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TRANSATLANTIC DIALOGUES ON INTERNATIONAL LAW

Preventive Detention and the "War on Terror": Keeping the Response to Terrorism within the Law

The Transatlantic Dialogues on International Law

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In association with Chatham House.

During what the U.S. government formerly called the "war on terror", both U.S. and European governments resorted to preventive detention. But holding individuals deemed to be a security risk indefinitely and without charge is a controversial strategy. Not only have there been miscarriages of justice, but detention may actually fuel the terrorist cause and attract more recruits. Yet, without recourse to preventive detention, military and security forces may be tempted to resort to more extreme, and perhaps prohibited, measures against an individual suspected of being a terrorist threat. If, therefore, U.S. and European governments are to employ preventive detention as a tool in fighting international terrorism, particularly in overseas operations, it must be done in a way that reinforces the legitimacy of their efforts and is in keeping with international law.

To date, the transatlantic experience with preventive detention has been decidedly mixed. In the past, European governments that have used such detention have found it just as likely to stimulate terrorist activity as to restrain it. Recent U.S. use in the so-called "war on terror" has adversely affected the U.S. image in Europe and around the world. It has undermined the U.S. position, shared with its European allies, as the defender of human rights and promoter of the rule of law. For these reasons and others, this paper does not advocate the use of preventive detention. Nor does it address European detention of terror suspects within their own countries without reference to armed conflict. But, if the practice of preventive detention is to continue in situations claimed to be armed conflict, the United States and its European allies must examine how to ensure that this use is consistent with existing international legal obligations. They must also strive to reach consensus on those matters where existing law is unclear or where their legal interpretations and policies may differ. This is essential, first, so that any use of preventive detention will be as legitimate as possible, and so that U.S. and European militaries operating together in Afghanistan and elsewhere will follow consistent rules on this controversial practice.

The election of Barack Obama to the U.S. presidency raised significant international expectations that U.S. policies would change in a wide array of areas, including preventive detention and international law. On his second day in office, President Obama signed three executive orders, which were intended to close the Guantanamo Bay detention facility within one year, ensure lawful interrogations without the use of torture, and review detention policies—all measures designed to ensure the legality and legitimacy of any future detention. Although the early 2010 deadline to close Guantanamo was not met, the President and his advisors continue to pledge their commitment to closing the facility. Yet the U.S. debate over the possible need for preventive detention intensified after the failed bombing of an airliner in the United States on Christmas Day, 2009 and the Justice Department's decision to try Khalid Sheik Mohammed, the alleged "mastermind" of the 9/11 attacks in civilian court, rather than by military commission.

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While much international attention remains focused on U.S. policies at the Guantanamo Bay detention facility, it has also turned to U.S. detention elsewhere, particularly in Afghanistan. Other countries, including European allies that have contributed to the International Security Assistance Force (ISAF) in Afghanistan and to the U.S.-led coalition in Iraq, have also struggled with the use of preventive detention and especially with issues concerning the release and transfer of detainees. Although this has received less media coverage than Guantanamo, they are serious issues for allied operations. The debate has been inflamed by reports by the Council of Europe and the European Parliament which revealed that some European countries collaborated with, or at least tolerated, the much-criticized U.S. practice of extraordinary rendition, in which the United States purportedly transferred suspected terrorists to countries known to employ harsh interrogation techniques.

The United States and European countries have engaged in preventive detention (variously called "security" or "administrative" detention or, in war, "internment") when confronted with armed conflict or the threat of terrorism. Significant controversy surrounds this practice and for good reason. Depriving a person of his/her liberty is one of the most extreme measures that can be taken. In the case of preventive detention, individuals are confined, not because they are awaiting trial or have been convicted of a crime by a court of law, but because they are considered a future threat to security. While envisioned as a mechanism for increasing security, the use of preventive detention has, according to some arguments, sometimes made citizens of those states employing it less safe. In particular, allegations of detainee abuse have on occasion undermined international alliances necessary to combat transnational terrorism and provided a recruiting tool for terrorist organizations.

International law—human rights law and the law of armed conflict—establishes parameters around the practice of preventive detention. But the policies and practices of the U.S. and European governments reveal significant differences between them over the understanding of these parameters. The U.S. and European governments have disagreed over fundamental questions concerning preventive detention, including who may be detained, on which basis, and under which circumstances. They have also disagreed over how detainees are to be treated and the required conditions of detention. Some differences are due to the United States and European countries being bound by different international treaties. This has created significant challenges when the United States and European countries form multi-national forces for deployment in a third country. Other differences, however, arise from an occasional lack of clarity in international law and from differing interpretations and ways of implementing the rules regulating preventive detention.

Different perspectives on how international law regulates preventive detention exist not only between the United States and European states but also among European states themselves. While European states often speak with one voice on legal matters, for example, through the European Union or the Council of Europe, European governments hold far from uniform views on preventive detention. The United States must keep this in mind when engaging its European allies on these matters.

With its key legal officials now in place, the Obama administration can build on the efforts made during the last four years of the Bush administration to engage partners and allies in consultations on preventive detention and international law. In particular, with the discussions between the legal advisors of the U.S. and European governments now renewed, the legal advisors should continue to discuss issues related to preventive detention despite their difficulty and the tensions they sometimes produce.

- **The U.S. and European governments should make preventive detention a top priority in their continuing dialogue on international law. In particular, they should seek to clarify who may be detained and under which circumstances, the necessary review mechanism and procedures, as well as required detainee treatment.** The U.S. and European governments should focus on the degree to which there is consensus between them on these matters and how that consensus can be strengthened in the future. Where differences are identified, it should be determined whether, for example, those differences are fundamental or more related to implementation. The United States and Europe should seek to achieve uniform standards regarding preventive detention in a manner consistent with international law. In this way,

states on both sides of the Atlantic may reaffirm their historical roles as defenders of individual rights and the rule of law. This consensus should be developed after securing views from high-level civilian and military officials and non-governmental experts. The views of those charged with applying the policies on the ground should also be taken into account so that future policies will be practical to implement.

Continuity and Change

In his May 2009 speech on national security, President Obama laid a firm foundation for U.S.-European dialogue when he stressed that, to keep America safe from terrorism, the power of America's most fundamental values, as enshrined in the Declaration of Independence, the Constitution, and the Bill of Rights, must be enlisted. While their founding documents may differ, Europeans share with the United States these core values of liberty, justice, fairness, equality and respect for the rule of law. In that same speech, President Obama began to lay out his positions on specific counter-terrorism measures, including preventive detention. Now, more than one year into Obama's presidency, time permits an assessment of how much has changed—and how much has continued—since the previous administration.

President Obama came into office promising significant change on the issue of preventive detention, as symbolized by the Guantanamo facility. During his first year in office, some major changes emerged compared to the previous administration. Perhaps the most notable are:

- President Obama issued an executive order prohibiting the use of so-called enhanced interrogation techniques.
- Secret detention engaged in by the U.S. Central Intelligence Agency has been prohibited.
- President Bush said in 2006 that he would like to close the Guantanamo Bay detention facility but for the fact that some of the terrorism suspects held there were too dangerous to release. President Obama issued an executive order requiring closure to be completed by January 22, 2010. Although that deadline has been missed, closing the facility remains a top Obama Administration priority.
- President Obama stated that whenever feasible Guantanamo detainees suspected of terrorism offenses will be tried in regular federal court. The presumption that,

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. The series has included a number of workshops in the United States and Europe on U.S. and European approaches to international law, on issues such as the use of force, torture, international criminal justice, and human rights. On December 7 and 8, 2009, a workshop was organized in Washington, D.C. on U.S. and European approaches to preventive detention and international law. The workshop brought together a select group of U.S. and European experts on international law to discuss transatlantic differences over preventive detention and detainee rights, as well as the prospects for future transatlantic cooperation in this area. The discussions included a review of the Obama administration's policy changes regarding detainees, international legal frameworks on the use of preventive detention and detainee rights, and steps to improve U.S. and European cooperation in the future.

The Atlantic Council of the United States and Chatham House would like to express their gratitude to all of the attendees at our Washington, D.C. workshop. This paper reflects the discussion of that workshop. We wish to thank all participants for their insights and expertise; however, no one individual is solely responsible for the views expressed and the individuals associated with the dialogue do not necessarily agree with all the conclusions and/or recommendations of this paper. The views expressed in the paper do not necessarily reflect those of the Atlantic Council or Chatham House.

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whenever possible, terrorism suspects will be tried in civilian courts contrasts with the previous Administration's preference for trial by military commission. It has also encountered significant opposition in Congress.

- The Administration revised the review procedures for determining whether a detainee held by the U.S. military in Afghanistan remains in preventive detention, is released, or is transferred to criminal prosecution. This new policy guidance, released by the Pentagon in September 2009, replaced the Unlawful Enemy Combatant Review Board procedures with new Detainee Review Board procedures.
- The Administration adjusted the internal process by which it decides upon the transfer of detainees from Guantanamo to their home state or a third state. The process is intended to better ensure that the U.S. respects its international obligation—called the principle of *non-refoulement*—not to transfer a person to a state where that person would be in danger of being ill-treated.

These elements of change are significant. But it is also true that the Obama Administration exhibits many elements of continuity with the previous administration, and that these affect the practice of preventive detention. Some of the most important areas of continuity include:

- President Obama has made clear that he considers the United States to be at war with al Qaeda and its affiliates and applies a law-of-armed-conflict framework. This application has in some circumstances been controversial, particularly as it authorizes the preventive detention of certain persons.
- Like the Bush Administration, the Obama Administration believes that specific domestic legislation is not required in order to use preventive detention. Unlike its predecessor, however, the Obama Administration has not asserted executive power as the source of its authority to engage in preventive detention but rather has relied solely on the authority already provided by Congress through its passage of the Authorization for Use of Military Force (AUMF) in 2001. The Obama Administration also reaffirmed the relevance of international law by stating that the AUMF is "necessarily informed by principles of the laws of war."
- The Guantanamo Review Task Force, which was established by President Obama through executive order on his second day in office to review and determine the disposition of the remaining Guantanamo detainees, released its final report to Congress in late May 2010. While the Task Force recommends that 126 of the detainees be transferred either to their home countries or to a third country and that 36 be prosecuted in either federal court or by military commission, it also confirms the Administration continuation of the practice of preventive detention by recommending that 48 be held indefinitely under the AUMF.[1] (A group of 30 Yemenis was approved for transfer if the security conditions in their home country improve.)[2]
- In 2008, the U.S. Supreme Court held that Guantanamo detainees are entitled to the privilege of habeas corpus, and, in handling these cases, the D.C. District Court asked the new Administration to clarify its standard for whom it believes it may detain. The Obama Administration slightly modified the Bush Administration's standard and rejected the term "unlawful enemy combatant," but continues to rely on the law-of-armed-conflict framework.
- This Administration's position that habeas rights do not extend to detainees at the U.S. detention facility in Afghanistan remains consistent with the position held by the Bush Administration. Recently, the D.C. Circuit Court held that the right of habeas corpus does not extend to the non-Afghan detainees who had been captured outside Afghanistan and are held by the United States in Afghanistan.
- While the Administration has made clear its preference to try terrorism suspects in federal court, the use of military commissions for criminal trials of Guantanamo detainees has continued after new legislation was passed in October 2009, revising the military commissions for a third time.

These elements of change and continuity in U.S. policy and practice regarding preventive detention should be

[1] Final Report, Guantanamo Review Task Force, Jan. 22, 2010, at ii, 9-10.
[2] Ibid. at ii, 10.

acknowledged within the transatlantic dialogue. A solid understanding of the Obama Administration's position is vital to managing expectations of U.S.-European rapprochement on preventive detention. It is also the starting point in identifying the most persistent transatlantic differences. By comparing these areas of change and continuity with the evolution of European policies over the same time period and by examining the extent to which European states' laws and policies are consistent with each other in dealing with these issues, the United States and European countries should be able to increase the likelihood of shared solutions that are in line with international law.

Apart from assessing current elements of continuity and change, the U.S. and European governments have much to gain from a clear understanding of their own best—and worst—past practices. For U.S. decision makers in particular, much can also be gained from reviewing other states' responses (and their effectiveness) to security threats over the years. In the United States, especially since September 11, 2001, it has been asserted that the current terrorism threat is exceptional in manner and severity, requiring equally unprecedented responses. However, past threats faced by other states have been far from negligible. For example, from 1992 in Algeria, the Groupe Islamique Armé was responsible for thousands of deaths, often in large-scale massacres destroying entire villages.[3] During the internal armed conflict in Peru, Sendero Luminoso was involved in the killing, torturing, and "disappearing" of thousands of civilians; fifty-four percent of the estimated 69, 280 persons who died in this conflict between 1980-1992 is attributed to Sendero Luminoso.[4]

In the past, states have responded to such challenges through a range of measures, including: broadly defining criminal offenses of terrorism, creating new criminal offenses, proscribing certain organizations, limiting the rights of suspects, changing criminal procedures to facilitate prosecution, employing military jurisdiction over civilians, resorting to preventive detention, using torture to gather intelligence, and resorting to armed force. These are not novel methods for countering security threats.[5] Yet the results have not always been beneficial. With regard to preventive detention, for example, it is now generally accepted that use of that practice in Northern Ireland in the early 1970s alienated whole communities and led to hundreds of young men joining the Irish Republican Army, creating one of the most efficient insurgency forces.[6]

- **The discussion between the United States and Europe should take into account other states' past experiences with counter-terrorism measures.** However substantial or exceptional the nature of the current threat, this should not hamper incorporation of the lessons learned from other states' past experiences with counter-terrorism measures over the decades and in various regions of the world.

The Future of Preventive Detention?

If any future use of preventive detention is to be perceived as legitimate, it must have a firm basis in law. While the Obama Administration abandoned the Bush Administration terminology of a "global war on terror," President Obama has made clear that he considers the United States to be involved in an armed conflict with al Qaeda and its affiliates. Sometimes referred to as the law of war or international humanitarian law, the law of armed conflict is a branch of international law that regulates the behavior of states and non-State actors during times of war, including the use of preventive detention. For the law of armed conflict to apply, an armed conflict—the legal term for war—must exist.

Much of the discord between the United States and Europe over preventive detention originates from different views as to whether the struggle against al-Qaeda—and the formerly called "global war on terror"—is a war in the legal sense such that the law of armed conflict applies, including its rules permitting the detention of a "combatant" until the end of hostilities. While most agree that an armed conflict was and is still taking place in Afghanistan, there is not agreement that a war with al Qaeda is raging around the world. This fundamental disagreement as to the classification of the situation—war

[3] Assessing Damage, Urging Action: Report of Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights (International Commission of Jurists 2009) at 28.
[4] Ibid. at 28.
[5] Ibid. at 30.
[6] Ibid. at 30.

or not—has led to divergent views as to the permissibility and regulation of preventive detention.

Even if the U.S. and all European governments agreed on the existence of an armed conflict, another issue arises: which type of armed conflict is it? Answering this question is a prerequisite for determining which specific rules of the law of armed conflict apply to any preventive detention. The law of armed conflict recognizes two types of war: *international* and *non-international* armed conflict. In general terms, an international armed conflict occurs when a state resorts to armed force against another state, for example, the U.S. and allied offensive in Afghanistan in 2001 against the Taliban regime. This situation triggers application of the law of international armed conflicts. A non-international armed conflict occurs when armed force is used between a state and an organized armed group—such as al Qaeda in Afghanistan or the FARC (Revolutionary Armed Forces of Colombia)—or between two or more organized armed groups. In addition, the level of violence must rise above mere internal disturbances or sporadic riots. In such situations, the international law of non-international armed conflicts applies.

Unless the situation falls into one of these categories, the law of armed conflict is not applicable and, thus, can provide no grounds for preventive detention. U.S. and allied operations against the Taliban government fell into the first category, while continuing operations against al-Qaeda in Afghanistan is generally considered to fall into the second. But the notion that the United States could detain someone apprehended outside of Afghanistan—in a country where there is no state of conflict—has been challenged by many observers as outside the bounds of international law. Some persons detained at Guantanamo were originally captured far from any battlefield, for example in Zambia, and accused of terrorist activities with only a tentative or remote link to Afghanistan. The way that states, including the United States, choose to apply the law of armed conflict outside an active combat zone can vary considerably and lead to disagreement.

- **The U.S. and European legal advisers should consider whether the involvement of transnational non-state actors creates a type of armed conflict not addressed adequately by existing international legal rules.** Are today's conflicts involving transnational non-state actors, such as al Qaeda, sufficiently addressed by the traditional categories of armed conflict regulated by the law of armed conflict? If not, what are the implications for the practice of preventive detention? The United States has at times asserted that the existing law-of-armed-conflict rules either do not apply to the situation or are no longer adequate, having failed to keep up with the changing nature of armed conflict. Resolution of this issue is essential for attaching a degree of international legitimacy to the practice of detention by either the United States and/or Europe. And it is required if the United States and Europeans are to find consensus on the particular rules of international law that specifically regulate preventive detention.

- **The United States and Europe should attempt to reach a common understanding as to whether the law of armed conflict may be applied to justify the capture of certain persons outside the combat zone and their subsequent detention.** The United States and many European countries agree that hostilities currently taking place in Afghanistan amount to a conflict and that the law of armed conflict applies. However, the extent to which law of armed conflict applies outside such an active combat zone is less clear. U.S. application of that framework in its confrontation with al Qaeda around the world has given rise to criticism from its European allies and others.

The United States and Europe traditionally have been the mainstays of upholding individual rights through international law. It is in the interest of both to respect, enforce, and, if necessary, clarify and develop international law with regard to preventive detention. Identifying and addressing specific differences between U.S. and European policies on preventive detention is thus essential. Three main questions should be the focus of any dialogue: who may be preventively detained, when, and why; how these determinations are made and reviewed; and what are the appropriate conditions of detention and standards for detainee treatment.

- **The U.S. and European governments should reaffirm their commitment to the established international rules that regulate preventive detention, including who may be detained, on what grounds, and subject to which review mechanism and procedures.** International human rights law and the law of armed conflict already provide

rules regulating preventive detention. Discussions regarding whether there is a need for more detailed international rules on preventive detention should not eclipse the U.S. and European governments' reaffirmation and implementation of their existing obligations.

The law of armed conflict regulates preventive detention through rules found in some of its most recently created treaties: the four Geneva Conventions of 1949 and their two Additional Protocols of 1977.[7] These treaties provide rules covering the reason someone may be detained, the procedures under which that determination must be made, how the person must be treated, and the conditions of their detention. The more detailed rules are those applicable to situations of international armed conflict—war between two states—rather than non-international conflict—war involving one or more non-state actor.

The Geneva Conventions provide specific grounds for subjecting specific categories of persons, in particular "prisoners of war" and "civilians," to preventive detention in international armed conflict. Specifically, the Third Geneva Convention, governing the treatment of prisoners of war, permits the detaining authority to "subject prisoners of war to internment."[8] The Fourth Geneva Convention, which protects civilians, allows internment of a civilian "if the security of the Detaining Power makes it absolutely necessary"[9] or "for imperative reasons of security."[10] In recent years, there has been significant disagreement on the issue of a person's status, that is, whether an individual fits into one of these specific categories. This is a centrally important issue, as a person's status determines whether he or she may be detained and the protections under the law to which he or she is entitled.

Civilians—unlike combatants who are captured and become prisoners of war—may be detained only if, and for as long as, they pose a security threat, not necessarily to the end of the conflict. For that reason, there must be a review assessing the reasons for that detention, to determine whether a security threat exists. The Fourth Geneva Convention provides review procedures applicable to civilians, giving some detail regarding the type of body that should conduct the review and the timing of the review. The decision to detain an individual must be reviewed as soon as possible by an appropriate court or administrative board, and, if the decision is upheld, it must be periodically reviewed twice yearly.[11] The First Additional Protocol provides that the detainee must be "informed promptly, in a language he understands, of the reasons why these measures have been taken."[12]

In addition to the law of armed conflict, preventive detention is also regulated by international human rights law. And, like the law of armed conflict, international human rights law aims to ensure a basic level of treatment for all individuals. Human rights provisions regulating detention can be found in a variety of different treaties, but there is much less consensus, including across the Atlantic, about how these treaties apply, particularly during armed conflict. Moreover, the European states also belong to regional conventions, particularly the European Convention on Human Rights, that place obligations regarding detention on European states that the United States does not have. Human rights treaties stipulate that a person may only be detained "on such grounds and in accordance with such procedure as are established by law."[13] All human rights treaties prohibit arbitrary arrest or detention, but usually with little definition of "arbitrary." Only the European Convention on Human Rights specifically lists the reasons for which a person may be deprived of his/her liberty. Human rights treaties articulate two procedures that must be complied with for a person to be lawfully detained when not specifically charged with a crime. First, an arrested person must be promptly informed of the reasons for arrest. Second, any person deprived of liberty "shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not

[7] The United States is party to the four Geneva Conventions of 1949, but, unlike its European allies, it has not ratified either of the two Additional Protocols.
[8] Art. 21 of the Third Geneva Convention.
[9] Art. 42 of Fourth Geneva Convention (for an alien on the territory of a party to the conflict).
[10] Ibid., Art. 78(1) (in occupied territory).
[11] Art. 43(1) & 78(2) of the Fourth Geneva Convention of 1949.
[12] Art. 75(3) of the First Additional Protocol of 1977.
[13] Art. 9(1) International Covenant on Civil and Political Rights [hereafter ICCPR]. See also Art. 5(1) ECHR, Art. 7 American Convention on Human Rights [hereafter ACHR], and Art. 6 African Charter on Human and Peoples' Rights [hereafter ACHPR].
[14] Art. 9(4) ICCPR, Art. 5(4) ECHR, Art. 7(6) ACHR, and Art. 7(1)(a) ACHPR.

lawful."[14] Unlike the four Geneva Conventions, none of these human rights treaties are universally ratified by states, most are regional instruments, and the provisions relevant to preventive detention may be suspended under certain circumstances.

- **The U.S. and European governments should not only reaffirm and clarify their existing legal obligations concerning preventive detention, they should also explore—if in fact they still see a need to use preventive detention—the further development of international rules regulating who may be detained, on which grounds, and under which review mechanism and procedures, particularly for situations of non-international armed conflict.** The who, when, why, and how of preventive detention continue to be a source of contention between the U.S. and European governments. Non-international armed conflicts—the most prevalent type of war today—pose unique challenges with regard to preventive detention. The law of armed conflict applicable to non-international armed conflict does not address the reasons nor procedures under which a person may be subject to preventive detention.

The debate surrounding who is detained at Guantanamo illustrates the differences between the United States and Europe over who may be detained and on which grounds. The controversies are, however, by no means limited to Guantanamo. While the Obama Administration no longer uses the term "unlawful enemy combatant," the scope of U.S. detention authority—that is, who it may detain—remains unsettled. The U.S. courts are working through the issue now as they review the *habeas* petitions of the Guantanamo detainees. However, further U.S. and European dialogue is needed to reach consensus on who, if anyone, can be detained, particularly in a non-international armed conflict.

Another equally important—and equally controversial—area is the review process required when decisions are made to hold someone in preventive detention. International law does not provide sufficient elaboration on some key issues. There is a need for greater specificity regarding the type of body that should conduct the review, the process and procedures that body should follow in its review process, as well as the procedural rights of detainees so that they can meaningfully challenge their detention.

The experience of Guantanamo can again provide an example. There has been an ongoing debate over what type of body—administrative or judicial—should review the decision to detain. The process by which the United States determined the status of those detained at Guantanamo evolved over time, mainly in response to judicial decisions concerning the legality of the Bush Administration's policies and procedures. That Administration was forced by the courts to create a review process for those held at Guantanamo, involving the Combatant Status Review Tribunals and the Administrative Review Boards. However, both the legitimacy and legal sufficiency of these institutions, which are administrative boards, not judicial bodies, remained subject to fierce criticism. Then, in 2008, the Supreme Court ruling in *Boumediene v. Bush* cleared the way for Guantanamo detainees to challenge their detention in U.S. civilian court. Whether this privilege of habeas corpus extends beyond Guantanamo detainees, for example, to detainees held by the United States in Afghanistan has been making its way through the U.S. courts. Recently, the D.C. Circuit Court held that the right of *habeas corpus* does not extend to the non-Afghan detainees who were captured outside Afghanistan and are held by the United States in Afghanistan.

When individuals are held in preventive detention, it frequently happens that they are only vaguely informed of the reasons for their detention. The question of legal assistance is often contentious. (Other issues are also often contentious, such as the right to family visits.) The review procedures that the United States previously had in place at the Bagram Theatre Internment Facility in Afghanistan provide insight as to the matters in need of clarification. According to reports, detainees held by the U.S. military at the Bagram facility were not informed of the reasons for their detention nor the specific allegations against them; they were not told of the evidence that was used against them; they did not have lawyers or any other representative to provide them with legal assistance. In September 2009, the Pentagon publicly announced new policy guidance for detentions in Afghanistan. The new

guidance replaces the Unlawful Enemy Combatant Review Board procedures with new Detainee Review Board procedures for those held in the Bagram facility and now for those held at the new Parwan facility, which has replaced Bagram. Human rights groups consider the new procedures to be an improvement but believe that additional reforms are needed to allow detainees a meaningful way to challenge their detention.

The United States has not been the only government confronted with the challenges of preventive detention. Other states, including European countries involved in Afghanistan and Iraq, have faced similar difficulties. While the challenges are significant enough for one government, they can be exacerbated when states form a multi-national force, as each state may not have the same international legal obligations. This can be further complicated when the multi-national force detains persons on the territory of a third state, such as Afghanistan, which may have yet another set of obligations. This can be especially difficult if the multi-national force is essentially assisting a host government, and that government has different standards for detention.

For exactly these reasons, establishing a proper and adequate review process is essential. This will do much to ensure that mistakes are not made regarding who is detained and will also enhance the legitimacy of a detention policy. The United States and Europe should take the lead in clarifying and, where necessary, elaborating standards for the type of review process, whether administrative or judicial, and the necessary procedural protections, such as access to counsel. In areas where they disagree, the U.S. and Europe must work to reach a consensus.

As has been mentioned, human rights law seeks to establish basic standards of treatment for all individuals. However, the United States and the European states do not always agree on whether or how human rights law should be applied during armed conflicts. The U.S. and European governments agree as a general matter that armed conflict does not suspend or terminate a state's human rights obligations and that human rights and the law of armed conflict are complementary and mutually reinforcing.[15] However, the exact way in which specific human rights rules and the law-of-armed-conflict rules interact during an armed conflict and apply to a state's particular conduct achieves less consensus.

The United States and European governments should seek consensus on how human rights law applies to armed conflict as a matter of law, while also seeking consensus on the application of appropriate human rights standards, as a matter of policy, to detainees held in relation to armed conflict. Resolving any differences between the application of human rights and the law of armed conflict would place the United States and European governments at a similar starting point and provide additional rules to fill any existing or perceived gaps in the law governing preventive detention, particularly in non-international armed conflicts where there are fewer applicable treaty rules. Even if the U.S. government finds it difficult to accept a legal commitment to the applicability of specific human rights rules during war, establishing a policy of following complementary human rights rules whenever practicable would do much to harmonize U.S. and allied practice. By including human rights standards into military detention practice, whenever possible, the U.S. and European governments will ensure that those standards are observed in most situations, even if disagreement persists over the legal basis for them.

- **The European governments should clarify their legal obligations under the European Convention on Human Rights with regard to preventive detention.** A discussion among European governments of their obligations under their regional human rights treaty, the European Convention on Human Rights, would facilitate an accurate identification and, thus, enforcement of those obligations. It would also strengthen consensus among European governments on those obligations, as being party to the same treaty does not always mean that all states are in full agreement on the precise responsibilities flowing from a particular obligation in that treaty or how it should be implemented. Where disagreements are discovered, European governments should deepen their dialogue in order to resolve them.

[15] Observations by the United States of America on Human Rights Committee General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Dec. 27, 2007, para. 25. United States Explanation of the Vote to the U.N. General Assembly, Third Committee: Extrajudicial, Summary or Arbitrary Executions (Nov. 25, 2008).

Transatlantic consensus has also been hindered by disagreements between the United States and Europeans on another basic issue concerning the applicability of human rights law, namely on which territory these human rights apply. The International Covenant on Civil and Political Rights (ICCPR) protects a range of basic human rights, like the European Convention of Human Rights. But, unlike the regional European Convention on Human Rights, any state in the world may agree to join the ICCPR. Both the United States *and* European countries have agreed to be bound by the provisions of this human rights treaty. These shared human rights obligations should be the basis for consensus, particularly in establishing minimum rules for multi-national forces involved in detention outside their own country. However, the U.S. government strongly disagrees with its allies and maintains that its obligations under the ICCPR apply only inside U.S. territory.

- **While it is doubtful that the U.S. government—unlike many European allies—will accept the obligations of the International Covenant on Civil and Political Rights as legally applicable outside U.S. territory, the U.S. administration should nevertheless apply these human rights provisions as a matter of policy, whenever possible.** Even if the U.S. administration does not accept as a legal obligation the extra-territorial application of the ICCPR, its agreement to apply the provisions in practice would resolve an area of disagreement in the transatlantic dialogue and fill any perceived gap in the law applicable to U.S. and European actions abroad.

In determining the rules applicable to preventive detention, the United States and Europe can draw not only on treaty law, but on another source of rules that bind states, customary international law. Customary international law is not created as treaties are through negotiation, drafting, redrafting, and, ultimately adoption by states if they so choose, but rather through the customary practice of states. A customary rule is considered to have crystallized into binding law if it reflects what a significant number of states do or do not do out of a sense of conviction that such practice is required or prohibited (depending upon the rule). For example, customary international law prohibits piracy, slavery, and genocide. While treaties only bind those states that have ratified them, customary law binds all states.

The U.S. and European governments should identify and reaffirm the customary international law that regulates preventive detention and related matters, such as the transfer of detainees. Identifying and reaffirming those rules would clarify the baseline of applicable international law pertaining to preventive detention, would ensure proper respect and enforcement of the law, and would move the transatlantic dialogue forward. This is particularly relevant for situations of non-international armed conflict, where fewer treaty rules exist and disagreement remains over the manner in which human rights law applies.

Once the right to detain a particular individual has been established, the issue of detainee treatment comes to the forefront. Nothing has been more costly to U.S. and European reputations than allegations of ill-treatment of detainees. Allegations of detainee abuse in recent years have included beatings, use of stress positions and sleep deprivation, waterboarding, threats with dogs, provision of inadequate food and water, holding detainees in cold isolation cells for several weeks, and denial of the opportunity to practice religion. How detainees are to be treated—or not treated—should be reaffirmed. Matters of detainee treatment relate not only an individual's immediate physical and mental integrity but also to the conditions of their confinement.

- **The U.S. and European governments should uphold and enforce international legal obligations concerning detainee treatment, starting with reaffirmation of the fundamental standards applicable to all persons, such as freedom from torture and inhuman and degrading treatment.** Both the U.S. and European governments hold hard-earned reputations as protectors of human rights. To ensure respect around the world for the international law that prohibits torture and cruel and inhuman treatment, the U.S. and European reaffirmation of these fundamental human rights is crucial. Otherwise, we could see an erosion of those standards in a way that may put more people at risk, including U.S. and European military personnel.

The law of armed conflict applicable to international wars provides rules on how prisoners of war and detained civilians are to be treated while in detention. Most significantly, torture, cruel treatment and other forms of ill-treatment are absolutely prohibited. The rules also provide extensive detail on the required conditions of detention, covering matters from health and hygiene to communication with the outside world. Conditions in preventive detention should not be equated with a penitentiary, as the individuals are being detained preventively and not due to a criminal conviction.

For non-international conflicts, the law of armed conflict also provides treaty rules for how detainees must be treated and describes certain minimum conditions of detention, but with less specificity than in state-on-state conflicts. Importantly, however, Article 3 common to the four Geneva Conventions establishes fundamental rules from which no exception is permitted. It requires humane treatment for all persons in enemy hands, without any adverse distinction. It specifically prohibits murder, mutilation, torture, cruel, humiliating and degrading treatment, the taking of hostages and unfair trial.

Similar to the law of armed conflict, human rights law prohibits all forms of ill-treatment, including torture and cruel and inhuman treatment. These prohibitions can be found in the ICCPR, the European Convention on Human Rights, the American Convention on Human Rights, and the Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment. The notions of ill-treatment are so similar in both human rights and the law of armed conflict that the interpretation of one body of law often influences the other. However, human rights law is not as specific on conditions of detention, such as health care, hygiene, and family visits. Such rules can be found in what is called "soft law," that is non-binding rules and regulations, such as the U.N. Standard Minimum Rules for the Treatment of Prisoners and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment adopted by the U.N. General Assembly.

The U.S.-European dialogue should also address the details of a detained individual's capture, release, and right to a remedy. Methods employed to capture and transfer certain terrorism suspects have been very damaging to the reputations of both the United States and Europe. Furthermore, very little has been said about the rights of the individuals wrongly detained or abused to receive reparation.

The practice of extraordinary rendition involves the transfer of a person from one state to another outside the usual legal process. It has recently come to be associated primarily with situations in which the United States has purportedly abducted suspected terrorists from one country and transferred them to another country for detention and interrogation. In many cases, the individual was apprehended in a country with a functioning legal system through which the United States could have had recourse. Indeed, if the individual had been suspected of involvement in a major criminal enterprise, rather than terrorism, requesting cooperation from the local legal authorities would have been the normal course of action. Once apprehended and transferred, the suspects have been detained and interrogated either by U.S. personnel at U.S.-run detention facilities outside U.S. territory or, alternatively, handed over to foreign agents for interrogation. In both instances, it is alleged that harsh interrogation techniques have been employed.

- **The U.S. and European governments should end the practice of extraordinary rendition.** This practice of capturing and transferring individuals without any form of legal process has eroded the position of the United States as champion of the rule of law, as well as that of its European allies. In recent years, it has come to light, as reported by the Council of Europe and the European Parliament that some European countries collaborated with or tolerated this practice of extraordinary rendition. Both the U.S. and European governments should ensure that their practices in this area are consistent with the rule of law.

The U.S. and European governments have an obligation under international law—refugee law, human rights, and the law of armed conflict—to protect persons from being transferred to the control of an authority where their lives or freedoms could be threatened. This obligation—called the principle of *non-refoulement*—prohibits transferring a person to another state where there exists substantial grounds for believing that the person would be in danger of being persecuted or ill-treated.

In facing the threat of terrorism, some states, including European countries, have questioned the absolute nature of this prohibition. These governments have been

concerned that respect for this principle could compel them, in some instances, to keep convicted or suspected terrorists in their territory. They argue that the security threat posed by the person should be factored into the transfer decision. While national security is a legitimate concern, such a balancing of factors runs counter to the consideration on which the principle of *non-refoulement* was founded: that no reason can justify exceptions to the absolute prohibitions of torture and ill-treatment.

The U.S. and its European allies have directly experienced the challenges raised in applying this obligation when operating as part of a multi-national force. These questions are not limited to the coalitions in Iraq and Afghanistan, but extend to all multi-national forces that engage in detention, such as those in Sudan, Chad, and the Democratic Republic of the Congo. For such forces, a clear legal framework is needed concerning not only the transfer of detainees between coalition members or countries contributing troops to a peacekeeping mission, but also to transfers of persons by international troops to the host country.

The principle of *non-refoulement* requires that the state planning the transfer of a person assess the risk of that person's rights being violated, and, if there is a risk, the person must not be transferred. There is no consensus, however, with respect to the exact form the risk-assessment process must take. In addition, while human rights and refugee law provide the person to be transferred with the right to challenge the transfer decision, the law is less clear on other points, including whether the detainee has the right to a lawyer during that review. The U.S. and European governments should develop a consensus on the procedural obligations involved in such transfers in order to ensure that the assessment is rigorously performed.

In situations where the principle of *non-refoulement* would otherwise prohibit transferring the person, states have sometimes resorted to transfer agreements—often called diplomatic assurances—in order to transfer an individual. Diplomatic assurances are meant to ensure that transferred persons will be treated in a manner consistent with international standards. They have been employed by numerous states for years, including by states seeking guarantees that a prisoner will not be subject to the death penalty. They are also becoming increasingly common between states' forces in multi-national operations.

However, the U.S. use of diplomatic assurances, particularly in order to transfer detainees out of Guantanamo when no third state had been willing to accept them, sparked international concern. Such assurances can be used by states to attempt to circumvent their obligation not to transfer a person to a state where they would be at risk. Thus, the appropriate weight, if any, to give diplomatic assurances must be considered in assessing the risk associated with a specific transfer.

Diplomatic assurances often contain some sort of post-transfer mechanism to monitor compliance with the assurances, such as providing a right of access by the transferring state's authorities or a national human rights commission to the person transferred. The idea is that third-party monitoring reduces the chances of ill-treatment. How to ensure the effectiveness of such a monitoring mechanism is worthy of discussion, as past experience has demonstrated the difficulty in establishing a reliable and effective monitoring mechanism. For example, the European Court of Human Rights permitted a transfer to take place based on the assurance that its staff would have access to that person after transfer. But when the Court's staff attempted a visit, they were denied access. Any dialogue on effective monitoring mechanisms must also take into account the possibility that monitoring may not remove the risk of ill-treatment, as detecting whether ill-treatment, including torture, has occurred can be much more difficult than determining whether the death penalty has been imposed or not. While it is fairly straightforward to determine whether a state has complied with its assurance not to impose or carry out the death penalty, it is much more difficult to monitor the various forms of ill-treatment that may be carried out in secret.

- **The U.S. and European governments should reaffirm the principle of non-refoulement, particularly in the context of multi-national operations, and reassess the required review process, the role of diplomatic assurances, and post-transfer responsibilities and monitoring.** In reviewing the practice of extraordinary rendition and reaffirming the principle of *non-refoulement*, the U.S.-European dialogue may benefit from the work of the special task force established by President Obama's Executive Order on ensuring lawful interrogations. The task force was created "to study and evaluate the practices of transfer-

ring individuals to other nations in order to ensure that such practices comply with the domestic laws, international obligations, and policies of the United States and do not result in the transfer of individuals to other nations to face torture or otherwise for the purpose, or with the effect, of undermining or circumventing the commitments or obligations of the United States to ensure the humane treatment of individuals in its custody or control."[16]

A final area that the U.S. and European governments should consider remains their responsibilities to those individuals who may have been illegally detained or suffered abuse during their detention. In general, international law provides that when a state violates its legal obligations, the law requires the state to make good that wrong: that is, to make reparations. Reparations can come in a variety of forms, including monetary compensation as well as guarantees to discontinue the illegal practice. This "right to a remedy" for victims of violations of human rights and the law of armed conflict is considered to be one of the basic pillars of the rule of law and a democratic society, values shared by the United States and European countries.

- **The United States and European governments should consider means to ensure reparation to those detained or treated in a manner that violated international law.** Upholding the "right to remedy" is a matter of law, but, as a matter of policy, it is essential and timely for states wishing to depart from the legacy of the past. Both the extent of the U.S. and European governments' legal obligations as well as best practices from a policy perspective merit discussion across the Atlantic.

There is no doubt that this is a challenging agenda. Undoubtedly, the United States and its European allies will find great difficulty in reaching agreement on every specific detail of the implementation of international law to the practice of preventive detention. U.S. and European governments should thus consider whether to adopt appropriately stringent guidelines or non-binding codes of conduct in relation to detainee treatment, the lawful authority for detention, grounds on which a person may be detained, and the appropriate review process.

- **To overcome an absence of consensus or a lack of clarity on the regulation of preventive detention, the United States and European governments, together with other countries, should identify guidelines that can achieve uniform standards on preventive detention, including detainee treatment, without undermining existing human rights or law of armed conflict obligations.** The idea of establishing minimum common standards that would apply at all times—whether during peace time or war—is not new. In 1990, experts in Finland elaborated the Turku-Abo Declaration on Minimum Humanitarian Standards. The advantage of such standards is that certain obstacles to the application of legal protections are removed. There would be no need to determine, for example, whether a situation is an armed conflict, whether the person is a combatant or a civilian, or whether certain treaty rules apply to the state's actions outside its territory. This would not only guarantee certain fundamental protections to all persons at all times, but would greatly facilitate cooperation among governments and military forces when working together in a multi-national operation.

The use of preventive detention in the "war on terror" has undermined the reputation of the Western countries as the promoters and enforcers of individual rights and liberties as well as the rule of law. It has also caused significant discord between the United States and European states. As neither the threat of international terrorism nor U.S. and European involvement in military operations abroad appear to be abating, the United States and its European partners must urgently engage in an in-depth dialogue on preventive detention and international law.

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[16] Executive Order 13491, Sec. 5, e(ii), Jan. 22, 2009.

Laura M. Olson currently serves as a Senior Policy Advisor in the U.S. Department of Homeland Security's Office of Civil Rights and Civil Liberties, but this policy paper was completed prior to the appointment, and the views expressed herein do not represent the position or views of the U.S. Department of Homeland Security, the U.S. Government, or Ms. Olson. Previously, Ms. Olson was Senior Counsel at The Constitution Project, and prior to that she served for ten years as Legal Advisor to the International Committee of the Red Cross.

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