Program on Transatlantic Relations

ISSUE BRIEF

THE ATLANTIC COUNCIL OF THE UNITED STATES

Beyond Closing Guantanamo: Next Steps to Rebuild a Transatlantic Partnership in International Law

The Transatlantic Dialogues on International Law

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February 2009

As the administration of Barack Obama begins, the role of the United States in the international legal system will come under great scrutiny. The United States will seek to strengthen its relations and enhance cooperation with its traditional allies. In doing so, it should work to restore the confidence of those allies that the United States will work with them to strengthen the international legal system and international institutions and resume its historical role of leadership in this task. Announcing its intention to close the Guantanamo detention camp is a significant step in the right direction, but only a first step.

International law promotes the values that are at the core of western societies, and thus protects their interests in a rapidly evolving global world. The U.S. and European governments should identify and reaffirm their common principles, attempting to resolve any differences. This will help clarify and, where appropriate, expand the application of law to the new challenges facing the world today. In an age of increasing diversity and shifting power across the world, the urgency of this task is growing.

Contrary to widespread public perception, the Obama administration will inherit a legacy of significant international cooperation on legal issues, especially across the Atlantic. Aside from routine legal cooperation, the last four years of the George W. Bush administration have seen a reinvigoration of transatlantic intergovernmental discussions on more controversial international legal issues. These have included meetings of U.S. and European interior, justice, and homeland security ministers focused primarily, but not exclusively, on anti-terrorism concerns. The State Department Legal Adviser has conducted frequent consultations with European counterparts, including a regular dialogue with the EU legal advisors, and he has attended meetings of legal advisers under the auspices of the Council of Europe, as well as in less formal constructions. Initially, these meetings served primarily to re-establish communication following the transatlantic tensions of 2002-4 and to foster more understanding of U.S. concerns and positions. More recently, especially in informal dialogues, there has been an attempt to narrow differences over certain issues, including legal aspects of counter-terrorism and conflict.

This progress is too often ignored because media focus has been primarily on the issues of detention and the treatment of detainees. These issues are important, and have done much to affect negatively public views of the United States in Europe and around the world. Although differences certainly remain, transatlantic conversations are now underway about how to remove specific detainees from

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Mission

The Atlantic Council of the United States 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 non-partisan 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.

Through its diverse networks, the Council builds broad constituencies to support constructive U.S. leadership and policies. Its program offices publish informational analyses, convene conferences among current and/or future leaders, and contribute to the public debate in order to integrate the views of knowledgeable individuals from a wide variety of backgrounds, interests and experiences.

Important contributions by the Council include:

- identifying and shaping responses to major issues facing the Atlantic Alliance and transatlantic relations;
- building consensus on U.S. policy towards Russia, China, Japan, Korea, and Taiwan;
- promoting balanced responses to growing energy needs and environmental protection;
- drafting roadmaps for U.S. policy towards the Balkans, Cuba, Iraq, Iran, and Libya;
- engaging students from across the Euro-Atlantic area in the processes of NATO transformation and enlargement.

Program on Transatlantic Relations

The Program on Transatlantic Relations promotes dialogue on the major issues that will affect the evolution of the transatlantic relationship. At the heart of the program is the conviction that a healthy transatlantic relationship is an essential prerequisite for a stronger international system. The Council seeks to strengthen the transatlantic relationship by addressing specific areas of policy differences by identifying areas of potential cooperation and by building the personal networks and mutual understanding that form the basis for an effective partnership.

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Guantanamo and apply the Geneva Conventions to situations of irregular warfare and terrorism. But these are extremely difficult issues, and any progress, even under the new administration, is likely to be slow.

Once the new administration has appointed its key officials concerned with international legal matters, the United States and Europe should continue the efforts that have been made in the last four years. But they must also take advantage of the positive enthusiasm engendered by President Obama's election to move ahead in a few key areas. Much repair work has been done, especially on the government-to-government level across the Atlantic. But important issues remain unresolved, and new challenges continually emerge. Most recently, for example, the scourge of piracy has re-emerged in international shipping lanes and U.S. and European navies have responded. Together, they have had to deal with the legal ramifications of destroying private vessels and detaining and/or releasing pirates.

Strengthening Legal Diplomacy

The Obama administration should make clear immediately that it intends to continue and enhance the efforts made during the last four years of the Bush administration to engage partners and allies in consultations on a wide range of legal issues.

- **The new Attorney General and the new Secretary for Homeland Security should make it a priority to visit their European colleagues very early in their tenure.** Secretary Chertoff's meeting with his EU colleagues on his first overseas trip is a good example to follow. Even though Homeland Security has responsibilities other than legal policy in fighting terrorism, outreach by both Cabinet-level officials as soon as possible will send a strong signal of the new administration's commitment to transatlantic cooperation in anti-terrorist efforts, including developing a shared legal basis for needed actions.

- **Equally important, the dialogue between the State Department and EU foreign ministry legal advisers should continue and where possible become more focused on achieving agreements.** This dialogue has a strong record of dispelling misunderstandings and building very useful, pragmatic relationships. The new U.S. legal adviser should make it a high priority for the dialogue to be strengthened. Once the U.S. legal adviser has established relationships with European colleagues, the dialogue should be geared up to focus more on achieving understandings on the application of law and resolving differences, especially in areas of counter-terrorism and armed conflict.

- **Additional transatlantic dialogue may also be helpful as the United States considers how to construct domestic judicial measures to try suspected terrorists.** A number of European states, including France, Spain, and the United Kingdom, have significant experience with special courts or mechanisms for such cases, and could provide valuable lessons and "best practices" for working within a domestic legal order in a way that respects human rights.

Through these dialogues and other mechanisms, the United States and European governments should address some key issues of international law. Because both the United States and European governments can expect to be involved in regional conflicts in the coming years, they should especially focus on clarifying the rules of international humanitarian law, which govern the conduct of parties to a conflict towards combatants and civilians, as well as the relationship between international humanitarian law and international human rights law, which provides standards for treatment of individuals in situations where international humanitarian law does not apply.

International Humanitarian Law and Human Rights

In Afghanistan, U.S. and European military forces have been engaged in operations together since 2002, in situations where combatants and civilians are side-by-side and the enemy is almost never a traditional uniformed soldier. Nor is Afghanistan likely to be the last such engagement. There is little doubt that U.S. and European military forces will be engaged together in coalition warfare in a wide range of situations over the years to come. For that reason, it is vital that the United States and European governments agree upon

the applicability of international humanitarian law in different kinds of conflict. The following steps should support good progress to that end.

- **The United States should become a party to Additional Protocol 1 to the Geneva Conventions, with suitable reservations and statements of understanding.** The Protocol, which addresses the methods of warfare and the treatment of combatants and prisoners of war, has been ratified by more than 165 countries. Based on the U.S. experience in Afghanistan, accepting the Protocol would not be a large departure from present practice, but it would send a very positive signal of U.S. affirmation of obligations under international humanitarian law. Before becoming a party to Additional Protocol 1, the U.S. government could confirm that it regards Article 75, which establishes minimal guarantees for human protection, as customary international law. The Supreme Court, in its decision on the *Hamdan* case, noted that civilian U.S. officials have stated this in the past, and it has separately been affirmed by the Office of the Joint Chiefs of Staff.

- **The United States and European governments, together with other countries, should adopt guidelines or non-binding codes of conduct in relation to the treatment of detainees, the lawful authority for detention, grounds on which a person can be detained, and the review process**. International humanitarian law on matters regarding detainees in armed conflict is currently scanty, but some guidelines are under development in collaboration with the International Committee of the Red Cross. Continuing with this effort and adopting codes that draw on best practices is the best way to ensure a consistent approach in this difficult and controversial area.

- **All NATO states should examine their national legislation, including rules on jurisdiction, to ensure that they can enforce their obligations under the Geneva Conventions and, where applicable, the Additional Protocols, within their domestic legal systems.** This could be a NATO project to mark the 60th anniversary of the Geneva Conventions in 2009.

- **NATO member states should ensure that they have jurisdiction over war crimes committed overseas by private military companies and private security companies and their employees.** Both U.S. and European governments have mechanisms for trying their regular military personnel who engage in war crimes, but there is not full accountability for war crimes committed by personnel from private companies based in NATO member countries. Partnership for Peace countries and others who participate in NATO military operations should also be expected to have the necessary jurisdiction if they use such companies.

- **The United States and its European allies differ on whether or not particular international human rights treaties apply in conflict situations as a matter of law. Nevertheless, the standards embedded in those treaties should be used as a matter of practice whenever possible in situations of conflict or when dealing with detainees.** Allies should continue to review all relevant human rights provisions to assess their applicability in conflict situations. By introducing human rights standards into military practice, the U.S. administration will ensure that they are observed, even if disagreement persists as to the legal basis for the standards. This will provide a strong signal that those treaties provide legitimate guidelines to behavior in complex situations, underline that the US and its allies do not differ as to underlying standards and values, and strengthen the acceptance of these standards as part of customary international law.

- **The U.S. Congress should authorize a bipartisan commission of inquiry to look into U.S. government decisions regarding torture and detainees.** This effort, which might be modeled on the 9/11 Commission, should aim to get the truth and understand the roles of various parties, rather than to fix blame. It should ensure that the focus goes beyond the lower level individuals immediately involved. This would be consistent with long U.S. practice of honestly reviewing and reporting on its past conduct (as in the Church Committee and the Iran Contra review) and urging other states to do the same. Moreover, an open and transparent inquiry could do much to boost confidence in the U.S. system.

International Criminal Justice

Both the United States and European states have a strong commitment to end impunity for the perpetrators of genocide, war crimes, and crimes against humanity. They have been active supporters of the International Tribunal for the Former Yugoslavia and the Rwanda Tribunal, as well as other courts with international elements such as the Special Court for Sierra Leone. The United States has been much criticized for its refusal to join the International Criminal Court (ICC), but during the second half of the Bush administration, it allowed the referral of the Darfur situation to the Court. It later emerged as the strongest opponent of moves to suspend proceedings regarding the president of Sudan on charges of war crimes and genocide. The United States and European states have much to gain by working together to strengthen the mechanisms of international criminal justice, including the *ad hoc* tribunals and other international courts.

- **The United States should continue to strengthen its current level of cooperation with the International Criminal Court.** This could include providing intelligence information and evidence, as well as acquiescing in efforts in the UN Security Council to refer situations to the Court (as it has done vis à vis Sudan). Washington could also support efforts to include in appropriate UN peacekeeping mandates obligations for the mission concerned to assist the Court.

- **While there is little expectation that the United States will join the ICC anytime soon, the new U.S. administration could put itself in a better position to influence developments at the ICC by announcing that it is not bound by the Bush administration pledge not to ratify the Rome statute, but will instead review the issue for itself.** Such an announcement would be warmly received by European allies who are already parties to the Rome Statute (the treaty that established the ICC).

- **The United States and all NATO member states should conduct reviews to ensure that their domestic law is fully updated and consistent with developments in international criminal law.** Because the ICC will not investigate or prosecute cases that can be handled by a fully functioning national legal system, this will enable those governments to ensure that their own nationals can be prosecuted in their own courts, with no risk of being brought before the international court. It is obviously preferable to have citizens suspected of war crimes investigated and, if necessary, tried by their own domestic legal system.

- **The new U.S. administration should end efforts to convince other states to sign bilateral agreements promising not to surrender U.S. personnel to the ICC (otherwise known as Article 98.2 agreements) and instead focus on establishing extradition arrangements.** These agreements should ensure that a U.S. citizen accused of war crimes would be returned to the United States for appropriate criminal procedures.

- **The new U.S. administration should also review the American Service-Members Protection Act (ASPA), which seeks to prevent the prosecution of U.S. military personnel and officials by the ICC and which limits cooperation with the Court.** In that review, the new administration should consider the effectiveness of the Act to achieve its stated objectives and the extent to which the Act precludes cooperation with the ICC that is determined by the president to be in the national interest.

- **The United States should participate in the Special Working Group on Aggression, which is coming to the end of its work, to define the crime of aggression and the conditions under which the ICC can exercise its jurisdiction.** Indeed, all NATO members should ensure that they are satisfied with the definition and the implications of prosecution by the ICC before the matter is put before the Review Conference of the ICC in 2010. The Working Group is open to all states, not simply states parties to the statute, and participating in the Group will help ensure that the United States is fully aware of the process of the negotiations and can contribute to the negotiations. It may also increase the chances that the Group will recommend that those states not party to the agreement should not fall under ICC jurisdiction

as long as states parties have the ability to opt out. If instead the Group recommends that non-parties fall under ICC jurisdiction while members can opt out, the domestic U.S. debate about the Court is likely to be re-ignited and efforts at cooperation with the Court will be significantly set back.

Creating and Enforcing International Law

The U.S. and Europe have traditionally been mainstays of the international legal system as a whole. It is in the interests of both the United States and European countries to develop and enforce international law in a way which upholds standards of democracy, rights of the individual, and the protection of the environment.

Dealing with global problems by international treaties is often the most effective course. While the United States is sometimes regarded as being reluctant to conclude and ratify treaties, the care which the U.S. democratic process gives both to ratification and implementation of treaties must be recognized. Compared with most parliamentary systems, the requirement for Senate approval ensures that the implications of a treaty are widely understood and that the commitment to implement an agreed treaty is strong. However, securing Senate approval of treaties by a two-thirds vote is an onerous process that has produced significant delays in U.S. ratification. Highly motivated but small groups have sometimes been able to prevent ratification of some agreements that are widely supported. For example, the UN Convention on the Law of the Sea (UNCLOS) has been supported by two administrations, but has not yet been consented to by the Senate. This reluctance to ratify is now producing a secondary effect in that those negotiating with the United States are reluctant to give concessions if they suspect that the United States will not ratify and become a party to the agreement in the end in any case.

- **The new U.S. administration should identify a few key treaties, including perhaps UNCLOS and the Convention on Biological Diversity, and push for ratification. Such an effort would help rebuild the image of the United States as a leader in developing international law.** The fact that ninety treaties passed the Senate – including some that had been languishing for years – during the last year of the Bush administration demonstrates that ratification is not an impossible goal.

- **The United States and European governments should explore ways of dealing with global problems by global mechanisms.** It is in the interest of the United States to find some way to better accommodate international agreements, since anticipated failure to ratify is making negotiations more difficult. Where reservations to a treaty would not frustrate its object and purpose, such reservations should be allowed under the treaty. Where securing ratification of treaties would be difficult, it may be possible to agree instead to executive agreements, memoranda of understanding, or congressional-executive agreements. In some cases, a treaty that the United States has observed without ratifying for some time might be acknowledged as customary international law.

- **The United States and European governments should consider whether their laws are adequate to implement decisions of the International Court of Justice in cases where they are parties.** The recent *Medellin* case has shown that this is not always possible in the United States.

- **The new U.S. administration and European governments should work with others at the United Nations to ensure that due process is respected in anti-terrorist legislation.** The imposition of sanctions on individuals via the UN should include procedures that will provide an adequate provision for due process and transparency.

- **In both the United States and Europe, there should be much more serious and extensive efforts to educate judges on international law, so that when they are called on to rule in a case involving an international obligation, they can do so with a sound understanding.** Especially in this era of globalization, international law does have impacts in the domestic arena and even state-level judicial officials find themselves required to deal with treaties or other international

legal commitments on occasion. This education could be done through a variety of institutions, including professional associations, law schools, etc. Although judges from different systems have different needs in such courses, it might be useful to bring them together on occasion to develop better understanding of different legal systems and court practices.

As the Obama administration reaches out to friends and allies — and to publics as well as governments — it will find a great desire to see the United States again become a leader in global human rights and the rule of law. Early in the new administration, the United States should demonstrate that its traditional commitment to the international legal system is strong and vibrant. By seeking Senate approval of key international agreements or acknowledging them as customary international law, and by more fully cooperating with the ICC, the U.S. administration can show that it values such legal instruments. The United States should reach out to those who share similar values and views on international law — including especially its European partners — to address together the tough issues that face us today. In a world of globalization, where the boundaries between international and internal conflict have blurred, terrorism poses unexpected and significant dangers, and our military forces fight on confusing and unpredictable battlefields, international law can provide guidelines and standards that prevent others from seeing our response as arbitrary. Thus, for the new administration, reinvigorating the U.S. role as a leader on international law will be essential to restoring international confidence in the United States and advancing U.S. national interests.

About the Transatlantic Dialogues on International Law

The Transatlantic Dialogues on International Law is an on-going discussion series, co-chaired by William H Taft, IV and Elizabeth Wilmshurst, and organized by the Atlantic Council of the United States in association with Chatham House. On December 5 and 6, 2008, a workshop was organized in London on U.S. and European approaches to international law and the impact of the change in the U.S. administration. The workshop brought together a select group of U.S. and European experts on international law to discuss transatlantic differences over international legal issues as well as the prospects for future transatlantic cooperation in this area. Discussions began with an assessment of U.S. and European approaches to international law, and then moved to the future, considering the scope for change in both the United States and Europe. The group examined the U.S. and European approaches on several issue — the role of multilateral treaties, the prospects for international criminal tribunals, use of force and international humanitarian law, and the enforcement of international law — and then discussed some potential ways of enhancing transatlantic cooperation in these areas.

The Atlantic Council of the United States and Chatham House would like to express their gratitude to all of the attendees at our London workshop. This paper reflects the discussion of that workshop. We wish to thank all participants for their insights and expertise; however, the individuals associated with the dialogue do not necessarily agree with all the conclusions and/or recommendations of this paper. In addition, the views do not necessarily reflect those of the Atlantic Council or Chatham House.

The Atlantic Council of the United States would also like to thank LexisNexis for sponsoring the publication of this work as well as the dinner associated with the workshop. We would also like to thank the German Marshall Fund of the United States and the Washington Delegation of the European Commission for their generous support for the workshop.

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February 2009