



THE ATLANTIC COUNCIL
OF THE UNITED STATES

Law & the Lone Superpower: Rebuilding a Transatlantic Consensus on International Law

William H. Taft IV
Frances G. Burwell

Policy Paper
April 2007





THE ATLANTIC COUNCIL

OF THE UNITED STATES

The Atlantic Council promotes constructive U.S. leadership and engagement in international affairs based on the central role of the Atlantic community in meeting the international challenges of the 21st century.

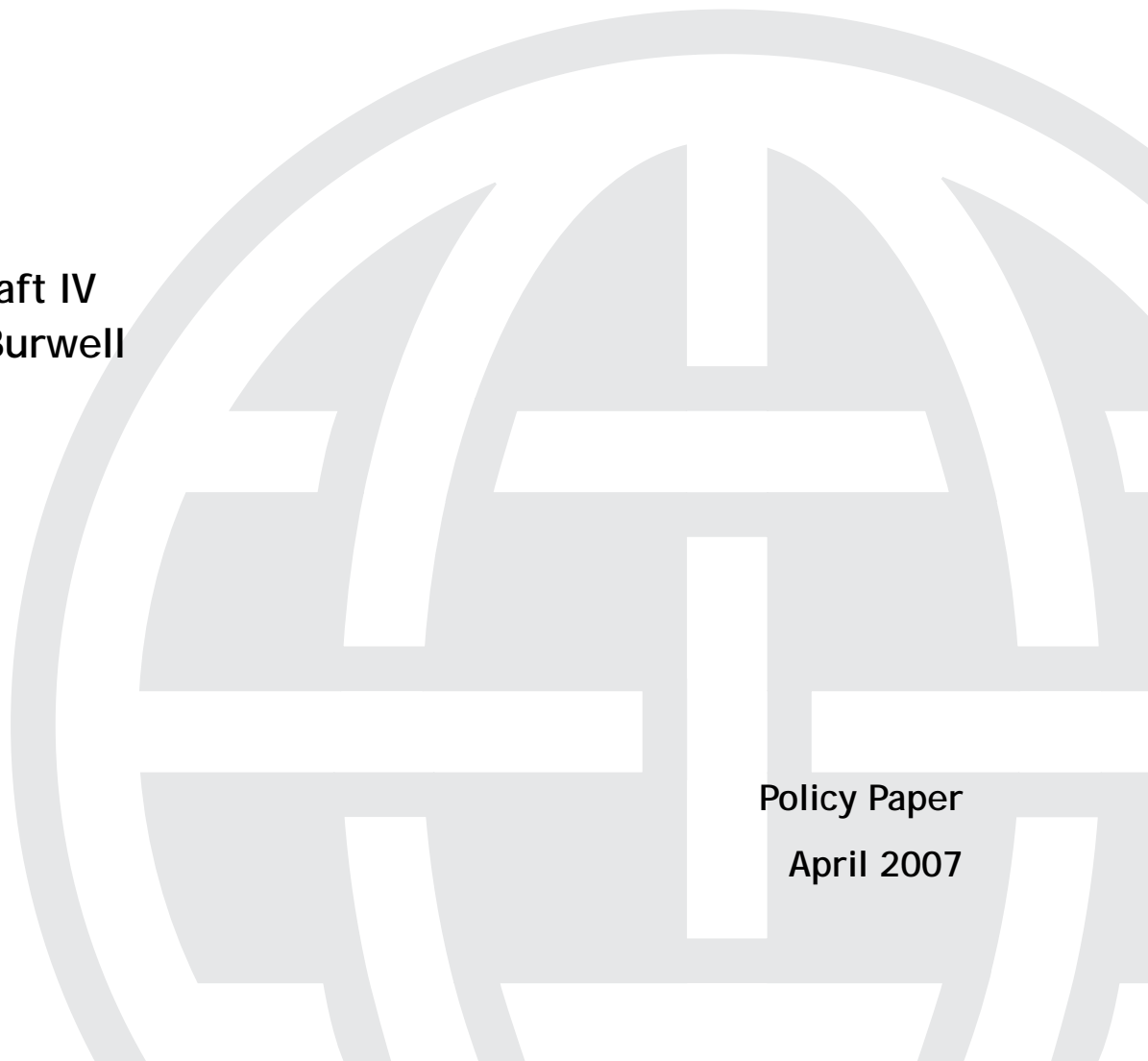
The Council embodies a nonpartisan network of leaders who aim to bring ideas to power and to give power to ideas by:

- stimulating dialogue and discussion about critical international issues with a view to enriching public debate and promoting consensus on appropriate responses in the Administration, the Congress, the corporate and nonprofit sectors, and the media in the United States and among leaders in Europe, Asia and the Americas;
- conducting educational and exchange programs for successor generations of U.S. leaders so that they will come to value U.S. international engagement and have the knowledge and understanding necessary to develop effective policies.

Law & the Lone Superpower: Rebuilding a Transatlantic Consensus on International Law

William H. Taft IV
Frances G. Burwell

Policy Paper
April 2007



For further information about the Atlantic Council of the United States or its
Program on Transatlantic Relations
please call (202) 778-4990

Information on the Atlantic Council programs and publications is available on the
Council's website at <http://www.acus.org>

Requests or comments may be sent to info@acus.org

The views expressed in this report reflect the consensus of the authors and do not
necessarily reflect those of the Atlantic Council.



THE ATLANTIC COUNCIL
OF THE UNITED STATES

11th Floor, 1101 15th Street, N.W.
Washington, DC 20005

Table of Contents

Foreword.....	v
Conclusions and Recommendations.....	vi
A Transatlantic Divide.....	1
International Law and the New Century.....	3
The Evolution of International Law.....	5
The International Criminal Court: A Fundamental Divide?.....	7
The United Nations: Creating New Law.....	11
A New Transatlantic Consensus?.....	13
About the Authors.....	16

Foreword

Today, the United States and its European allies find themselves divided over several international legal issues. While European governments have championed many treaties, including the Ottawa Convention on anti-personnel mines and the Kyoto accord on climate change, the United States has remained a skeptic, questioning the effectiveness of these treaties and the restrictions they might place on U.S. sovereignty. These differences predate the recent U.S.-European tensions over Iraq, and they persist despite the improvement in transatlantic relations overall. Discord over the rendition of suspected terrorists and the prison at Guantanamo has been especially sharp and public, but discord over other legal matters — from the International Criminal Court to pre-emption in cases of WMD — has continued to fester.

With the review conference for the ICC set to begin in 2009, the Atlantic Council believes now is an opportune time to begin a discussion over U.S. and European differences toward international law. Too often, it is simply declared that the United States is “unilateralist” while the European Union is “multilateralist.” This distinction only obscures the reasons behind these disagreements. This paper goes beyond the unilateralist vs multilateralist debate to ask whether the United States and the European Union (and its member states) really do have different views on international law. Can Europe and the United States — the two architects of the postwar international legal system — find a renewed consensus on the role of international law, now and in the future? Or have globalization and the threat of terrorism fundamentally changed the environment in which that law must function? Has the emergence of the United States as the “sole superpower” affected the international legal regime?

In addressing these questions, the two authors of this paper, William H. Taft IV and Frances G. Burwell, drew a number of points from a workshop on this issue organized by the Atlantic Council in late 2005, and the Council is very grateful to all those U.S. and European legal experts who participated in those discussions. Although they bear no responsibility for the conclusions and recommendations in this paper, they did contribute many ideas and helped clarify the essential nature of the transatlantic debate. As events evolved, however, so did this paper, and we were particularly privileged to benefit from the insights of Will Taft, former State Department legal adviser (as well as deputy and acting secretary of defense and Atlantic Council board member). Finally, the Council gratefully acknowledges the support of LexisNexis, the Washington Delegation of the European Commission, and the German Marshall Fund of the United States, who have supported our work on international legal issues.



Fred Kempe
President, The Atlantic Council of the United States

Law and the Lone Superpower: Conclusions and Recommendations

- ❖ The United States and the European Union should demonstrate their commitment to the future of international law and the strength of international jurisprudence affecting their citizens by:
 - Issuing a joint declaration committed to building a new consensus on the international legal system; This declaration should be reinforced by a new transatlantic dialogue on key topics, including: accountability and transparency in international organizations; pre-emptive action; the role and mandate of international tribunals; and the treatment of enemy combatants.
 - Working together to complete an effective process of UN reform;
 - Launching a program of extensive legal assistance to bolster the rule of law around the world;
 - Working together to reduce discord between states party to the International Criminal Court, and those that have not joined by reaching agreement on “crimes of aggression” and “opt-outs” for non-state parties.
 - The United States should demonstrate its willingness to work with the international legal system by ratifying a major multilateral treaty consistent with its interests, such as the UN Convention on the Law of the Sea.

- ❖ In the lead up to the review conference for the International Criminal Court in 2009 the U.S. and European governments should take the following steps:
 - The United States and the EU should apply considerable energy and resources to improving the legal systems of countries around the world. An independent and fair judiciary within an effective legal system will reduce the need for the ICC, and contribute enormously to better governance.
 - The United States should review its own legal system for compatibility with the requirements established by the ICC. The more compatible the U.S. system is to the criteria laid out by the ICC the less likely anyone will be able to argue that a U.S. citizen should be brought before that court.
 - The more extreme positions and rhetoric on both sides of the Atlantic should be toned down.
 - Instead of seeking immunity for its citizens through Article 98 accords, the U.S. administration should pursue bilateral agreements in which it promises to exercise its own jurisdiction in the cases that might otherwise fall within the ICC’s jurisdiction.
 - Finally, the U.S. government should, in appropriate cases, provide assistance to the ICC in the form of technical expertise and evidence, as it does with the UN tribunals. This will give the United States more access to the procedures of the ICC, and may encourage its development in directions more compatible with U.S. practice

Law & the Lone Superpower: Rebuilding a Transatlantic Consensus on International Law

A Transatlantic Divide

Throughout 2006, allegations of U.S. involvement in “renditions” of suspected terrorists from Europe to prisons in Afghanistan and elsewhere reverberated around European capitals. Charges that the United States had established secret prisons in some European countries raised the temperature even further. The European Parliament and the Council of Europe initiated investigations, while some European leaders called for the United States to close its detention facility in Guantanamo, describing the facility as contrary to international law.

The controversy over Guantanamo and U.S. treatment of “enemy combatants” is only the latest example of transatlantic differences over international legal matters. In recent years, the U.S. refusal to join a number of high-profile multilateral legal agreements has been seen by many in Europe as evidence that the United States is moving away from the international legal system. In response, U.S. officials and analysts have criticized European governments for supporting multilateral treaties that they see as neither effective nor enforceable.

This divide should not be viewed as another transatlantic disagreement that can be blamed on the policies of the Bush administration — disagreements over the ICC and the de-mining convention surfaced during the Clinton administration and reflect widely held views within the U.S. legal establishment. Nor should it be seen simply as a European preference for multilateralism and a U.S. commitment to unilateralism. In some cases, transatlantic disagreements over international legal issues represent differing opinions over whether a specific law — from the Geneva Conventions to a trade agreement — is being properly implemented. But on a more fundamental level, many of these transatlantic differences reflect a very real divergence in approach toward the international legal system, based on different conceptions in the United States and Europe about the role of international law and its future evolution.

These different views on the future of international law are demonstrated by the transatlantic disagreement over the International Criminal Court (ICC). A growing number of European policymakers and analysts see law as a way to resolve international problems not just between states, but also within them, such as the failure of the rule of law in some societies. But the United States — which has certainly not rejected international law — is cautious about how a permanent international court might affect its interests as a superpower with global responsibilities and interests. Many Europeans are comfortable ceding significant decision-making powers to an international organization with the potential to extend its responsibilities beyond the original mandate. But many in the U.S. legal community remain concerned that this goes beyond the consent given by democratically elected governments and worry

about how the ICC might interpret its own powers in some unforeseen future circumstance.

The continuation of this transatlantic divide could pose a serious challenge to the strength and credibility of the international legal order. International law already faces a new and difficult environment at the beginning of the 21st century. Developed to maintain order between sovereign states, that legal system must now cope with a world in which sovereignty is under challenge. If it is to remain relevant, international law must evolve so that it can respond effectively to the threats of this new century. In particular, global terrorism and the proliferation of weapons of mass destruction — along with the potential combination of these two in the form of terrorist possession of WMD — pose perhaps the most significant threats to state security today. Determining how international law should respond to these threats will be largely the responsibility of the United States and Europe. There is now an urgent need for the United States and the European Union (and its member states) to find a new consensus on the future of the international legal system. Without that consensus, a vacuum will emerge. Other major states, such as China or Russia, are unlikely to fill that void in a way that the United States or Europe would see as beneficial.

One way forward may be found in the transatlantic cooperation that developed on the issue of UN reform. Although the United States and European governments started from different places, they did reach agreement on reform of the institution, including such sensitive issues as human rights and the responsibility of governments to protect their citizens. The reach of the UN expanded into important new areas, but the UN Security Council veto provided an essential safeguard for the interests of the major powers. With that balance intact, the United States and European governments were also able to work together within the UN to create new legal instruments that have been effective in the fight against terrorism.

A new transatlantic consensus on the future of international law should draw on the lessons of the UN experience. At the least, there must be an understanding that the international legal system should be relevant in meeting the threats facing the world today, especially those of terrorism and proliferation of WMD. Law by itself is unlikely to end those threats, but it must be part of the response to those dangers, if it is to be credible and effective in the future. The new transatlantic consensus must also bring with it a demonstration of the renewed commitment of the United States and European governments to strengthening the international legal system.

In particular, the United States and the European Union should demonstrate their commitment to the future of international law by:

- ❖ **Issuing a joint declaration committing themselves to building a new consensus on the international legal system.** This declaration should be reinforced by a new transatlantic dialogue aimed at building consensus on key topics, including: accountability and transparency in international organizations; pre-emptive action in response to the threat of weapons of mass destruction; the role and mandate of international tribunals; and the treatment of enemy combatants in irregular warfare.
- ❖ **Working together to complete an effective process of UN reform;**

- ❖ **Launching a program of extensive legal assistance that will bolster the rule of law around the world; and**
- ❖ **Working together to reduce the prospects of discord between states party to the ICC, and those that have not joined,** by reaching agreement on such issues as the definition of “crimes of aggression” and the possibility of “opt-outs” for non-state parties.

The United States in particular should demonstrate its willingness to work with the international legal-system — while maintaining the flexibility needed as the sole superpower — by:

- ❖ **Ratifying a major multilateral treaty that is consistent with its interests, such as the UN Convention on the Law of the Sea;**
- ❖ **Taking some concrete steps to indicate its willingness to work with the ICC under defined circumstances. For example, the United States should:**
 - Review its own legal code for compatibility with the standards set by the Rome Statute establishing the International Criminal Court;
 - Seek promises of U.S. jurisdiction rather than immunity when negotiating Article 98 agreements with ICC members; and
 - Provide technical and evidentiary assistance to ICC procedures as it does with UN tribunals, so that it can be somewhat involved with the development of the Court’s practices in its formative stage.

This is a wide-ranging set of recommendations, but together they provide a set of specific actions and a commitment to future discussions that should help the United States and the European governments, including the European Union, build a consensus on the role of the international legal system in the 21st century.

International Law and the New Century

Since at least the end of World War II, the United States and Europe have been strong partners and advocates — in word and usually in deed — in support of international institutions and the rule of law in relations between states. Yet, in recent years, the United States and European governments have found themselves at odds over a range of international legal issues. While the European Union has taken the role of enthusiastic promoter of the ICC, for instance, the United States has refused to join and sought immunity for its citizens from potential Court action. The refusal of the United States to sign the Kyoto accord on climate change and its decision to withdraw from the Anti-Ballistic Missile Treaty also caused concern and dismay among many European governments and publics. U.S. and European attitudes toward the United Nations has also differed at times.

After September 2001, transatlantic distinctions on legal matters came into even sharper relief, particularly as tensions increased during the U.S.-led coalition campaign in Iraq. For many in Europe — including some whose countries participated in the coalition — the legality of that war was highly suspect, even though the U.S. government maintained that existing UN resolutions provided an adequate legal basis. As the Iraq conflict continued and the United States fought against global terrorism, additional legal issues emerged, especially regarding the treatment of enemy combatants taken into U.S. custody.

In many ways, transatlantic differences on legal issues reflect two distinctive views of the state of the world following the Cold War. Europe seems more secure and more at peace than at any time during the past hundred years. Europe has not been immune to the threat of terrorism, but the attacks on Madrid and London were neither as unexpected nor catastrophic as the attack on the United States. If anything, this period of relative security has seemed to many Europeans an opportune time to strengthen the role of international law.

Since 2001, the United States has felt itself to be under a significant and immediate threat. The priority has been to ensure the safety and security of the nation, using force if necessary. While not rejecting the international legal system that it championed in the past decades, the U.S. government has sought to ensure that there are enough safeguards to protect U.S. interests as it fights international terrorism.

The U.S. view has also been affected by the emergence of the United States as the most powerful nation — the only superpower — a status with both special capabilities and obligations. Almost alone among states, the United States has the resources to accomplish most of its aims. Its need for the protection of the international legal order is probably less than that of any other country. At the same time, the United States is more likely to find its troops and other personnel deployed around the world. Simply because of its status, the United States — and its citizens — often make tempting targets. As a result, the U.S. government has been determined to preserve the flexibility it needs within international law to protect its citizens and itself from those who might use the law against them.

As a result, the United States has been accused of embarking on a “unilateralist” approach, abandoning the constraints of the international legal system in order to act according to its own sovereign needs and desires. In contrast, the European Union, it has been claimed, took a more multilateralist approach. The EU was willing to compromise the sovereignty of its member states to develop a more comprehensive international legal order that could respond to a growing number of global issues. From another perspective, the United States was merely exercising the established right of all sovereign states to protect its own interests, while the EU seemed enamored of legal agreements even if their effectiveness was in great doubt.

While there is some basis for the charge that Europe is more “multilateralist” and the United States more “unilateralist,” the reality is much more complicated and diffuse. The international legal community on both sides of the Atlantic — both in and out of government — presents a diverse array of opinion on these issues. Moreover, portraying the conflict as one between “multilateralism” and “unilateralist” does not offer much clarity, as the terms tend to have different meanings for different observers. Nor does a debate over multilateralism vs. unilateralism go to the heart of the matter — transatlantic disagreements have been less about the present limited realities of international law and more about the aspirations for law in the future and how quickly those aspirations should be achieved.

The Evolution of International Law

The transatlantic legal community shares many basic assumptions about the purpose of law. There is widespread agreement that law between states is intended, first, to reduce transaction costs by providing predictability and common language. On a range of topics, from trade to exchange of diplomats, sovereign states have found it to their benefit to have a set of common understandings, so that each new agreement does not have to be negotiated from first principles. Second, international law is intended to improve the security of states; that is, states agree to certain limitations on their behavior because having all states agree to the same limitations enhances their individual security.

Within these terms, international law has been very successful. One has only to note the many treaties and institutions that exist — from the World Trade Organization to the International Maritime Organization — to comprehend the importance of international law. The decolonization of much of the developing world and the emergence of new, independent states could have presented a major challenge to this system. Perhaps the most striking indicator of its success, however, has been the extent to which these new states have sought to join the existing legal system, making it a truly global undertaking. Certainly membership in its major institutions, such as the United Nations and the World Trade Organization, is seen as indication that a state has been accepted as a sovereign nation.

This system seemed under threat, however, when the United States backed away from a number of developing multilateral commitments during the 1990s. Not only did it decide to stay out of the ICC, it refused to join the Convention on the Law of the Sea, the Comprehensive Test Ban Treaty, and the Ottawa Convention banning anti-personnel mines. After its election in 2000, the Bush administration gave notice that it would not accede to the Kyoto Convention on Climate Change. It withdrew from the ABM treaty, an entirely legal step justified by arguing that the treaty was written in 1972 for a fundamentally different strategic environment. Yet inevitably, some critics of the U.S. administration feared that this withdrawal was the beginning of the unraveling of the multilateral arms control regime.

These treaties and the U.S. reaction to them reveal a growing divergence in aspirations for the international legal system. In one view, it is time for the international legal system to move beyond basic aspirations, such as preserving the security of sovereign states, and become a mechanism for the fair and orderly solution of international problems. This view is seen by its advocates as especially relevant in the face of globalization. It is probably most prevalent in Europe, where it is sometimes seen as a natural progression from the experience of pooling sovereignty in the European Union. In this view, international law should become a means of resolving conflicts without resorting to military force. Eventually, international law would not only regulate conduct among states, but through the current emphasis on poverty reduction and protection of human rights, would also provide a “code of conduct” for state behavior vis à vis its own citizens.

The second view sees such an evolution of international law as inadequately protecting the interests or sovereignty of states or their necessary freedom of action. Of particular concern is the tendency to omit “escape clauses,” in the form of vetoes, national security exemptions, derogation and withdrawal rights, etc., from some of the recent multilateral conventions, thus reducing the ability of states to deal with unforeseen future circumstances. This is of special concern in the United States, where a legal order based on pooling sovereignty seems likely to affect a superpower more than other “normal”

states, given its international perspective and responsibilities. For example, the de-mining convention would have made it difficult for the United States to maintain minefields on the Korean peninsula that it considers vital to providing for the security of its South Korean ally.

The differences between these two perspectives seen in four aspects of international law: the nature of consent; the requirement of common values; the relationship between domestic and international law; and the importance of compliance.

- ❖ **The nature of consent:** A key distinction between these two perspectives rests on whether a legal instrument, such as a treaty, can be endowed with the authority to create new law itself without the approval of the states party to the original agreement. One of the best examples of this is the European Union, to which member states have ceded their sovereignty on certain issues. International tribunals may also be created with the authority to interpret treaty obligations in ways that state parties did not intend or anticipate. For many in the U.S. legal establishment, such an arrangement is inherently undemocratic, as states could be obliged to implement policies that their governments never had a chance to approve. U.S. opposition to the ICC is based to a great extent on concerns that there would be no effective way of withholding consent from future developments. In this view, states are obliged to abide by the specific agreements they have made, but those agreements cannot be expanded without explicit consent.
- ❖ **Requirement for common values:** There is a widespread consensus that law and international institutions cannot be effective unless there is a consensus about the values they are designed to protect. Are there now certain acts that are seen as illegal no matter where they happen? Genocide is certainly regarded that way by most governments, and increasingly, terrorism also falls into that category. Identifying a particular instance as genocide or terrorism can still be a very political act, however. International law has for centuries condemned the slave trade and piracy. Many European and U.S. analysts argue that there is now a consensus on basic human rights — such as freedom from torture or illegal detention — that would support the development of international laws. Nevertheless, this issue has been a key point of contention in discussions between the U.S. administration and its European allies.
- ❖ **The relationship between domestic and international law:** In Europe, law created at the European Union level is assumed to take precedence over national law, and increasingly international treaties and customary law are regarded in the same way. In the United States, however, international treaties and other laws are generally only given domestic effect through the passage of implementing legislation. Only rarely has the U.S. court system referred to international law, either in terms of creating obligations or precedents, in determining the validity of a particular U.S. law. Furthermore, for many in the U.S. legal community, a basic distinction between international and domestic law is the lack of any effective enforcement outside of the domestic arena. In Europe, however, individual citizens can hold their own governments accountable in an international court — the European Court of Human Rights — if they believe their basic rights have been violated.
- ❖ **The importance of compliance:** The experience of the U.S. legal community with domestic litigation has made compliance a high-priority issue even in the international arena. Even though international law has no effective enforcement mechanism, the U.S. view is generally that an inter-

national agreement should not be signed unless compliance is both possible and expected. International law can be used to address challenges such as terrorism, but compliance must be high if the effort is to be credible. But from another perspective — one that sees law as evolving to meet new challenges — total compliance is held out as an unrealistic expectation.

Despite these very different aspirations for the international legal system, the U.S. and European governments must reach a new consensus if international law is to remain relevant. Cooperation between the United States and the European Union will be essential in adapting the international legal system to the post-Cold War environment. Eventually, that consensus must also include emerging powers such as China and India, giving them a stake in the preservation of effective international legal system.

Two institutions stand out as important indicators of the future of that system and of the prospects for the building of a new transatlantic consensus. First, international criminal tribunals, and especially the International Criminal Court, represent a new direction in international law — the ICC particularly stands at the nexus between the two distinctive views of that law. Second, the United Nations is the pre-eminent international organization, and the United States and Europe were central to its founding and development. Whether the United States and Europe can reach agreement on the future of this key international institution and its role in meeting critical threats, will be indicative of the strength of the international legal order generally.

The International Criminal Court: A Fundamental Divide?

The birth and initial development of the ICC has been the occasion for vocal U.S.-European disagreements. Following negotiations sponsored by the United Nations, 120 countries voted to approve the Statute of Rome at a 1998 conference, but seven — including the United States — rejected the statute. The Court became effective in 2002, after ratification of the Rome Statute by sixty countries. Although the Clinton administration had serious reservations about the ICC, and especially about the lack of effective oversight by the UN Security Council, it eventually did sign the Statute, primarily in hopes of having some role in shaping the Court's early evolution. Nevertheless, it was clear that the U.S. government did not expect to submit the agreement to the Senate for ratification. In 2002, the Bush administration announced that the United States was not bound by the Rome Statute, citing concerns about the risks the ICC might pose to U.S. soldiers fighting in Afghanistan. In contrast, all European Union members have signed the ICC statute. Some, such as France, have issued special interpretations of particular clauses, but overall support for the ICC is very strong throughout Europe.

U.S. concerns about its soldiers serving abroad being subject to the ICC led the Bush administration to pressure other countries to sign "Article 98" agreements, under which an ICC member promised immunity to U.S. citizens. This was especially problematic for the EU candidate countries of central Europe, who found themselves in the middle between the European Union, which argued that Art. 98 agreements of the sort put forward by the United States were contrary to at least the spirit of the ICC, and the United States, which threatened to withdraw military assistance to all those who failed to sign, unless they were already a NATO member. As the central European countries joined NATO, this conflict abated, but the existence of immunity for U.S. citizens through Article 98 agreements with many other countries still reinforces transatlantic tensions in this area.

In contrast to their differences over the ICC, the U.S. and European governments have worked closely together over many years to establish internationally mandated tribunals for specific conflicts. The United States was the moving force behind the Nuremberg war crimes trials, which established the principle of internationally mandated justice following World War II. More recently, the United States and its European partners have supported the creation of UN-mandated war crimes tribunals following the conflicts in Sierra Leone, Rwanda, Cambodia, and the former Yugoslavia. Along with Truth Commissions — as in El Salvador, South Africa, and many other places — these tribunals demonstrate the growing international recognition that cultures of impunity cannot be allowed to persist.

These specific tribunals have met with some criticism. Some have been established retroactively, inviting criticism from defendants that they could not know their conduct was criminal until well after the fact. Even when established prior to a particular crime, tribunals have mixed records in creating a deterrent against illegal behavior. The Srebrenica massacre occurred after the establishment of the International Criminal Tribunal for Yugoslavia (ICTY), as did ethnic cleansing in Kosovo. Moreover, these courts have proven tremendously difficult to establish; each one required extensive negotiations over budget, jurisdiction, and process. Many in Europe thought a permanent court might reduce the need for difficult start-up negotiations, and even serve as a more effective deterrent.

While these are laudable goals, U.S. opposition to the ICC reflects concerns about a more generally ambitious international legal system. Precisely because the Court's supporters — including many Europeans — have envisioned it as a step toward a more supranational legal system, the ICC has raised U.S. suspicions in the key areas of consent, compliance, domestic vs international law, and the definition of crimes.

Consent — UN tribunals have been limited to a specific conflict, making them of finite longevity and involving consent only to a particular investigation. In contrast, the ICC can claim jurisdiction if a relevant crime involves either a citizen or the territory of a state party to the treaty (that crime may also involve citizens of states not party to the treaty). The UN Security Council can also refer cases to the ICC, even those involving non-state parties, such as happened in Resolution 1593, giving the court jurisdiction over the Darfur conflict on the grounds that the Sudanese government was unwilling or unable to address such crimes through its own legal system. This opens the possibility that citizens from a state not party to the treaty (such as the United States) could be made subject to the ICC during a future conflict that no one has yet imagined. The statute establishing the ICC makes clear that the court claims jurisdiction only if the national courts are judged incapable of addressing the particular case, and this is considered extremely unlikely ever to apply to the United States. Yet the fundamental problem remains: acceding to the ICC would require giving a broad consent to actions in contingencies that have not yet been imagined.

The question of consent also arises because of the permanent nature of the ICC. Judges and prosecutors would play a very large role in determining the processes and decisions of the Court. A UN tribunal would end once it had concluded work on its particular conflict, ensuring that undesirable officials or procedures could be abandoned. Critics of the ICC feared, however, that its permanence might offer the opportunity for personnel to take the Court in a direction that had little relationship to the desires of the states party to the statute.

Compliance — It is clearly far too early to review the Court’s ability to bring individual defendants before it or to impose its judgments. But states that are party to the Rome statute can opt out of the Court’s jurisdiction in particular respects for a period of years, reducing the chance that their citizens will be prosecuted. States not acceding to the Rome statute, however, cannot provide such a temporary respite for their citizens who might be involved in a case falling within the Court’s jurisdiction.

Domestic vs international law — Many in the United States remain very leery of any international attempt to judge U.S. personnel, especially if that might include military personnel carrying out their duties. U.S. personnel serving overseas are subject to Status of Forces Agreements (SOFAs), but these are negotiated on a bilateral basis with the host government and thus can be very specific about the circumstances in which U.S. personnel would be subject to foreign jurisdiction. In Europe, however, the principle — and practice — of supranational jurisdiction is already well established. The European Court of Justice can find EU member states in violation of their obligations as members, and individual European citizens can sue their governments for a broad range of human rights violations before the European Court of Human Rights. The new European Arrest Warrant requires any European country to accept an arrest warrant from any other EU member, giving other member states a very real jurisdiction over their own citizens.

Definition of crimes — Currently, there is a transatlantic consensus that the specific crimes laid out in the Rome statute are deserving of international prosecution if no national authority has jurisdiction. However, because the ICC is permanent, there will be an opportunity for the definition of those crimes to evolve considerably. To limit such evolution, the U.S. administration had sought more precise definitions of certain crimes listed in the Rome statute, but no agreement on this was reached. This leaves open the possibility that, for example, European criticism of the U.S. detention facility in Guantanamo and of “extraordinary renditions” could be reflected in an expanded definition of war crimes that includes “illegal detentions.”

Above all, the U.S. concerns with the ICC are rooted in its role as a global superpower intent on preserving its security. This requires that U.S. military forces, intelligence operatives, and diplomatic representatives have the ability to act around the world. Many Europeans have tried to reassure U.S. officials by noting that the ICC is only intended to apply to individuals if a national legal system is not effective (and they note that the United States did deal with the Abu Ghraib prison scandal). Nevertheless, U.S. officials remain sensitive to the risks such a broad jurisdiction could pose to U.S. personnel. They argue that the prominent position of the United States in the world makes it a target for frivolous, but potentially very harmful, lawsuits. Moreover, uncertainties about the future evolution of the terrorist threat have also made the United States determined to retain sufficient freedom of action to deal with as yet undefined situations.

Despite these seemingly fundamental differences, however, there is room for the United States and the European Union to find some points of consensus. One step has been taken — the United States agreed to allow the ICC to have jurisdiction over the Darfur conflict in return for immunity for its citizens. But this agreement is only a patch on the continuing transatlantic disagreement. In large part, the United States was motivated by horror over the Darfur situation and a desire to cooperate with its allies, not by a rethinking of its position on the ICC. In fact, this decision was entirely consistent

with the U.S. approach in that consent was provided only to apply the jurisdiction of the Court to one specific conflict. A U.S. administration may be willing to support use of the Court in similar situations in the future, or it may not.

In the lead up to the review conference for the ICC in 2009, the following represent some steps the U.S. and European governments might take toward building a consensus.

- ❖ **A new emphasis should be placed on the competence of domestic legal systems, because the ICC only becomes relevant when that competence is lacking. This should be a two-pronged effort.**
 - *First, the United States and the EU should apply considerable energy and resources to improving the legal systems of countries around the world.* An independent and fair judiciary within an effective legal system will not only reduce the need for the ICC, but also contribute enormously to better governance and is essential for economic development.
 - *Second, the United States should review its own legal system for compatibility with the requirements established by the ICC.* A similar review of the Norwegian legal system resulted in numerous changes, primarily because of an outdated legal code. Clearly, the more compatible the U.S. system is to the criteria laid out by the ICC — and only relatively minor changes would be needed to cover the Rome statute crimes — the less likely anyone will be able to argue that a U.S. citizen should be brought before that court.
- ❖ **The more extreme positions and rhetoric on both sides of the Atlantic should be toned down.** European criticism of the death penalty contributes to the impression that the EU is eager to have supranational courts overturn national decisions. The European reluctance to assist in training of Iraqi judges because that country permits the death penalty was unfortunate.
- ❖ **Instead of seeking immunity for its citizens through Article 98 accords, the U.S. administration should pursue bilateral agreements in which it promises to exercise its own jurisdiction in the cases that might otherwise fall within the ICC's jurisdiction.**
- ❖ **The definition of crimes should be tightened, so that there is less chance that zealous judges and prosecutors will expand the definition beyond that acceptable to states party to the statute.** The notion of “crimes of aggression” is of particular concern to the U.S. legal community.
- ❖ **Currently, states that have signed up to the ICC can temporarily opt out of being prosecuted for some crimes, especially “crimes of aggression.” In the interests of treating non-members and members equally, a similar provision should be considered for states that have not acceded to the statute.** Allowing such a temporary respite for extraordinary circumstances would be consistent with the treatment of those who have signed on to the ICC.
- ❖ Finally, the United States has much to gain by being as influential as possible in the development of the Court, which will undoubtedly foster developments in international jurisprudence that will affect the U.S. and its citizens. For that reason, **the U.S. government should, in**

appropriate cases, provide assistance to the ICC in the form of technical expertise and evidence, as it does with the UN tribunals. This will give the United States more access to the procedures of the ICC, and may encourage its development in directions more compatible with U.S. practice.

The United Nations: Creating New Law

If the ICC demonstrates the continuing differences between the United States and Europe on legal issues, the experience of the United Nations shows that cooperation is possible, despite significant divergences. It also shows a way forward, extending the reach of international law on specific issues and boosting the credibility of the organization in the process.

During 2005-2006, the United Nations embarked on a major period of re-examination and reform. Initially, there were fears that this process would lead to unbridgeable gaps not only between the developing countries and the permanent members of the Security Council, but also between the United States and European governments. The latter had been very critical of the earlier refusal of the United States to pay its UN dues, and the recent appointment of an ambassador who has been very critical of the UN raised new questions about the U.S. commitment. At the UN, the U.S. focus had been on pushing the organization to fight terrorism, rogue states, and WMD proliferation, while most others, including the secretary general, gave greater emphasis to development, the International Criminal Court, environmental issues, and full implementation of the Non-Proliferation Treaty. The continuing U.S. emphasis on reform of UN bureaucracy and budget also contributed to concerns that the U.S. commitment to the UN was limited.

In the end, the United States and European governments, especially those in the Security Council, worked together to achieve a notable set of reforms. In particular, the UN was pushed into new areas, such as acknowledging the responsibility of national governments to protect their citizens and of the international community to consider taking action if they do not. The UN also established a new Peace Building Commission, responsible for coordinating efforts towards states in internal crisis and sought to restructure and rename the Human Rights Commission (which now became the Human Rights Council). In many ways, these reforms were only the first steps, and much will depend on how the basic decisions are implemented during the coming year.

Given the low expectations for transatlantic cooperation at the beginning of this process, what accounts for the relative success of this effort? First, the United States and Europe fully shared an interest in making the UN more effective through the reform process. Despite very difficult rhetoric at times, their views were much closer to each other than to those of many others engaged in the reform process. Moreover, given the recent improvement in transatlantic relations following President Bush's trip to Europe in early 2005, both the United States and European Union eagerly sought areas where collaboration was possible and could reinforce the positive new atmosphere in their relations.

UN reform also provided an opportunity for both the United States and European governments to move forward with their particular visions of international law. For the Europeans, the adoption of the "responsibility to protect" and the Peace Building Commission reinforced the view of international

law as an effective tool for addressing global problems. For the United States, its Security Council veto ensures that no reform measure can advance without its approval. This prevents the United Nations from producing legislation harmful to U.S. interests, or beyond the consent of its members.

By working together, the U.S. and European governments have also made the UN more relevant in the fight against terrorism. Starting even before September 2001, the UN passed a series of binding resolutions requiring members to take certain steps toward those groups identified as terrorists. In the 1990s, UNSC resolutions 748 and 1267 had established the principle of imposing sanctions on state-sponsors of terrorism. After the attacks in New York and Washington, UNSC resolution 1373 called on all members to increase intelligence sharing, eliminate any safe havens for terrorists, and freeze the financial assets of terrorist groups. These resolutions are part of a larger effort that has led to the creation of the UN Counter-Terrorism Committee, which, among other roles, provides technical assistance to countries trying to implement UN anti-terrorism mandates. The UN General Assembly has also initiated a number of multilateral conventions aimed at suppressing hostage-taking, bombings, and most recently, nuclear terrorism. Over time, these efforts have reduced state sponsorship of terrorist groups by making it more difficult for a government to actively support or even tacitly tolerate such a group that operates on its territory or through its financial system.

Contrary to those who would argue that the U.S. administration has been opposed to any extension of international law, U.S. support for these resolutions has greatly extended the specific obligations of states in dealing with those organizations identified as terrorist groups. The fact that the veto safeguards U.S. interests has undoubtedly made this process more acceptable within the United States, but it has raised some questions about equity among those who do not have a veto. Nevertheless, the use of the UN as the forum for expanding these obligations has boosted the profile and legitimacy of that organization on this central issue, and those who support the expansive view of the international law have generally welcomed these developments.

Transatlantic cooperation at the UN, on both the issues of UN reform and fighting terrorism, has demonstrated that the United States and European governments can cooperate on specific issues, despite the presence of very different perspectives on international law generally. The next challenge will be building on this cooperation. This will not be easy, but the fact that the United States and European governments are working together in the United Nations to address the issue of Iranian WMD proliferation and the aftermath of the conflict in Lebanon indicates that both parties are more aware of the value of the UN than has been the case in the past. The time may be ripe for continuing to move forward to strengthen this institution. Specifically:

- ❖ **The United States and European governments should work together to ensure that the new UN reforms — especially the Peace Building Commission and the Human Rights Council — are implemented effectively.** This may be especially difficult for the United States, given the condemnation of Guantanamo by the UN Human Rights Commission, but that judgment also makes clear the stake that the U.S. has in reforming the UN human rights process.
- ❖ **The United States and European governments should continue to look for specific steps that could be authorized through UNSC resolutions on terrorism and other issues where there is a wide consensus.** Establishing the United Nations as an institution that requires its

members to take practical but common sense steps toward addressing global issues will bolster the credibility of the institution. Using the Security Council process will also build U.S. support by demonstrating that the UN can be used to achieve effective ends. The U.S. and European governments must be careful, however, that using the Security Council does not create the impression that they see the UN merely as a tool to serve their own interests. Some of the measures should be designed to address issues of interest to the wider UN membership.

- ❖ **The United States and Europe must not only enhance their own cooperation, but also reach out to many other members.** The day is long past when the United States and its European allies can set the agenda or control the outcome. Instead, they must reach out and convince others that they are committed to a strong, effective United Nations.
- ❖ **Above all, they must lead by example; that is, the United States and European governments must abide by the Charter and other legal instruments.** They must also make clear that they have a vision for the UN and its various bodies that goes beyond their own self interest to the strengthening of the institution as one of the leading representations of the international legal system.

A New Transatlantic Consensus?

What can be learned about the prospects for transatlantic cooperation — or the lack of it — in the international legal arena by the experiences of the ICC and the UN? The ICC demonstrates the significant differences emerging in the U.S. and European approaches to the future of the international legal system and the resulting failure to agree on new legal institutions. Yet, the UN experience indicates that these two approaches can be reconciled at least to the point where cooperation can exist on specific issues. How far can that cooperation grow? Will it spill over from one specific issue to another, such as pre-emptive self-defense or the treatment of detainees? Can cooperation on specific issues lead to the building of a broader new consensus on the role and scope of international law in the future? Or does the failure to agree on the ICC show the futility of such an effort?

If the United States and Europe are to begin building a strong consensus, both sides must reaffirm the importance of the international legal system and their commitment to its future strength. Recently, U.S. leaders have increasingly sought to describe their actions as consistent with that system, and attempted to mollify those concerned that the United States has lost its commitment to international law. It is now time to go one step further. To this end,

- ❖ **The United States and Europe should make clear their commitment to working together to strengthen the international legal system through a public declaration,** perhaps issued from a U.S.-EU summit. This statement should be aimed both at reducing the suspicion that currently greets U.S. pronouncements in this area, and at reassuring U.S. policymakers that the special responsibilities and threats facing a superpower are understood. It should commit the United States and European Union to reaching out to the emerging powers, such as China and India, that must be involved if leadership of the international legal order is to reflect a truly global constituency.

The United States and European Union should further demonstrate their commitment to this declaration through some additional actions.

- ❖ **The United States should join at least one multilateral agreement that will enhance its reputation as a leader in the international legal field while also furthering U.S. interests.** In particular, securing ratification of the UN Convention on Law of the Sea would reinforce the U.S. position as a leader not only in legal, but also environmental matters — topics on which the U.S. reputation has dropped considerably in recent years, especially in Europe. The Bush administration has submitted UNCLOS for ratification, and the Senate Foreign Relations Committee reported it favorably by a unanimous vote. Consideration by the full Senate has been delayed, however.
- ❖ **The U.S. and European governments should launch a significant program of international legal assistance.** If the international system is to function effectively, other participating states must have strong legal processes. They must also have the capacity — both in their institutions and their legal professionals — to handle the legal dilemmas that will engage everyone during the 21st century. Encouraging the rule of law nationally will send a strong signal about the priority of law and create a foundation for a more effective international legal system.
- ❖ **The U.S. and European governments should cooperate to ensure the effective implementation of UN reform.** Although the United States and Europe were able to cooperate in securing agreement on reforms during the 2005-2006 General Assembly, there is still much work to be done in ensuring that these changes actually have a positive impact on the UN. Perhaps the biggest challenge will be the Human Rights Council.

Along with these activities, **the United States and the European Union should undertake discussion on a set of key legal issues.** A transatlantic declaration in support of the international legal system will only be credible if it is followed by the development of a stronger consensus on difficult issues. In particular, if confidence in the international legal system is to be preserved, there must be a greater transatlantic consensus on the following issues:

- ❖ **Accountability and transparency in international institutions.** Both the United States and the EU agree on the need for international institutions to be transparent and effective. But they must now convince other governments that these institutions must change their way of operating if they are to be credible and effective. This issue will not be resolved unless the United States and Europe find a way to give others a serious stake in the international legal system.
- ❖ **Pre-emption in the face of WMD.** The proliferation of WMD, and particularly the prospect of terrorists gaining control over such weapons, has raised the question of when pre-emptive use of force is lawful. Pre-emption in the face of an imminent attack has long been considered justifiable. But the U.S. argument that pre-emption is legitimate even when an attack is not imminent has raised many questions. What if a pre-emptive strike is launched on the basis of faulty intelligence? Could such an attack resolve the issue at a much lower cost in lives and damage than a later full-scale conflict? What is the role of law in such circumstances?

- ❖ **International tribunals.** Transatlantic differences over the ICC and other forms of international tribunals are likely to remain sharp, yet there is clearly a trend toward the internationalization of justice, as demonstrated by U.S. and European support for an international investigation in the case of the assassination of leading Lebanese political figure Rafiq Harari. The U.S. agreement to allow the ICC to have jurisdiction in the Darfur conflict through a Security Council resolution is also an indicator of a productive way forward.

- ❖ **Detention of enemy combatants.** The most severe test is likely to be the issue of the treatment of enemy combatants, whether suspected terrorists or irregular fighters. This issue will not abate in the future — with troops deployed in a growing number of civil conflicts and wars, both U.S. and European forces will encounter guerrilla forces and insurgents even as they seek to protect their societies from that most irregular combatant, the non-state terrorist organization. The issue of updating the Geneva Convention has been raised, but there is no international consensus in support of such a move and the U.S. court system is in the midst of addressing this issue. However this topic is broached, it is clear that finding some measure of agreement will be a critical element in building a more general transatlantic consensus.

In recent years, international law has emerged as one of the most difficult and contentious issues between the United States and Europe. It has affected the tone and content of official government-to-government relations, and it has also affected the view of the United States among the European public. If the United States and European governments are to work together effectively in fighting terrorism as well as combating extremism in the world, there must be a new transatlantic consensus on the role and scope of the international legal system. Today, instead of moving closer together, the United States and the EU are developing very different approaches to international law; approaches that are based on distinctive and conflicting views of how international law should evolve in the future. Without a concerted effort to develop a new consensus in this area, there could emerge two rival camps, to the detriment of the entire legal system. The time to reverse this trend is now, starting with a concerted transatlantic effort as the first step toward building a global consensus that will be effective in meeting the challenges of the 21st century.

About the Authors

William H. Taft IV is of counsel resident in Fried, Frank, Harris, Shriver & Jacobson in Washington, DC. Mr. Taft has served in numerous senior positions at the Department of State and Department of Defense. He was appointed legal adviser to the Department of State by President George W. Bush and has served as U.S. permanent representative to NATO, deputy secretary of defense, acting secretary of defense, and general counsel for the Department of Defense.

Frances G. Burwell is director of the Atlantic Council's Program on Transatlantic Relations.

THE ATLANTIC COUNCIL'S BOARD OF DIRECTORS

CHAIRMAN

*Henry E. Catto

PRESIDENT AND CEO

*Frederick S. Kempe

VICE CHAIRS

*Carol C. Adelman

*Chas. W. Freeman, Jr.

*Roger Kirk

*Geraldine S. Kunstadter

*Richard L. Lawson

*John D. Macomber

*Virginia A. Mulberger

*W. DeVier Pierson

*Paula Stern

*Ronald P. Verdicchio

TREASURER

*Jan M. Lodal

SECRETARY

*Walter B. Slocombe

DIRECTORS

David L. Aaron

*Robert J. Abernethy

Michael A. Almond

G. Allen Andreas

David D. Aufhauser

Nancy Kassebaum Baker

*Donald K. Bandler

Lucy Wilson Benson

*Julia Chang Bloch

Kathy Bloomgarden

Avis T. Bohlen

Beth A. Brooke

Harold Brown

Dan W. Burns

*Richard R. Burt

Kathryn Bushkin

Daniel J. Callahan, III

Sarah C. Carey

Michael P.C. Carns

*Daniel W. Christman

Wesley K. Clark

*Curtis M. Coward

Ralph D. Crosby, Jr.

W. Bowman Cutter

Brian D. Dailey

Kenneth W. Dam

Jaime Daremblum

Edwin Dorn

Lacey Neuhaus Dorn

William H. Draper, III

Stanley Ebner

Richard Edelman

Stuart E. Eizenstat

Robert F. Ellsworth

Barbara Franklin

*Ronald M. Freeman

*John L. Fugh

Carlton W. Fulford

Jacques S. Gansler

*Sherri W. Goodman

John A. Gordon

Janet Mullins Grissom

Marc Grossman

Kenneth H. Hannan, Jr.

Harry Harding

Rita E. Hauser

Marten H.A. van Heuven

James R. Hogg

*Benjamin Huberman

*Robert E. Hunter

Robert L. Hutchings

Mansoor Ijaz

Mercy Jimenez

A. Elizabeth Jones

Paul G. Kaminski

Arnold Kanter

Kathryn Dickey Karol

Francis J. Kelly

*James V. Kimsey

Henry A. Kissinger

*Franklin D. Kramer

Charles R. Larson

*Roderick K. von Lipsey

John R. Lyman

*Barry R. McCaffrey

James P. McCarthy

*Jack N. Merritt

*Judith A. Miller

*George E. Moose

Steven Muller

William A. Nitze

Hilda Ochoa-Brillembourg

Philip A. Odeen

Hilliard W. Paige

William J. Perry

*Thomas R. Pickering

Joseph W. Prucher

Norman W. Ray

Stanley R. Resor

Susan E. Rice

Robert W. RisCassi

Joseph E. Robert, Jr.

Jeffrey A. Rosen

Charles O. Rossotti

Marjorie M. Scardino

James R. Schlesinger

William O. Schmieder

John P. Schmitz

Jill A. Schuker

Brent Scowcroft

Patricia Sherman

Eric K. Shinseki

Matthew R. Simmons

Kiron K. Skinner

Anne-Marie Slaughter

William Y. Smith

*Helmut Sonnenfeldt

Delbert L. Spurlock, Jr.

George J. Stathakis

John Studzinski

William H. Taft, IV

Peter J. Tanous

Carl E. Vuono

Charles F. Wald

Roger W. Wallace

J. Robinson West

Togo D. West, Jr.

John C. Whitehead

R. James Woolsey

Dov S. Zakheim

HONORARY DIRECTORS

David C. Acheson

James A. Baker, III

Frank C. Carlucci, III

Warren Christopher

Harlan Cleveland

Russell E. Dougherty

Alexander M. Haig, Jr.

Christian A. Herter, Jr.

Robert S. McNamara

Bernard W. Rogers

Edward L. Rowny

George P. Shultz

William H. Webster

*members of the Executive Committee



THE ATLANTIC COUNCIL
OF THE UNITED STATES

11th Floor, 1101 15th Street, N.W.
Washington, DC 20005

ADDRESS CORRECTIONS REQUESTED

Non Profit Org.
U.S. Postage
PAID
Washington, DC
Permit No. 8134