, it is clear that the War in Iraq presented a serious moral dilemma for many governments. Canada was not alone in facing this dilemma and like many of Canada's allies, the ethical and moral barriers proved too great and led to Canada's decision not to participate with the US-led coalition.

---

<sup>37</sup> "Security Council Resolutions – 2002"[<http://www.un.org/Docs/sc/>]. 15 January 2003. Site provides all relevant details on UNSCR 1441.

<sup>38</sup> Tonda MacCharles, "Ousting Saddam wrong: Chretien", *The Toronto Star*, 28 February 2003

<sup>39</sup> "Coalition Members" [www.whitehouse.gov/news/release/2003/03/20030327-10.html](http://www.whitehouse.gov/news/release/2003/03/20030327-10.html) 27 Mar 03

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid. Apart from the main combat forces provided by the US and the UK, Australia has committed 2000 troops.

Canada's formal opposition to the war in Iraq without UN support should not have come as a total surprise and disappointment to its closest allies or the Bush Administration.<sup>44</sup> In truth, tangible signs first emerged in Fall 2002 when pollsters began closely monitoring the sentiment of the population on this sensitive issue. Despite the close ties between Canada and the US, the polls consistently show a marked difference in the basic attitudes of the two nations. In very general terms, Canada must be counted amongst those nations opposed to the war on Iraq having formally added its voice to the chorus of international opposition to the War on Iraq.<sup>45</sup> While Canada waited until the last possible moment to formally abstain from the war on Iraq, the results of recent public polls present a clear picture which ultimately reflected the position adopted by the Chretien government.<sup>46</sup> Consistently, the Canadian population remained unconvinced of the immediate threat cited by the US or that Iraq warranted attack.<sup>47</sup> In its annual end year poll, MacLean's Magazine pollsters concluded that over 50 % of Canadians did not support an attack on Iraq. Their views on the role of the CF were equally clear as, even if the war on Iraq were to be supported by a UN Security Council resolution, only 28 % supported the involvement of CF troops in combat. As an alternative to war fighting, 53% were in favour of following Germany's lead in providing logistical support, although a full 17% were against any Canadian involvement what so ever.<sup>48 49</sup>

---

<sup>44</sup> Gloria Galloway, "US envoy chides Canada", *Globe and Mail*, Mar 25 2003. US Ambassador Paul Cellucci, in a speech to the Economic Club of Canada, 24 Mar 03 said "there is a lot of disappointment in Washington and a lot of people are upset" about Canada's refusal to join the US-led coalition against Iraq.

<sup>45</sup> Philip Shishkin, "Germany Juggles War Opposition with its Duties as a NATO Member", *Wall Street Journal*, 4 Feb 2003.

<sup>46</sup> "Crisis in Iraq"

[ [http://www.dfait-maeci.gc.ca/foreign\\_policy/iraq\\_crisis/menu-en.asp](http://www.dfait-maeci.gc.ca/foreign_policy/iraq_crisis/menu-en.asp)] 29 Apr 2003

<sup>47</sup> Allen R Gregg, "Strains Across the Border", *MacLean's*, Vol 115, No 52, 30 December 2002,p 32.

<sup>48</sup> Ibid.

<sup>49</sup> Philip Shishkin, "Germany Juggles War Opposition with its Duties as NATO Member", *Wall Street Journal*, 4 February 2003.



A similar poll of Americans conducted in November 2002 highlighted a very different American position on this issue. The Harris poll concluded that over 70 % of Americans support military force to achieve goal of disarming Iraq.<sup>50</sup> Fully a third of Americans or 33 % supported military force in the absence of a UNSCR although less than half formally oppose an attack without a UNSCR.<sup>51</sup> A second poll conducted in early 2003 suggested that while the overall support has dipped marginally to approximately 66 %, those who support military action without a new UNSCR jumped to slightly more than 50 %.<sup>52</sup> In the analysis of the polls tracking the public sentiment in Canada and the US on the issue of Iraq, perceived threat levels, allegiance to the UN process and the ethical nature of preemptive actions appear to have had a major influence in the poll results in the two nations. Moreover, American's support for President Bush's proactive agenda in Iraq made the decision to launch military operations without a robust coalition or UN support much easier to make. Conversely, Canada public opinion, coupled with the pending Provincial election in Quebec, a province which strongly opposed the war in Iraq, made it very difficult for the Chretien government to support the war effort.<sup>53</sup>

Immediately following the commencement of coalition operations in Iraq by a coalition without Canadian forces, public sentiment in Canada and the US continued to reflect prewar opinions. In the days following the beginning of the war in Iraq, Canadian polls suggested that 66 % supported Canada's stand not to participate in the war. In sharp

---

<sup>50</sup> "Large Majority Favor US Foreign Policy Goals on Iraq",  
[[http://www.harrisinteractive.com/harris\\_poll/index.asp](http://www.harrisinteractive.com/harris_poll/index.asp)] 12 January 2003

<sup>51</sup> Ibid.

<sup>52</sup> "8 AM Report", CBC Radio News 99.1 FM, 3 Feb 03.

<sup>53</sup> Tim Harper, "Poll: Canadians sour on US", Toronto Star, 7 December 2003. Support for Canadian participation in the war stood at 23%, the lowest level of support in Canada at the time based on an EKOS Research poll.

contrast, more than 75% of Americans supported the War in Iraq, almost 25% more than the support enjoyed by the UN sanctioned operations to liberate Kuwait in 1991.<sup>54</sup> As the war progressed and US and British success became apparent, Canadians began to voice concern over Canada's non-participation with 72% of Canadian polled in early April 2003 suggesting that Canada should have backed the war.<sup>55</sup> It is difficult to assess if this spike in support for the war in Iraq is actually a true reflection of Canadian opinion or a reasonable reaction to economic angst associated with souring Canada-US relations. These numbers appear to be inconsistent with earlier polls and tend to support Professor Allen Sens' belief that "Canadians always get nervous at the mention of spillover between differences and disputes between the Canadian and US governments and the spillover to economic and trade issues."<sup>56</sup> Many Canadians appear to have been concerned that Canada's position on the war on Iraq would have an adverse economic impact. This preoccupation with short-term economic benefit, a preoccupation reflected by Deputy Prime Minister Manley following 11 September 2001 - "I felt that the greatest risk to Canada as a result of September 11 was to the economy" - often dominates the less tangible issues of national values and the commitment to international law.<sup>57</sup> In the case of Iraq, Canadian policy has placed greater stock in these values and international law despite economic concerns and US pressure to participate.

In the end, it appears that the wishes of both nations were respected as the US launched its military might against Iraq on 19 March 2003 without its longtime Canadian

---

<sup>54</sup> Joyce Howard Price, "Polls show support rises to 76 percent with war underway", *The Washington Times*, 24 March 2003.

<sup>55</sup> Michael Higgins and Sheldon Alberts, "72% believe Canada should have backed the war", *The National Post*, April 8, 2003.

<sup>56</sup> Ibid

<sup>57</sup> Allan Thompson, "Can Canada still lay claim to being glorious and free?", *The Toronto Star*, 9 September 2002.

allies at its side. The war on Iraq, like many of the other proposed US-led initiatives, has served to expose the growing disparity in Canadian and American views and their distinct values. As a result, the North American allies are forced to deal with the first significant manifestation of the ethical and legal chasm between the two nations. Clearly the stakes are high for the multitude of other complex ethical issues the Chretien government now faces. In the near term, Prime Minister Chretien's and the Canadian government's official policy on Iraq and a host of related defence and security issues reflect the traditional commitment to national values and multilateralism witnessed in the past 60 years of Canada-US relations.<sup>58</sup> As the US chooses a new path based on preemption and unilateralism, it will be increasingly difficult for Ottawa and Washington to achieve consensus. With the issues of BMD, Northcom and ongoing operations in support of the War on Terrorism still to be formally addressed, ethical and moral issues will continue to influence Canada's role in Canadian-US defence relations and will pose new challenges in the future.

### **Challenges, Concerns and the Costs of Compromising Canadian Values**

In examining the short-term US national agenda, defence and security matters are likely to remain at the fore. By extension, Canada must be prepared in the months and years ahead to entertain new requests from the US to participate in a host of US sponsored operations and initiatives to include Operation Iraqi Freedom, the ongoing war on terrorism and NMD. President Bush's 'you are either with us or against us' approach to coalitions will present new challenges for Ottawa and raises concerns over the state of Canada-US relations and the potential costs of following the US lead and of

---

<sup>58</sup> [<http://www.dfait-maeci.gc.ca/>]. A review of the various links provides current Canadian policy on key issues.

compromising Canadian values.<sup>59</sup> On the other hand, Canada must also consider the costs of not joining the US.

Notwithstanding the economic fears stemming from strained relations between Canada and the US, the influence of ethical and moral considerations is destined to play a more prominent role in developing Canadian defence and security policy. The immediate challenge for the Canadian government will be to sell both the US Administration and the people of Canada of the long-term merits of a multilateralist and ethically based approach to defence and foreign policy. North of the US border, most Canadians and politicians support this methodology despite a more pressing preoccupation with health care and the economy. By contrast, the US is prepared to go it alone in dealing with its principle preoccupation, national security. These differing views have led to different responses.

In the hope of avoiding a repeat of 11 September 2001, the US has committed enormous resources to security. At the expense of a sluggish US economy, American defence spending continues to rise to unprecedented levels whereas in Canada, modest increases to defence spending remain the norm. As the US continues to hunt down terrorists and rebuild Iraq without Canadian participation, American frustration and the strain on North American relations are understandable. The question is what price is Canada prepared to pay for being at odds with the US?

If Canada were willing to sacrifice long standing ideals and values in favour of the relationship with the US, Canadians would likely have witnessed Canadian soldiers “marching off to Baghdad for a reason that had nothing to do with either security and terrorism or with international law...but because the US was marching there and would

---

<sup>59</sup> “Address to a Joint Session of Congress and the American People”  
[<http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>], 20 September 2001.  
27/58

like to have Canadians along.”<sup>60</sup> The benefit of this approach is the prospect of improved relations with the US without concern for economic reprisal. Although a desirable objective, this approach would have been contrary to public opinion and may not be in Canada’s best interest in the long term. The reality is that Canada is unlikely to figure prominently in US politics and Canada has to carefully assess the cost of appeasement. Firstly, Canada’s tacit support for these various initiatives would place Canada at odds with many long standing allies and the growing network of ‘like-minded’ nations increasingly eager and willing to follow Canada’s leadership on key issues. In siding with the US on contentious issues, Canada risks losing any credibility that would allow Canada to mediate and influence key global issues in the future.

In the short term, the impact of Canada’s refusal to join the US-led coalition in Iraq should be minimal due largely to the intertwined nature of the North American partnership. In the longer term, Canada must look beyond the mere economic and security advantages and must defend and uphold its ethical and moral obligations and regardless of cost. If Canada chooses this path, there is scope in the future that Canadian opposition to the various US initiatives, based on legitimate national concerns and ethical considerations, will play an important role in shaping both continental and international defence and security activities and serve as an important counter-balancing force against American unilateralism and exceptionalism.

---

<sup>60</sup> Richard Gwyn, “A morally inert foreign policy”, *The Toronto Star*, 12 January 2003.  
28/58

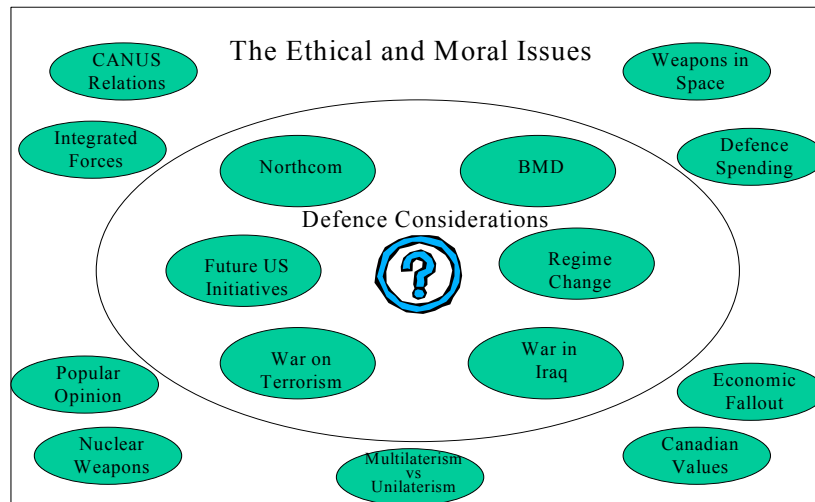


Figure 1 - Major Defence Issues and the Ethical Dilemma

As depicted in Figure 1, the defence considerations in the centre are influenced by a variety of external ethical dilemmas to include the challenges of going against public opinion and abandoning multilateralism in favour of supporting its American ally. A review of current government positions on the issues of Northcom, NMD, the war on Iraq and associated issues suggests that Canada is prepared to uphold Canadian public opinion and promote multilateralism despite American pressures. Moreover, Canada's stance on these issues appears to accurately reflect the beliefs, core values and ethical principles of Canadians. Canadian views on multilateralism, weapons in space and preemption are unlikely to change under the current Liberal leadership. By extension, it would stand to reason that Canada will have a difficult time participating in many of these initiatives, in their current constructs, due in part to the ethical dilemma they present and the current ethical and moral disparity evident between Canada and the United States.

The examination of Canadian and American ethics and morals identifies notable gaps and differing opinions on key defence and security issues. These differences are difficult to formally quantify but the potential fault lines of multilateralism versus unilateralism, preemption versus patience and diplomacy, and differing public sentiment on key issues do exist and are proving to be significant barriers and hurdles to overcome in pursuit of Canada-US cooperation and partnership on key defence initiatives. This is not to suggest that Canada will not participate in the various continental and international defence activities proposed by the US; however, Canada's participation will be directly influenced by its traditional commitments to national values and international multilateralism.

#### **IV. Legal Fault Lines in Canadian-US Defence Relations**

As the previous section has identified, unique national ethics and values have led to fundamental differences in both the agendas of the Canadian and American governments and in the views held by their respective citizens who influence those agendas. From a Canadian perspective, the influence of national ethics and Canadian values are central to Canada's policies on national, continental and international defence and security policy. Similarly, international law plays an important part. Whereas the ethical and moral considerations associated with the difficult choices facing the Canadian government are significant, they are proving difficult to explain and to justify to our long time American ally. Not to downplay the importance of national values and international norms, the more significant considerations for the current Canadian government, often overlooked, are legally based. In an era when the US appears suspicious of the value of international law, Canada's position on contemporary issues continues to reflect its

approach of the past that “the rule of law needs to come first, which then supports and protects individual liberty, which can then in turn promote stability.”<sup>61</sup> As a result, a significant gap, one similar to that noted along ethical fault lines, is reemerging between Canada and the US in the interpretation and application of international law. As this gap is exposed and the legal issues associated with BMD, preemption and Canada-US military operations are explored, the potential legal barriers to Canadian involvement in future US-led defence initiatives become more apparent.

Canada’s international legal framework, much like that of the US, has evolved over decades to include a wide array of conventions, protocols and treaties. Whereas Canada continues to be active in the further development of the broader international legal framework, the US has been very reluctant to enter into any new treaty agreements which may impede the American Security Strategy. Moreover, the US and Canada now find their interpretations of the legal framework diverging further. In some cases, US discomfort and frustration with previously approved treaties and conventions has prompted them to withdraw from treaties or to ignore laws currently in place.<sup>62</sup> This unilateralist approach to international law is inconsistent with Canada’s longstanding commitment to international law, and Canada must be cognizant of the legal pitfalls in relation to the various defence and security initiatives being pursued by the US. Just as Canada’s commitment to ethical and moral principles must not be negotiable, its commitment to lawful authority and to international law must also be without compromise. Whereas a debate based on ethical or moral criteria may present two

---

<sup>61</sup> Goertz, p 109.

<sup>62</sup> “United Nations Treaty Collection” [<http://untreaty.un.org/>] 11 January 2003.



competing and compelling options, legal considerations offer far less flexibility, frequently leaving the simple choice to obey existing laws or to violate them.

### **The International Legal Framework - Canadian and American Perspectives**

In order to appreciate fully the scope of the legal challenges that may threaten Canadian-US operations, it is important to review select keystone documents that shape national laws in both countries and their outlook on international law. For the US two documents warrant specific attention: the American Constitution and the “Later-in-Time” rule. The American Constitution is without peer in the US legal hierarchy. In simple terms, “No treaty of law can ever supersede the one document that all Americans hold sacred: the U.S. Constitution.”<sup>63</sup> In essence, the international law is viewed as secondary, a reality reflected in the second key document known as the ‘Later-in-Time’ rule. Adopted in the mid-nineteenth century, the ‘Later-in-Time’ rule affords the US legal recourse to put off compliance with a legally binding document until such time as it is prudent to invoke the legislation.<sup>64</sup>

Regardless of Washington’s views on the merits of international law in the current global environment, in the eyes of the current Liberal government, legal constraints have a legitimate and central role in all military operations. This belief is reflected in many defence publications including the publication “Canadian Forces Operations” which states that:

International law is the primary basis for the use of force during international operations. It provides stability in international relations and an expectation that certain acts or omissions will

---

<sup>63</sup> Detlev F. Vagts, “The United States and its Treaties: Observance and Breach”, *American Journal of International Law*, Vol 95, No.2 April 2001, p 321.

<sup>64</sup> Ibid, p 314. Vagts cites a statement made by Senator Helms 20 January 2000.  
32/58

bring about predictable consequences. Nations therefore comply with international law because it is in their best interest to do so.<sup>65</sup>

A similar view has long been held by the US, but it now appears that new questions are being raised as Americans reevaluate whether the traditional legal framework of international law is still in the American best interest. In an article appearing in the *American Journal of International Law* in April 2001, months prior to the onset of the War on Terrorism, a study of American trends with respect to international treaties concluded that while the US was still largely compliant with its treaty obligations [not uniquely limited to defence and security], the report indicated a new and troubling disrespect for US treaty obligations.<sup>66</sup> At the same time, there is a growing belief in the US that “international law constitutes a real and immediate threat to US national interests.”<sup>67</sup> As the views on the role of international law held by Canada and the US diverge, the potential for legal obstacles and disagreements in pursuit of continental and international peace and security objectives are likely to surface.

In light of Canada’s active role in strengthening the international legal framework to include the Ottawa Convention on Landmines and the Rome Statute establishing the International Criminal Court, the implications of the recent US trend to discount the merits of international law and current treaty obligations are cause for alarm. Canada must be careful to protect its place among the like-minded nations dedicated to lawful authority and the rule of law. More specifically, Canada must protect its good standing with the broader international community and be diligent in its consideration of US

---

<sup>65</sup> “Canadian Forces Operations”, Canadian Forces Publication B-GG-005-004/AF-000, (Ottawa: Department of National Defence, 2001), p 5-5.

<sup>66</sup> Vagts, p 318.

<sup>67</sup> “The Rocky Shoals of International Law”, *National Interest*, Issue 62, Winter 2000/2001, p 35. 33/58

defence initiatives, particularly at a time when the US appears to be of the opinion that “as the world’s pre-eminent power, we have both the greatest opportunity and the most pressing need to shape international law.”<sup>68</sup> In a worst-case scenario, different legal interpretations on issues of international law will prevent Canadian participation in US-led military operations intended to bolster continental and international security.

### **International Law: Treaties and Conventions**

Although no single document constitutes international law, it is a useful term encapsulating customary and treaty law to include the law of peace and the law of armed conflict. The Canadian Forces holds the view that “the international law of peace includes but is not restricted to treaties, conventions, agreements and customary international law comprising the norms of international behaviour in times of peace.”<sup>69</sup> The basis for the Laws of Armed Conflict are the Hague Conventions and 1907 and the four Geneva Conventions for the Protection of Victims of War in 1949 which have been supplemented by the various Protocols to the Conventions<sup>70</sup> In the aggregate, a host of laws and treaties are in place with the prime objective of establishing a framework for international stability and peace. The continued value of this long-standing approach to international cooperation is evident in the recent additions to the legal foundation previously built around the Geneva and Hague Conventions to include the Ottawa Convention on Landmines and the Rome Treaty.

In critically reviewing Canadian and American commitment to international law and lawful authority, two notable trends emerge. The first is Canada’s continued commitment to the well-established international legal framework and its leadership role

---

<sup>68</sup> Ibid.

<sup>69</sup> “Canadian Forces Operations”, p 5-5.

in support of its evolution. The second trend is the conspicuous absence of US endorsement of current laws and treaties which stand to curtail US flexibility in pursuit of its National Security Strategy. As a result of the disparate views on the merits of international law held by the two nations, there are a growing number of potential legal frictions and barriers to Canadian Forces participation in US-led initiatives. The legal fault lines that jeopardize Canadian participation in US-led operations and initiatives range from the various treaties at odds with the US vision of the NMD programme, the Ottawa Convention of Landmines, the Geneva Convention of the Handling of Prisoners of War, and the Rome Statute establishing the International Criminal Court.

In reviewing the international list of signatories to the various Geneva Protocols and Hague Conventions that encompass contemporary international law the disparity in approach between the US and Canada is further exposed as two significant statistics jump out. First, in looking at the period after the First World War, Canada is party to 24 Conventions and Protocols in contrast to only 16 by the United States.<sup>71</sup> The second fact is that the United States has not ratified a Convention or Protocol since 1996. This trend should be of concern considering that in the past seven years both the Convention on the Prohibition on the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on the Destruction of 1997 and the Rome Statute of the International Criminal Court of 1998 were championed, brokered and ratified by Canada.

Not only is the United States increasingly hesitant to becoming party to bodies of international legislation supported by Canada and the broader international community, the US is also showing a willingness to withdraw from existing commitments under

---

<sup>70</sup> Ibid.

<sup>71</sup> "United Nations Treaty Collection" [<http://untreaty.un.org/>] 11 January 2003.  
35/58

various treaties and international legislation to include the Anti-Ballistic Missile Treaty, the Comprehensive Test Ban Treaty and the Rome Statute establishing the International Criminal Court. Regardless of the US rationale to reject and withdraw from various treaties and conventions, Canada and traditional allies have not adopted the US approach to international law. Until such time as Canada is willing to adopt a similar policy, a host of treaty and convention obligations will continue to influence Canadian defence policy and prevent unconditional support for US-led military operations and initiatives. A closer look at the various treaties and conventions highlighted in Table 2 will help to identify specific legal fault lines that threaten Canadian and American defence partnerships.

<b><u>Convention/Protocol</u></b>	<b><u>Canada</u></b>	<b><u>United States</u></b>
Ogdensburg Declaration	Embedded in Canadian Law	Informal Agreement Only
Landmine Treaty	Ratified	Not Ratified
Rome Statute	Ratified	Withdrew Signature
Prisoners of War	Ratified	Ratified
ABM	Supported	Withdrew
CTBT	Ratified	Not Ratified
Non-Proliferation Treaty	Ratified	Not Ratified
Space Treaty	Ratified	Withdrew
CCW/Protocol II	Ratified	Not Ratified

Table 2 – Comparison of Ratified International Treaties, Conventions and Laws<sup>72</sup>

### **The Ottawa Convention - Landmines**

The Ottawa Convention, formally known as the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and On Their Destruction is the first in series of treaties posing a legal obstacle to

---

<sup>72</sup> Ibid.  
36/58

Canada-US military operations. This treaty, a treaty near and dear to Canada and championed by former Minister of Foreign Affairs Axworthy, was negotiated more rapidly than any other major international agreement in history and reflects the international appeal of this treaty<sup>73</sup> Testament to the level of international concurrence and a desire to bring the provisions into law, the US has refused to ratify the treaty “citing different international responsibilities and obligations”, further testimony to the US concept of unilateralism and exceptionalism.<sup>74</sup> As a result, Canada could have potential difficulty operating as part of a US-led coalition if the US was adamant on the use of landmines. Although unlikely in practice, the Landmine Treaty is the first of many potential legally based frictions affecting future Canadian participation in US-led initiatives.

### **Prisoners of War and the International Criminal Court**

Among the more sensitive issues in modern conflict, the issue of Prisoner of War and Detainee Handling in a US-led coalition presents a similar legal challenge to the issue of landmines. During the Global War on Terrorism and the campaign in Afghanistan, Al Qaeda and other suspected terrorists captured by Canadian forces became an issue. Under the provisions of the Geneva Convention for Prisoners of War, Prisoners of War are a national responsibility; however, recent Canadian Forces deployments have lacked integral Prisoner of War handling capabilities. Although both Canada and the US subscribe to the same laws concerning Prisoners of War, different legal interpretations should serve to prompt bilateral discussions and debate over this

---

<sup>73</sup> “Ottawa Landmines Convention: Treaty Signing Conference and Mine Action Forum”, *Disarmament Diplomacy*, Issue No 21 June 2000

sensitive issue. As witnessed in Afghanistan, Canada was relegated to a junior partner in the US-led operation. Despite the relatively small number of forces involved, Canada was active in detaining suspected Al Qaeda. Lacking an integral national Prisoner of War processing capability to handle the prisoners in accordance with international law and the Geneva Convention on Prisoners of War, Canadian Forces turned all prisoners over to the US. In the absence of formal legal review, Michael Byers, a professor in the area of International and Comparative Law at Duke University has concluded “Canadian forces under U.S. command in Afghanistan, ... [had] to violate the Geneva Convention on Prisoners of War.”<sup>75</sup> Specifically, concerns stem from the US refusal to seek clarification on the official status of prisoners captured in Afghanistan and transferred to Guantanamo Bay, Cuba. Under the 1949 Geneva Convention, article 5 states:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen in the hands of the enemy...such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent authority.<sup>76</sup>

Unwilling to entertain this process, the US unilaterally concluded that all prisoners captured by either Canadian or American forces were not entitled to the full protection of the Geneva Convention despite formal objections from the International Committee for the Red Cross and the UN High Commissioner for Human Rights.<sup>77</sup>

Although the US military quietly formalized terrorism as an act of war in early 2003, no

---

<sup>74</sup> John Manley, “The View from Ottawa” from David Rudd, Jim Hanson, and Adam Stinson, ed, *Playing in the ‘Bush-League’: Canada-US Relations in a New Era*, (The Canadian Institute of Strategic Studies: Toronto, 2001), p 12.

<sup>75</sup> Stephen Clarkson, *Uncle Sam and Us*, (Toronto: University of Toronto Press, 2002), p 404.

<sup>76</sup> Directorate of Law Training, ed., “1949 Geneva Convention(III) Relative to the Treatment of Prisoners of War”, *Collection of Documents on the Law of Armed Conflict*”, (Ottawa: Department of National Defence, 2001).

<sup>77</sup> Michael Byers, “Canadian armed forces under US Command”, Report commissioned by Simon Centre for Peace and Disarmament Studies, UBC 6 May 2002, 38/58

mention or clarification has been offered on the status for the detainees held in Guantanamo Bay, to include those captured by Canadian Forces.<sup>78</sup> Canada has been relatively silent on this issue but as the War on Terrorism persists and in the aftermath of the war on Iraq, this issue remains unresolved. Canada must understand the legal obligations of operations and the intentions of its allies. In the case of prisoners, stemming from both the conflict in Afghanistan and Iraq, the US appears unhindered by the Geneva Convention on Prisoners of War and the jurisdiction of the ICC. These legal issues present Canadian leadership with yet another legal fault line that may influence future Canadian and American coalitions.

With the inception of the International Criminal Court, a new legal dimension has been added to the handling of prisoners and war criminals in the new security environment. Apart from the legal issues associated with prisoner handling in the actual conduct of military operations, future Canadian-American operations must also consider the issue of International Criminal Court jurisdiction. Whereas the Clinton administration had offered soft support to the ICC, President Bush and the government of the United States have distanced themselves from the ICC. Specifically, a letter dated 6 May 2002 written by John Bolton, Under Secretary of State for Arms Control and International Security for President Bush was delivered to the UN and declared that the US would not become a party to the Rome Statute of the International Criminal Court. The letter added that the US had no legal obligations resulting from President Clinton's signature of the Treaty on 31 December 2000; the last day for such signatures.<sup>79</sup>

---

<sup>78</sup> Gerry Gilmore, "Post 9-11 Military Considers Terrorism 'An Act of War'", *American Forces Information Services*, 30 January 2003.

<sup>79</sup> Jonathan I. Charney, "The United States and the Statute of Rome", *The American Journal of International Law*, Vol 95, No 124, December 2001.  
39/58



Further evidence of American exceptionalism, the Bush Administration has gone a step further and offered strong opposition to the ICC. In addition to withdrawing its initial support to the ICC, the US has taken significant steps to limit the jurisdiction of the ICC over US personnel. The issue merited mention in the National Security Strategy which indicates that the US will “take the actions necessary to ensure efforts to meet global security commitments and protect Americans are not impaired by the potential for investigations, inquiry, or prosecution by the ICC...”<sup>80</sup> In support of this effort, the US has introduced the American Servicemembers Protection Act, specifically designed to protect US personnel and officials against the jurisdiction of the ICC.<sup>81</sup> This act, introduced by US Senator Helms paints a worst-case scenario in which the US would be precluded from cooperating with the ICC and “deny military assistance to any foreign country that did join the court.” The Act leaves provisions to make exceptions for NATO countries and other key allies but the US opposition to the ICC is clear. It is also interesting to note that the US also withdrew from International Court of Justice in 1986 after 40 years, further evidence of the US general unwillingness to be subject to the provisions of international law and international jurisdiction.

Despite a US policy strongly opposing the ICC, Canada has been a driving force behind the creation of the International Criminal Court (ICC). The ICC was formally created when the Rome Statute was adopted in Rome on July 17, 1998. The ICC is the first permanent international court to have jurisdiction over the most serious crimes

---

<sup>80</sup> “The National Security Strategy of the United States of America”, [<http://www.whitehouse.gov/nsc/nss.html>], 15 December 2002, p 31.

<sup>81</sup> Ibid.

established in international law.<sup>82</sup> In a related legal initiative, the Crimes Against Humanity Act has been implemented in Canada in conjunction with the Rome Statute of the International Criminal Court. It would replace the current war crimes provisions of the Criminal Code. The Act would include the offences Genocide, Crimes Against Humanity and War Crimes.<sup>83</sup>

As a result of operations in Afghanistan and Iraq, Canada now appears more sensitized to the legal pitfalls associated with the handling of prisoners and its ICC obligations. Notably, the Canadian government has issued an order to the Canadian Commander of the Canadian Task Force in the Persian Gulf not to turn over suspected Iraqi war criminals to the US choosing instead to respect its ICC obligations.<sup>84</sup> Ambassador Cellucci, the point man and American messenger of a growing list of grievances with Canada has called Canada's policy "incomprehensible".<sup>85</sup> Far from incomprehensible, Canada's direction simply upholds its legal obligations under both the Geneva Convention for Prisoners of War and the ICC. Canada's support for the prosecution of all war criminals is unquestionable but as a signatory to the Rome Statute, Canada has made it clear that Canadian Forces personnel will turn all war criminals over to an international court.<sup>86</sup> Regrettably, the US is unwilling to accept this approach which sets out to achieve a common outcome. As a result, the Rome Statute has become yet another legal point of tension between Ottawa and Washington.

---

<sup>82</sup> "Canada and the International Criminal Court"  
[[http://canada.justice.gc.ca/en/news/nr/1999/doc\\_24328.html](http://canada.justice.gc.ca/en/news/nr/1999/doc_24328.html)] 20 March 2003.

<sup>83</sup> Ibid.

<sup>84</sup> Allan Thompson, "Sailors would not hand over Iraqis", *The Toronto Star*, 9 April 2003..

<sup>85</sup> Robert Fife and Sheldon Alberts, "Cellucci derides Ottawa's Policy on War Fugitives", *National Post*, 11 April 11 2003.

<sup>86</sup> Ibid.

## **National Missile Defence**

Whereas legal considerations associated with landmines and Prisoners of War are limited to major military operations, many of the other proposed US initiatives associated with the defence of North America stand to violate international law from the outset. As a result, the prospect of violating international law and treaties is making it difficult for Canada to participate with particular concern with the MND program and the broader program of global arms control. Notably, the interrelationship between the Anti-Ballistic Missile Treaty, the Non-Proliferation Treaty, the Space Treaty and the Nuclear Comprehensive Test Ban Treaty are all of interest to Canada which is concerned that all such longstanding treaties will be destabilized by the pending US NMD program.<sup>87</sup>

American concerns over lack of Canadian support of NMD is not likely to be sufficient to alter Canada's position. Financial, ethical, and pract

for NMD research and development activities was predicated on continued compliance with the 1972 ABM and related treaties.<sup>88</sup> Under the Bush Administration, the ABM has fallen from favour and is yet another treaty to be rescinded by the Bush administration. Conveniently, the US withdrawal from the ABM in December 2001 opens the way to NMD.<sup>89</sup> For its part, Canada continues to support the ABM and views a robust multilateral non-proliferation arms control and disarmament regime as an essential element in pursuit of Canada's foreign policy objectives and is convinced that missile defence need not be incompatible with arms control and disarmament.<sup>90</sup> Even without considering the other treaties central to the NMD proposal, Canada's participation in the near term would represent a significant deviation in the government's policy that "Canadian involvement would be predicated on the proposal being compliant with the 1972 ABM treaty or an updated treaty negotiated with Russia, as well as any other arms control and disarmament agreements, protocols and arrangements."<sup>91</sup> Short of following the US and abandoning the ABM, the treaty remains a legal constraint to Canadian participation in NMD.

### **Non-Proliferation Treaty (NPT) and the Comprehensive Test Ban Treaty (CTBT)**

Following on the heels of the US withdrawal from the ABM, the NPT, a treaty the Bush Administration once valued, is another treaty no longer endorsed by US. The change in opinion was formalized by the US by Ambassador Eric Javits who described

---

<sup>88</sup> "Canada's Policy on Ballistic Missile Defence" [[www.forces.gc.ca/site/focus/canada-us/bg99.055\\_e.asp](http://www.forces.gc.ca/site/focus/canada-us/bg99.055_e.asp)]  
5 Feb 2003

<sup>89</sup> "Bush Announces Withdrawal from ABM Treaty",  
[<http://www.rfel.org/nca/features/2001/12/12122001102735.asp>]

<sup>90</sup> "Canada's Policy on Ballistic Missile Defence" [[www.forces.gc.ca/site/focus/canada-us/bg99.055\\_e.asp](http://www.forces.gc.ca/site/focus/canada-us/bg99.055_e.asp)]  
5 Feb 2003

<sup>91</sup> Ibid.

the NPT as “another example of a treaty we no longer support”.<sup>92</sup> In contrast to the US pull out of the NPT, Canada is one of 188 countries, to include all other NATO nations less the US, who have ratified the treaty, and remains a strong supporter of the 1970 treaty. Earlier this year, Minister Graham expressed concern over North Korea’s withdrawal from the NPT adding that the Korean decision “would be a significant setback to global efforts to prevent the proliferation of nuclear weapons.”<sup>93</sup> The extent of Canadian support for the NPT was reinforced in a government news release in January 2003 which described the NPT as the “cornerstone of international efforts to prevent the spread of nuclear weapons.”<sup>94</sup> Clearly the NPT remains a treaty Canada deems worthy to support and respect. Accordingly, Canada’s eagerness to uphold the NPT will inhibit Canadian involvement in any activities that violate the provisions of this treaty.

In addition to its commitment to the NPT, Canada is also a staunch supporter of the Comprehensive Test Ban Treaty (CTBT), yet another treaty the US is unwilling to ratify. The CTBT, intended to prevent further nuclear testing, was introduced in 1999 and follows the Partial Test Ban Treaty of 1963. The CTBT compliments the ABM and NPT as essential legal components of arms control. Ratified by over 85 countries to include Canada and all of its European NATO allies, the UN views CTBT as “vital to international security in the 21<sup>st</sup> century.”<sup>95</sup> Unfortunately, the US joins a list of nations to include China, Iraq and Vietnam who have yet to ratify the CTBT, significantly weakening the value and clout of the CTBT.<sup>96</sup> More specifically, the US has distanced

---

<sup>92</sup> Rebecca Johnson, “NPT Report”, *Disarmament Diplomacy*, Issue No 64, May-June 2002, p 4. Refers to a statement by Ambassador Javits delivered to the NPT PrepCom, Article VI “special time”, 11 April 2002.

<sup>93</sup> Ibid.

<sup>94</sup> “Canada Deplores DPRK Withdrawal from Nuclear NPT” [[http://www.dfait-maeci.gc.ca/minpub/min\\_pub-docs/105824.html](http://www.dfait-maeci.gc.ca/minpub/min_pub-docs/105824.html).] 10 Jan 03

<sup>95</sup> “CTBT Final Declaration”, *Disarmament Diplomacy*, Issue No 61 Oct-Nov 2001.

<sup>96</sup> Ibid.

itself from the CTBT and announced it “maintains readiness to resume underground testing if required.”<sup>97</sup> Collectively, Canada’s respect for the treaty obligations of the ABM, NPT and CTBT present tangible barriers to Canada’s full participation in NMD and future initiatives that threaten to dismantle the current arms control mechanism.

### **The Space Treaty**

The last of the treaties to present a legal barrier to NMD is the oldest of the four key treaties associated with the NMD project. In 1967, the Space Treaty was introduced with the primary objective to ban weapons from the earth’s orbit; a compliment to the ABM treaty which also prohibits the testing and deployment of space based weapons.<sup>98</sup> Canada has consistently sought to prevent the weaponization of this last frontier through negotiation of multilateral arms control treaties.<sup>99</sup> Canada is among those nations that still hold that international law, by eliminating threats before they arise, offers a better protection than the introduction of new weapons into space.<sup>100</sup> The US remains unconvinced and will move forward with NMD and the weaponization of space, compounding Canada’s ability to be a full partner in NMD and various continental defence initiatives without turning its back on a host of international treaties it has helped implement and views as critical to global arms control.

The major motivation for the US withdrawal from ABM, NPT, CTBT and the Space Treaty appears to be focused on the NMD and the US commitment to dominate space. Under these conditions it will be very difficult for Canada, as a middle power dedicated to multilateralism and its existing treaty obligations, to follow the US example.

---

<sup>97</sup> Ibid.

<sup>98</sup> Ambassador Thomas Graham, “ International Law and the Military Uses of Space”, *Disarmament Diplomacy*, Issue No 63, March-April 2002

<sup>99</sup> “Outer Space” [<http://www.dfait-maeci.gc.ca/arms/outer-en.asp>] 10 Oct 02

Granted, Canada may be a marginal player in NMD but this is insufficient ground on which to abandon treaties that have played an important role in achieving arms control in the past. Although the Cold War is over and the immediate threat to the US from Russia and China has subsided, the merits of the various treaties identified above continue to have broad global relevance. The mere fact that select treaties may not be relevant or beneficial to the US in pursuit of its national interests is not sufficient justification for Canada to willingly dismantle the international legal framework it has helped to build.

### **The United Nations**

The international framework currently in place is ultimately governed by the United Nations. Canada's commitment to international law and lawful authority of the United Nations (UN) is central to Canadian policy and is frequently expressed by Canadian officials including Prime Minister Chretien who recently commented, "the Canadian position is that on matters of peace and security, the international community must speak and act through the UN Security Council."<sup>101</sup> At the centre of the broader legal debate surrounding the various defence initiatives is the current and future role of the UN. To expand, Canada remains committed to the lawful authority of the UN and the associated legal framework:

As the cornerstone of a rules-based international system, the UN has remained throughout a vital forum through which we have sought to influence world affairs, to defend our security and sovereignty within a stable global framework, to promote our trade and economic interests, and to protect and project Canadian values such as fairness, equal opportunity, and respect for human rights. Living, as Canada does, in the shadow of the most powerful and influential nation on earth, the UN has been of prime importance in our efforts to counterbalance continental attractions, to establish a clear,

---

<sup>100</sup> Ibid

<sup>101</sup> Allan Thompson, "PM say Iraq war demands UN nod", *Toronto Star*, 16 January 2003 46/58

independent identity and to have a sustained and long-term impact on the evolution of world affairs.<sup>102</sup>

Frustrated in the bureaucracy of multilateralism and working through the UN, the US has been critical of the UN, openly questioning if “Security Council resolutions [are] to be honored and enforced, or cast aside without consequence? Will the United Nations serve the purpose of its founding, or will it be irrelevant?”<sup>103</sup> As a result of the distinct and opposing views of the UN held by Ottawa and Washington, the issue of the role and lawful authority of the UN has proven a significant fault line for many traditional allies, case in point, the US-led war in Iraq over United Nations Security Council Resolution (UNSCR) 1441. Opposed to a war in Iraq without either a new UNSCR approving force or firm proof that Iraq was in blatant violation of UNSCR 1441, Canada choose to stand behind the UN and the principles of lawful authority, multilateralism, patience and diplomacy and refused to participate in US-led operations to disarm Iraq and topple Saddam Hussein’s regime.<sup>104</sup> Canada’s stance on Iraq should send a clear message that the US cannot take for granted Ottawa’s support for other key defence and security initiatives without due regard for the lawful authority of the UN and Canada’s legal broader views on international law.

### **Preemption and the War on Iraq**

Implicit in the 2002 US National Security Strategy is the central issue of preemption. While such a doctrine may seem prudent in the wake of September 11<sup>th</sup>,

---

<sup>102</sup> “Canada and the United Nations” [<http://www.un.int/canada/canadaandun.html>] 6 May 2003.

<sup>103</sup> “President's Remarks at the United Nations General Assembly” [<http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html>], 12 September 2002

<sup>104</sup> “Crisis in Iraq” [[http://www.dfait-maeci.gc.ca/foreign\\_policy/iraq\\_crisis/menu-en.asp](http://www.dfait-maeci.gc.ca/foreign_policy/iraq_crisis/menu-en.asp)] 7 April 2003.



Canada is among those nations concerned “it flouts international law...”<sup>105</sup> Rather than work with the international community to clarify the legal limitations on preemption, the US has moved forward on its own agenda. The two sides of this issue are difficult to harmonize. Whereas “legal scholars and jurists often conditioned the legitimacy of preemption on the existence of an imminent threat”, the United States has made it very clear that it will, if deemed necessary, act preemptively and assume any associated risk. The stakes of such a policy are high as recently witnessed in the global debate over the US-led Operation Iraqi Freedom. The US arguments for preemption based on UNSCR 1441 failed to unite traditional allies or lead to a new resolution formally authorizing preemptive force. Instead, new divisions emerged in the various alliances to include within North America and a new era in preemption began. In the absence of clear international legal opinion on the issue of preemption, it is difficult to assess the immediate impact of the 2002 US National Security Strategy but to cite William Glaston, a former Clinton Administration official: “A global Strategy based on the new Bush doctrine means the end of the system of international institutions, laws, and the norms the United States has worked for more than a century to build.”<sup>106</sup>

### **Challenges, Concerns and the Costs of Legal Compromise**

Although both Canada and the United States are committed to lawful authority and the rule of law, the two nations hold unique national views and interpretations on a host of issues ranging from the role of the UN to the relevance and applicability of various treaties and conventions. The immediate challenge is for Canada and the US to find common legal ground in pursuit of continental and international peace and security

---

<sup>105</sup> “Global Vigilante”, *Progressive*, Vol 66, Issue 8, August 2002, p 8.

<sup>106</sup> Ibid.

issues. In the post-Cold War period, this is proving difficult, as Canada and the US have followed two very distinct paths. Whereas Canada has been a leader in helping to further develop the global framework for international law, the US has chosen not to be an active member, instead challenging the very relevance of many international treaties and conventions. Overall, what is especially unsettling is the observation that “in recent years the [US] executive, Congress, the courts and influential commentators have verbalized that the idea of the ‘later-in-time’ rule is the final answer and that the binding effect of international law carries little weight.”<sup>107</sup>

Ultimately, the past decade has led to a growing disparity in the application and interpretation of many international laws. As a direct consequence, the legalities associated with various continental defence initiatives, the War in Iraq, and the global War on Terrorism represent significant challenges to Canada, a nation firmly committed to the rule of law as a cornerstone of global stability. The short-term reality is that legal frictions stemming from Canada’s view of the UN’s lawful authority, the Rome Statute and the ICC, as well as the various treaties at odds with ongoing US military operations and the current NMD proposals, do pose very real barriers to Canada’s participation in future US operations. A summary of the legal barriers influencing Canada’s policy and contribution to the various US initiatives under consideration are reflected in Figure 2.

---

<sup>107</sup> Vagts, p 313.  
49/58

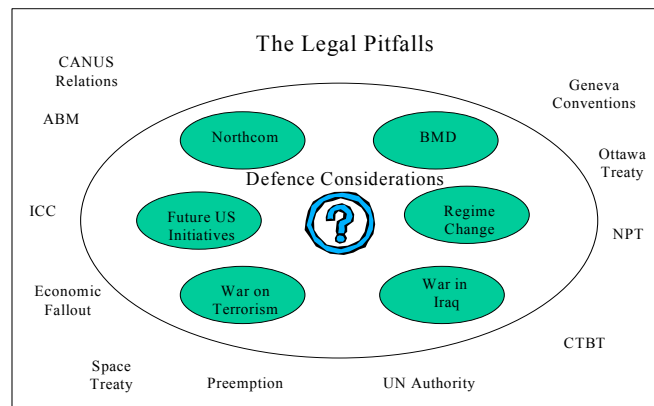


Figure 2 - Major Defence Issues and the Legal Dilemma

As the simple illustration suggests, there are a series of treaty obligations at play. The costs of compromising Canada's legal position are no less significant than those of compromising its moral position. Similarly, the potential economic and security fallout of non-participation in various US-led defence initiatives raise concerns for the average Canadian. Concerns that "Canada would be left outside the American homeland defence perimeter...[and] catastrophic consequences for the Canadian economy" have not materialized despite recent legal disagreements between Ottawa and Washington.<sup>108</sup> As Secretary Powell recently acknowledged: "Differences will come along, but the common history strongly binds the two countries."<sup>109</sup>

In examining the various legal issues associated with the myriad of defence issues currently under review, it is important that Canadian policy makers understand all the facts and consider all the costs. Canada cannot afford to ignore these issues, choosing only to focus on the short-term economic rewards and a promise of improved continental

<sup>108</sup> Middlemiss and Stairs, p 3.

<sup>109</sup> "Canada and U.S. 'inseparable': Powell" [[http://www.cbc.ca/cgi-bin/template/200304/15/powell\\_canada030415](http://www.cbc.ca/cgi-bin/template/200304/15/powell_canada030415)] 15 April 2003. 50/58

defence. The most significant challenge for Canada will be to find the common legal ground with the US, a challenge made more difficult given the Canadian assessment that the United States “ will not permit the niceties of diplomacy, alliance practices, arms control agreements or international legal norms to stand between it and its objective of providing for its own security, and that of its friends and allies.”<sup>110</sup> In the near-term, this common legal ground will be difficult to find and until legal concerns over various treaties, conventions and the role of the UN can be resolved, these concerns are destined to deter Canadian participation in US-led defence initiatives.

## **V. Conclusion**

The beginning of the 21<sup>st</sup> century and the current US defence and security agenda have presented many challenges. Indeed, Canada and the current government must make difficult decisions in very difficult times. Canada, as a long time ally of the US, is being called upon to join the US in pursuit of its ambitious agenda, an agenda that includes a protracted war against terrorism, regime change in Iraq, Northcom and NMD.

As a detailed review of the ethical, political and legal realities facing Canada and the United States reflects, there is a growing disparity between the two nations on very critical issues. Whereas Canada may support the desired end states of the various initiatives, Canada is hard pressed to support the means proposed or employed by the US to achieve these end states based on legitimate ethical and legal concerns. The tough choice is whether to follow the American lead at the risk of compromising Canadian traditional values and a legal framework which has evolved over more than a century, or to chart a separate course at the expense of a longstanding partnership that has led to

---

<sup>110</sup> Directorate of Strategic Analysis Policy Planning Division Policy Group, “Strategic Assessment 2002”, (Ottawa: Department of National Defence Canada 2002), p 11.  
51/58

economic prosperity and continental security. These are complex issues that present compelling advantages and disadvantages.

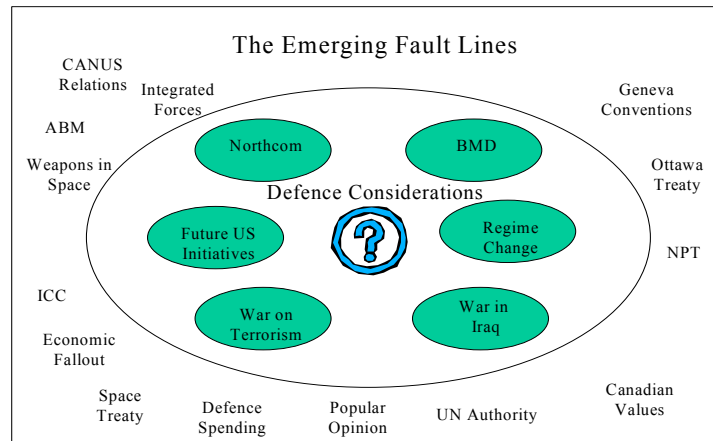


Figure 3: Major Defence Issues – The Big Picture

Although this paper has not explored the full spectrum of ethical and legal issues associated with Canada-US defence relations, the aggregate of the many challenges and fault lines influencing Canada policy on the issues of Northcom, NMD and the wars on terrorism and in Iraq are depicted in Figure 3. Although final decisions are still pending on the issues of Northcom, NMD and Canada's role in post war Iraq and Afghanistan, Canada's refusal to participate in the war in Iraq is testimony to the influence of these fault lines and the lengths Canada's is prepared to take in defence of its commitments to multilateralism, national values and international law.

Canada's cool reception to Northcom, NMD and the full spectrum of operations being conducted under the auspices of the Global War on Terrorism should not be construed as a rejection of the US vision for enhanced continental defence and global peace and security. It does, however, reflect the Chretien government's discomfort with

the means and methods sanctioned by the US to achieve its objectives. Ultimately, ethical and legal considerations have played a pivotal role in the formulation of Canadian defence and security policy and these factors will continue to be central considerations in guiding Canada's future participation in US-led operations and initiatives. As the disparity between the US and Canada exposed and understood it will be increasingly difficult for Canada to support.

The challenge for Canada has been to balance the benefits of both its relationship with the US and its place in the international community. Achieving this balance will continue to present significant challenges but based on current Canadian defence and security policy it is clear that Canada will not choose the immediate economic and security advantages of a strong Canada-US defence partnership over the advantages of promoting international peace and security through the values and international law nor will Canada abandon its longstanding commitment to multilateralism and willingly violate treaties and international law that Canada has helped craft in order to participate as a full partner in the defence of North America. In the final analysis, Canada's future participation in American led military initiatives and operations will continue to be difficult to secure and will be increasingly influenced by the growing disparity between the two nations along ethical and legal fault lines.

## Bibliography

### **Books and Periodicals**

Bland, Douglas. "Canada and Military Coalitions: Where, How and with Whom?", *Policy Matters*, Vol 3, No 3, February 2002.

Byers, Michael. "Canadian armed forces under US Command", Report commissioned by Simon Centre for Peace and Disarmament Studies, UBC 6 May 2002.

Charney, Jonathan I. "The United States and the Statute of Rome", *The American Journal of International Law*, Vol 95, No 124, December 2001.

Clarkson, Stephen. Uncle Sam and Us (University of Toronto Press: Toronto, 2002)

Cruikshank, John. "We're not like Americans", *MacLean's*, Vol 115, No 52, 30 December 2002.

Cuff, R.D. and Granastein, J.L. Canadian-American Relations in Wartime (Hakkert: Toronto 1975).

Directorate of Law Training, ed. Collection of Documents on the Law of Armed Conflict Department of National Defence: Ottawa, 2001.

Gatehouse, Jonathan. "Why So Cranky?", *Macleans*, Vol 115, No 52, 30 December 2002.

"Global Vigilante" *Progressive*, Vol 66, Issue 8, August 2002.

Goertz, Jan-Phillip. "The Rule of Law - Meaning and Significance fro Security Policy and Reform", *European Security*, Vol 7 No 3 Autumn 1998.

Grace, Kevin Michael. "Playing to the home crowd", *The Report*, Vol 29, No 24, 16 December 2002.

Graham, Thomas. "International Law and the Military Uses of Space", *Disarmament Diplomacy*, Issue No 63, March-April 2002.

Granastein, J.L. "A Friendly Agreement in Advance: Canada-US Defence Relations Past, Present, and Future", *C.D Howe Institute Commentary*, No 166, June 2002

Green, L.C. The Contemporary Law of Armed Conflict (Manchester University Press: Manchester, 1993).

Gregg, Allen R. "Strains Across the Border", *Maclean's*, Vol 115, No 52, 30 December 2002.

Johnson, Rebecca. "NPT Report", *Disarmament Diplomacy*, Issue No 64, May-June 2002.

Jokel, Joseph and Sokolsky, Joel. "The End of the Canada-U.S. Defence Relationship." Occasional Paper Series, May 1996, (Kingston: Centre for International Relations Queens' University 1996).

Lagasse, Phillippe. "Coming Home to Roost: Canadian Indecision on BMD and the Eclipse of Canada-US Space Cooperation", *On Track*, 2002.

"Ottawa Landmines Convention: Treaty Signing Conference and Mine Action Forum", *Disarmament Diplomacy*, Issue No 21 June 2000

NATO. NATO Handbook (Brussels: NATO Office of Information and Press, 2001).

Middlemiss, Danford W. and Stairs, Denis. "The Canadian Forces and the Doctrine of Interoperability: The Issues", *Enjeux Publics*, Vol 3, No 7, June 2002.

Rudd, David, Hanson, Jim and Stinson, Adam, ed. Playing in the 'Bush-League': Canada-US Relations in a New Era, (Toronto: The Canadian Institute of Strategic Studies, 2001).

Schabas, William A. An Introduction to the International Criminal Court (Cambridge: Cambridge University Press, 2001).

Shishkin, Philip. "Germany Juggles War Opposition with its Duties as a NATO Member", *Wall Street Journal*, 4 Feb 2003.

"The Rocky Shoals of International Law" *National Interest* Winter 2000/2001 Issue 62.

Vagts, Detlev F. "The United States and its Treaties: Observance and Breach", *American Journal of International Law*, Vol 95, No.2 April 2001.

### **Government Sources – America**

Address to a Joint Session of Congress and the American People,  
[<http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>], 20 September 2001.

"Coalition Members" [www.whitehouse.gov/news/release/2003/03/20030327-10.html](http://www.whitehouse.gov/news/release/2003/03/20030327-10.html) 27 Mar 03.



“President's Remarks at the United Nations General Assembly”  
[<http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html>], 12 September 2002

“State of the Union 2002”  
[<http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>], 29 January 2002.

“The Ballistic Missile Defence System”  
[<http://www.acq.osd.mil/bmdo/bmdolink/pdf/approach.pdf>] 8 January 2003.

“The National Security Strategy of the United States of America”,  
[<http://www.whitehouse.gov/nsc/nss.html>], 20 September 2002.

“US Northern Command”[<http://www.northcom.mil>] 24 Mar 03.

“We instill values” [<http://www.defenselink.mil/>], 2 February 2003.

### **Government Sources – Canadian**

“Canada and the International Criminal Court”  
[[http://canada.justice.gc.ca/en/news/nr/1999/doc\\_24328.html](http://canada.justice.gc.ca/en/news/nr/1999/doc_24328.html)] 3 April 2003.

“Canada and the United States: A Strong Partnership” [<http://www.dfait.maecigc.ca/can-am/menu-en.asp>] 7 January 2003.

“Canada and the United States: A Strong Partnership” DFAIT: Canada in the World  
[<http://www.dfait.maecigc.ca/can-am/menu-en.asp>] January 1<sup>st</sup> 2001

“Canadian Constitution/Canadian Constitution Act 1982”  
[[http://laws.justice.gc.ca/en/const/annex\\_e.html](http://laws.justice.gc.ca/en/const/annex_e.html)] 12 December 2002.

“Canada Deplores DPRK Withdrawal from Nuclear NPT” [http://www.dfait-maeci.gc.ca/minpub/min\\_pub-docs/105824.html](http://www.dfait-maeci.gc.ca/minpub/min_pub-docs/105824.html). 10 Jan 03.

“Canadian Forces Operations”, Canadian Forces Publication B-GG-005-004/AF-000, (Ottawa: Department of National Defence, 2001).

“Canada’s Policy on Ballistic Missile Defence”[ [www.forces.gc.ca/site/focus/canada-us/bg99.055\\_e.asp](http://www.forces.gc.ca/site/focus/canada-us/bg99.055_e.asp)] 5 Feb 2003.

“Crisis in Iraq”, [[http://www.dfait-maeci.gc.ca/foreign\\_policy/iraq\\_crisis/menu-en.asp](http://www.dfait-maeci.gc.ca/foreign_policy/iraq_crisis/menu-en.asp)] 7 April 2003.  
Defence Ethics Program, “Ethics and Conduct”, (Ottawa: Department of National Defence, 2000).

Department of Foreign Affairs and International Trade, “Freedom From Fear – Canada’s Foreign Policy for Human Security”, (Ottawa: Department of Foreign Affairs and International Trade, 2002),

Directorate of Law Training, ed., “1949 Geneva Convention(III) Relative to the Treatment of Prisoners of War”, Collection of Documents on the Law of Armed Conflict”, (Ottawa: Department of National Defence, 2001).

Directorate of Strategic Analysis Policy Planning Division Policy Group, “Strategic Assessment 2002”, (Ottawa: Department of National Defence Canada 2002).

“NORAD”, [[www.forces.gc.ca/site/focus/canada-us/bg00.010\\_e.asp](http://www.forces.gc.ca/site/focus/canada-us/bg00.010_e.asp)] 24 October 2002.

“Outer Space” [<http://www.dfait-maeci.gc.ca/arms/outer-en.asp>] 10 Oct 02.

“Strategy 2020” [[http://www.cds.forces.gc.ca/pubs/strategy2k/intro\\_e.asp](http://www.cds.forces.gc.ca/pubs/strategy2k/intro_e.asp)] 12 October 2002.

“1994 White Paper on Defence”,  
[[http://www.forces.gc.ca/site/Minister/eng/94wpaper/white\\_paper\\_94\\_e.html](http://www.forces.gc.ca/site/Minister/eng/94wpaper/white_paper_94_e.html)] 10 December 2002.

### **Government Sources – International**

“Canada and the United Nations” <http://www.un.int/canada/canadaandun.html> 6 May 2003.

“Security Council Resolutions – 1991” [<http://www.un.org/Docs/sc/>]. 15 January 2003

“Security Council Resolutions – 2002” [<http://www.un.org/Docs/sc/>]. 15 January 2003.

“United Nations Treaty Collection” [<http://untreaty.un.org/>] 11 January 2003.

### **Internet Sources**

“Bush Announces Withdrawal from ABM Treaty”,  
[<http://www.rfel.org/nca/features/2001/12/12122001102735.asp>]

“Canada and U.S. ‘inseparable’: Powell” [[http://www.cbc.ca/cgi-bin/template/200304/15/powell\\_canada030415](http://www.cbc.ca/cgi-bin/template/200304/15/powell_canada030415)] 15 April 2003.

“Large Majority Favor US Foreign Policy Goals on Iraq”,  
[[http://www.harrisinteractive.com/harris\\_poll/index.asp](http://www.harrisinteractive.com/harris_poll/index.asp)] 12 January 2003

“Senate Resolution 239, 80<sup>th</sup> Congress, 2<sup>nd</sup> Session, 11 June 1948”  
[[www.nationalalliance.org/NA\\_Treaty/vandy.res.htm](http://www.nationalalliance.org/NA_Treaty/vandy.res.htm)] 22 February 2003.

57/58

04-08-05

United States of America – Declaration of Independence 1776  
[<http://www.law.cornell.edu/constitution/constitution.overview.html>] 23 September 2002.

## **Newspaper Sources**

“Canada opposed to weapons in Space”, *The Toronto Star*, 7 May 2003.

Fife, Robert and Alberts, Sheldon. “Cellucci derides Ottawa’s Policy on War Fugitives”, *National Post*, 11 April 2003.

Galloway, Gloria. “US envoy chides Canada”, *Globe and Mail*, Mar 25 2003.

Gilmore, Gerry. “Post 9-11 Military Considers Terrorism ‘An Act of War’”, *American Forces Information Services*, 30 January 2003.

Gwyn, Richard. “A morally inert foreign policy”, *The Toronto Star*, 12 January 2003.

Higgins, Michael and Alberts, Sheldon. “72% believe Canada should have backed the war”, *The National Post*, 8 April 2003.

Harper, Tim. “Poll: Canadians sour on US”, *The Toronto Star*, 7 December 2003.

Michael Higgins and Sheldon Alberts, “72% believe Canada should have backed the war”, *The National Post*, April 8, 2003.

MacCharles, Tonda. “Ousting Saddam wrong: Chretien”, *The Toronto Star*, 28 February 2003.

Price, Joyce Howard. “Polls show support rises to 76 percent with war underway”, *The Washington Times*, 24 March 2003.

Thompson, Allan. “Can Canada still lay claim to being glorious and free?”, *The Toronto Star*, 9 September 2002.

Thompson, Allan. “PM say Iraq war demands UN nod”, *Toronto Star*, 16 January 2003

Thompson, Allan. “Sailors would not hand over Iraqis”, *The Toronto Star*, 9 April 2003