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POLICY BRIEF

BEYOND THE "WAR ON TERROR": TOWARDS A NEW TRANSATLANTIC FRAMEWORK FOR COUNTERTERRORISM

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SUMMARY

Deep divisions with the United States over counterterrorism policy have been a major problem for the European Union since September 11, 2001. The presidency of Barack Obama offers the possibility of a new approach, based on transatlantic agreement on the core principles for fighting terrorism. The EU should work with the new US administration to agree a comprehensive declaration on counterterrorism that could be signed under the Spanish presidency in 2010.

There will still be differences between EU and US approaches. President Obama believes that the United States is at war with al-Qaeda, and Europeans reject this idea. But these differences are likely to be outweighed by Obama's commitment to restore US adherence to international law and to respect fundamental human rights. Even in the complex area of detention, both partners should now be able to accept basic rules of due process.

To seize this opportunity, the European Union should launch an internal review to clarify its own views about core principles for fighting terrorism as part of the preparation for a joint declaration. Europe should also restart a dialogue on international law and counterterrorism with the United States. This would give it the chance to influence US thinking, and allow EU officials to push for clarification of the US position on key questions of international humanitarian law and human rights. Finally, the European Union should quickly agree a joint position on resettling detainees from Guantanamo, and member states should consider offering a new home to these prisoners wherever possible.

In the years since September 11, 2001, the European Union and the United States have been divided in their response to international terrorism. To many Europeans, the Bush administration's "war on terror" was both unjust in itself and harmful to European interests. Transatlantic disunity over counterterrorist policies caused practical problems on the ground and hindered the projection of a political message that could reduce the appeal of al-Qaeda and other terrorist groups. Now, with the presidency of Barack Obama, there is the chance for a new transatlantic understanding on the nature of the fight against terrorism. Europe should seize the opportunity to work with the United States to establish a set of principles that combine an effective response to the terrorist threat with respect for the fundamental values at the heart of the transatlantic alliance.

US counterterrorist policies are a direct and significant concern for European countries. International terrorism remains among the greatest security risks faced by Europe as well as the United States. While European security officials acknowledge that the United States has been successful in removing much of al-Qaeda's senior leadership and infrastructure from action, many also believe that US policies have made it easier for al-Qaeda to recruit supporters through a narrative of Western oppression and hostility toward the Muslim world.[1] It has been difficult for European countries to avoid being stigmatized by association with these policies

1 Based on ECFR interviews with current and former European security officials, November & December 2008.

because of the historic strength of the security alliance between Europe and the United States.

The record of EU member states during this period has also been troubling. There is strong evidence that a number of European countries cooperated with US counter-terrorism practices that offend their own proclaimed values, creating the impression of a gap between official rhetoric and covert practice. At the same time, EU countries have been slow to develop a comprehensive approach to the threat of terrorism from overseas.[2] In particular, Europeans do not have clearly agreed policies on some difficult questions raised by external military operations against non-state armed groups, where the United States has largely taken the initiative. More broadly, the European Union cannot hope to succeed in its declared ambition to expand the scope of the rule of law, multilateralism and human rights in international politics unless it works in close cooperation with the United States, with both partners respecting these values themselves. The "war on terror" has made such a transatlantic alliance much more difficult in recent years.

With Barack Obama in the White House, the difference between American and European conceptions of the fight against terrorism has narrowed substantially. President Obama moved swiftly to strike down many of the US policies that European governments found most problematic, and has recently begun to sketch out his ideas about what should replace them. There will not be complete transatlantic agreement: unlike European governments, Obama continues to assert that the United States is engaged in a global armed conflict with al-Qaeda that includes some legal right to detain or kill enemy suspects worldwide, and to try them before military tribunals in some cases. However, this difference between US and EU views is likely to be outweighed by Obama's apparent determination to restore the United States' standing as a law-abiding country, and the convergence between his broad vision of counter-terrorism and that held by EU member states.

This policy brief attempts to elaborate the areas of likely agreement between European and American visions of the fight against terrorism and assess the importance of the differences that remain. It argues that EU countries and the United States are now close enough in their views that they should be able —for the first time since September 11, 2001— to agree a common framework of understanding to guide their counterterrorist policies. Such a framework would be valuable in helping to resolve operational problems in areas like detention, transfer of individuals and interrogation. More significantly, it would allow the European Union and the United States to present a unified message to the world about their commitment to combat terrorism in line with the fundamental values that they both espouse.

2 For a detailed discussion, see Daniel Keohane, "The Absent Friend: EU Foreign Policy and Counter-Terrorism", Journal of Common Market Studies, Vol. 46, No. 1, 2008, pp. 125-146.

The best way to reinforce this message, this policy brief argues, would be through a public declaration of principles. Such a declaration would follow on from and complete earlier public commitments to cooperate in the fight against terrorism. It would serve as a powerful symbolic demonstration that the divisions of the last seven years have been overcome, and would help to re-establish Europe and America as leaders in the debate about the relationship between security and human rights in today's world. The author of this policy brief has already raised this idea in discussions with European and American officials and in writing.[3] There may now be an opening to move forward with an agreement along these lines: according to EU officials, US deputy secretary of state James Steinberg floated the idea of a joint declaration during talks in Washington on 16 March.[4] European countries should welcome this overture, but to reach agreement with the United States they will need themselves to launch a review aimed at developing a common position on the full range of principles governing counterterrorism. They will also need to decide how far these principles can accommodate different American policies, where they persist. Finally, as a contribution to a new partnership with the United States, the European Union should agree a common position on resettling some of the detainees who have been held in Guantanamo Bay.

The Fight against Terrorism—European and American Visions

European countries do not all see terrorism in the same way; but EU members do share a broadly similar outlook that is distinct from the vision that the United States followed after September 11, 2001. The differences are rooted in culture, ideology and geopolitics. As has often been pointed out, Americans see terrorism primarily as an external threat, while for European societies it has a large internal dimension.[5] The Bush administration presented the fight against terrorist groups as a war in which military methods—killing enemy fighters or removing them from the field of battle—would play a prominent part; Europeans see it above all as a matter of law enforcement. Under President Bush, the United States suggested that the objective of its policies (and thus the ultimate aim of the "war on terror") was the elimination of al-Qaeda as an organisation, while Europeans prefer to talk about the progressive reduction of a continuing threat.

There are genuine differences between European and American political culture and circumstances that affect their views of terrorism, but these differences were amplified by the particularly aggressive ideological claims that the

3 Anthony Dworkin, "A New Partnership in Support of International Law", European Council on Foreign Relations, 5 November 2008, http://ecfr.eu/content/entry/commentary_a_new_partnership_in_support_of_international_law_dworkin/
4 "US Raises New Anti-Terrorism Approach with EU", Reuters, 16 March 2009.
5 The United States has experienced internal terrorism, notably with the Oklahoma City Bombing of 19 April 1995, but it has not faced a sustained campaign of political violence from an organized group on its territory in recent years, and there is little evidence that al-Qaeda has succeeded in establishing active cells in the United States.

Bush administration put forward. European governments recognise the external dimension of terrorism, stemming above all from areas of weak or ineffective government. The British prime minister, Gordon Brown, said on 27 April 2009 that a "chain of terror" linked the border areas of Afghanistan and Pakistan to the streets of many of the capital cities of the world.[6] Germany has arrested suspects linked to an Uzbek Islamist group based in the Afghanistan/Pakistan border region, and security officials have expressed concern about the risk of attacks in Germany during the run-up to this year's federal elections. Spain and France face threats from the Algerian-based group Al-Qaeda in the Islamic Maghreb, while European counterterrorism coordinator Gilles de Kerchove has emphasized the importance of the ungoverned expanses of the Sahel as a hinterland for terrorists who might threaten Europe through North Africa. European governments regularly say that the aim of NATO's engagement in Afghanistan is to deny a safe haven to terrorists.[7]

Domestically, while highlighting the law enforcement dimension of counterterrorism, European states have taken or considered steps that go beyond the prosecution of individuals for attacks that have already taken place. Sometimes this has involved an expansion of the criminal law: for example, the criminal prosecution of terrorists in France is based on a legal concept of conspiracy, the *association des malfaiteurs*, that a leading French expert described as clearly "aimed at preventing a crime that has not yet happened."[8] In other cases, European governments have sought increased detention powers within the European human rights framework. The United Kingdom passed legislation allowing the government to detain foreign terrorist suspects who could not be returned to their own country for fear that they would be abused, and imposed control orders on the men after the system of detention was overturned by the nation's highest court. The German minister of the interior, Wolfgang Schäuble, has suggested that some form of preventive detention for terrorist suspects might be desirable.[9]

The essential difference between the vision of counterterrorism that is broadly shared by European states, and that of the Bush administration since September 11, concerns the degree to which the fight against terrorism requires governments to ignore normal rules. President Bush and his officials framed their response to al-Qaeda as something that took place, to a significant degree, outside the conventional rules and relationships that define international and domestic society. They appeared to believe that the urgent need to obtain intelligence about al-Qaeda's plans and to kill or capture its members meant that the United States must disregard the broader context in which counterterrorist efforts are pursued. Above all, the Bush administration often acted as if the "war on terror" need not comply with internationally accepted notions of the rule of law. It was responsible for indefinite detention with inadequate review, secret detention of some "high-value detainees", the systematic infliction of physical and mental pain and suffering rising to torture, and the rendition of prisoners to other countries where they were tortured by local intelligence services.

There is convincing evidence that several European countries were involved in some of these practices. An investigation carried out by the Parliamentary Assembly of the Council of Europe identified several forms of "collusion" for which its member states were responsible. These included hosting secret prisons, handing suspects over to the United States for unlawful detention, allowing "rendition" flights to pass through their territory, passing on intelligence for use in rendition or detention decisions, participating in interrogation of detained suspects, and making use of intelligence derived from interrogation involving physical and mental abuse.[10] The European Parliament convened a temporary committee on extraordinary rendition whose final report condemned "the acceptance and concealing of the practice, on several occasions, by the secret services and governmental authorities of certain European countries." [11] In many European countries, including most recently the United Kingdom and Spain, revelations of official involvement in the transfer of US prisoners have caused political embarrassment and controversy.

Intelligence sharing, joint interrogations and the granting of overflight rights would normally be routine actions for closely allied intelligence services. The legal and moral problems raised by such cooperation with the United States since September 11 illustrate the dilemmas that US counterterrorism policies have caused for Europe. In some cases, European intelligence agencies may have faced a genuine difficulty in fulfilling their duty to protect their publics by accepting and acting on intelligence from the United States, when the United States would not give details of the circumstances in which individuals were held.[12] However, as the UN special rapporteur Martin Scheinin has argued, participation in the interrogation of detainees held in places where their rights are being violated can be understood as implicitly condoning such practices.[13] While the Bush administration over time acknowledged some of the practices it engaged in, and President Obama has released further official memoranda from his predecessor's administration, European governments have been less forthcoming in accounting for the actions that have been attributed to them.

Whatever their involvement with US policies, EU countries continue to argue that terrorism should be confronted on a

6 "Press conference with President Karzai in Afghanistan", Prime Minister's Office, 27 April 2009, http://www.number10.gov.uk/Page19145.
7 For a recent statement, see Angela Merkel & Nicolas Sarkozy, "La sécurité, notre mission commune," Le Monde, 3 February 2009.
8 ECFR Interview with Antoine Garapon, Paris, 22 October 2008.
9 "We Could Be Struck at Anytime", Spiegel Online, 9 July 2007, http://www.spiegel.de/international/germany/0,1518,493364,00.html

10 "Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states", Committee on Legal Affairs and Human Rights, Parliamentary Assembly, Council of Europe, 12 June 2006.
11 "Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners", European Parliament, 30 January 2007.
12 Communication from former European security official, 9 March 2009.
13 "Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin", UN Human Rights Council, 4 February 2009, p. 19.

long-term basis within the normal framework of domestic and international political rules.[14] Although the European human rights framework allows countries to derogate from many of their obligations in times of national emergency, only the United Kingdom has proclaimed an emergency in respect of international terrorism since 2001, and it withdrew the claim after the House of Lords ruled that the legislation involved was disproportionate and discriminatory. In European civil law countries, authorities often have much greater leeway to act against suspected terrorists within the criminal justice system. France and Spain both permit lengthy pre-trial detention, and Spain allows incommunicado detention for up to thirteen days.[15] These laws, which reflect Europe's long history of confronting internal terrorist groups, have made it easier to prosecute terrorists without resorting to procedures drawn from military models.

A Shift under Obama

Through his speeches and his actions since taking office, Barack Obama has begun to change US counterterrorism policy in ways that bring it significantly closer to the European mainstream. While Obama follows his predecessor in saying that the United States is at war with al-Qaeda—he referred in his inaugural speech to a "war against a far-reaching network of violence and hatred"—he has notably refrained from talking of a broader "war on terror" as the central organizing principle of American foreign policy.[16] Instead he has indicated that he will take pains to differentiate his campaign against al-Qaeda from his wider attitude to the Muslim world. In his interview with al-Arabiya in late January he promised Arab and Muslim listeners that the United States was ready "to initiate a new partnership based on mutual respect and mutual interest".[17]

Within two days of entering the White House, Obama issued a series of executive orders that amounted to a sweeping rejection of the Bush administration's counterterrorism framework. He directed that the Guantanamo Bay detention camp be closed within a year; halted all prosecutions before the military tribunals established under the previous government; reversed the Bush administration's reinterpretation of Common Article 3 of the Geneva Conventions; required the CIA to use only those interrogation practices approved by the Army Interrogation Field Manual; ordered the closure of the CIA's secret prisons and required the United States to give the International Committee of the Red Cross access to all detainees held in connection with armed conflict. In a particularly pointed provision, Obama required all US officials to disregard any interpretation of the laws governing interrogation issued by the Department of Justice between September 11, 2001 and the end of the Bush administration.

In addition, Obama set up a task force to make recommendations by July 2009 about future American policy on detention, and another to make recommendations about interrogation and the transfer of prisoners to third countries by the same date. He also ordered reviews of the cases of all Guantanamo detainees. Obama's executive orders represented a significant change, but at the same time left fairly wide scope for the policy recommendations that the task forces will make. The orders did not rule out the possibility that the United States might continue to hold alleged terrorists without charge; they did not prevent the United States from setting up new military tribunals to prosecute terrorist suspects; and they did not forbid the use of rendition to transfer individuals to other countries, as long as it complied with international law. Even before the task forces complete their work, Obama has indicated that detention without trial and the use of military commissions are likely to form part of his counterterrorism policy, though in a different form than under President Bush.

The precise rules for these procedures remain to be determined, pending the task force reports and further negotiation with the US Congress. The task force process offers an opportunity for the European Union to engage with the United States and provide input that could help shape the new administration's counterterrorism policy. The EU should seek to introduce European views into the task forces' discussions, perhaps through a renewed dialogue between European and US legal advisors of the sort that was held during the last few years (as discussed in the following section).

Legal Frameworks for Fighting Terrorism

Despite the shift in direction under President Obama, the EU and the US will continue to have different perspectives on some aspects of the fight against terrorism. Although the significance of these differences should not be minimized, it would also be easy to overstate. While rejecting some American policies themselves, many European officials recognize that a number of them fall into a grey area and that their legitimacy depends in part on the way they are carried out. European officials are in many cases willing to concede that the United States is dealing with complex questions that have not arisen before and do not have easy answers.

At the heart of the differences between Europe and the United States is the question of which legal regime applies to counterterrorist operations. Outside the narrow circumstances of Afghanistan and Iraq, European governments have looked to domestic law and human rights law, while the United States has argued that the law of armed conflict is most relevant. In large part, this disagreement is likely to continue. Obama describes the fight against al-Qaeda as an armed conflict, and the United States has long argued that the International Covenant on Civil and Political

14 See e.g. the speech by David Miliband, "After Mumbai, Beyond the War on Terror", delivered 15 January 2009, and the French government white paper "Prevailing against Terrorism", La documentation Française, 2006, pp 123-4.
15 These measures have been criticized on human rights grounds. See "Pre-empting Justice", Human Rights Watch, 1 July 2008 and "Setting an Example?", Human Rights Watch, 26 January 2005.
16 See "Obama team drops "war on terror" rhetoric," Reuters, 30 March 2009.
17 "Obama tells Al Arabiya peace talks should resume", AlArabiya.net, 27 January 2009, http://www.alarabiya.net/articles/2009/01/27/65087.html

Rights, the most important human rights treaty to which it is party, does not apply outside American territory. Europe rejects the notion of a global war against al-Qaeda and all EU member states are party to the European Convention on Human Rights, which has been held by the European Court of Human Rights and national courts to apply extraterritorially in certain limited cases.

European and American views on the legal framework for counterterrorism were at the centre of a closed-door dialogue between government legal officials that was launched by the US State Department legal advisor John Bellinger in early 2006. According to participants, the discussions were helpful in clarifying views on both sides. European officials acknowledged that there can be an armed conflict between a state and a non-state group on the territory of another state. The United States indicated that, despite its assertions of a global war against al-Qaeda, it did not claim an automatic right to use armed force on the territory of any other state without its consent. Bellinger has said publicly that he would not suggest that the United States "is free to use military force against al-Qaeda in any state where an al-Qaeda terrorist may seek shelter". But he added that "where a state is unwilling or unable to [prevent terrorists from using its territory as a base to launch attacks], it may be lawful for the targeted state to use military force in self-defence to address that threat". [18]

The details that have emerged from this dialogue provide a useful starting point for assessing how far apart the EU and the US remain in their understanding of the legal framework for fighting terrorism. Many Europeans recognize the existence of an armed conflict against the Taliban and al-Qaeda in Afghanistan; where the United States goes further is in extending the boundaries of the conflict to take in al-Qaeda's operations around the world. The new US Attorney General Eric Holder said in his Senate confirmation hearing that he would regard someone captured by the CIA in the Philippines and suspected of financing al-Qaeda worldwide as part of the battlefield in a war. This assertion may be difficult for Europeans to accept, but it remains unclear what powers the Obama administration will claim in practice as part of this global conflict. Moreover the US Supreme Court has not yet ruled on the central question of whether there is an armed conflict with al-Qaeda as distinct from that against the Taliban in Afghanistan.[19]

Most importantly, the United States under Obama is likely to recognise much greater legal constraints on its military operations than the Bush administration did. Already, by revoking President Bush's executive order on Common Article 3, Obama has restored the United States to a mainstream interpretation of this key provision, which applies minimum humanitarian standards to conflicts between states and non-state groups.

Obama's administration can be expected to take a comparable step with respect to inter-state armed conflict. One of the most controversial claims made by President Bush was that even in these conflicts (such as the initial war between the United States and the Taliban regime in Afghanistan) irregular fighters were to be regarded as "unlawful combatants", not entitled to the protection due either to prisoners of war or civilians in the Geneva Conventions. This position found little support internationally, but there remains a question about how far such fighters are covered by the specific provisions on civilians in the Fourth Geneva Convention. However the United States has previously agreed that the set of "fundamental guarantees" listed in Article 75 of the first Additional Protocol to the Geneva Conventions applies at a minimum to all detainees in international armed conflict as part of customary law. The Bush administration refused to confirm this position, leaving American policy on a vital question of humanitarian protection in a damaging state of uncertainty.[20] It would be reasonable to expect the Obama administration to return to the traditional understanding, and European governments should ask for an early public confirmation of this point as a way of facilitating joint military operations in the future.

The new administration might also be prepared to clarify the US position on human rights. While the United States believes that human rights treaties do not apply outside its own borders, it has consistently recognized certain fundamental human rights as part of customary law. The Operational Law Handbook produced by the US Army Judge Advocate General's Legal Center says that a series of human rights are "binding on US forces during all overseas operations" and govern the treatment of any individual. The rights listed include the prohibition of: murder, or causing the disappearance of individuals; torture; punishment without fair and regular trial; and prolonged arbitrary detention.[21] European officials should press the new US administration to elaborate on the way these human rights apply in counter-terrorist operations.

Europe and the United States may continue to differ about which operations within the spectrum of armed force can legitimately be classified as part of an armed conflict. However, they should now be able to acknowledge a shared understanding that international law applies across the spectrum in a way that is predictable and respects fundamental human rights. In addition, the practical implications of the US claim that it is engaged in a global armed conflict with al-Qaeda may now be limited by the effect of international and domestic law and by a new assessment of American policy. In the following section, this paper examines the policy areas where EU countries and the United States have been at odds, and analyses how far their approaches are now likely to converge.

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18 John B.Bellinger III, "Legal Issues in the War on Terrorism", speech delivered at the London School of Economics, 31 October 2006, http://www.lse.ac.uk/collections/LSEPublicLecturesAndEvents/pdf/20061031_JohnBellinger.pdf.

19 It is sometimes claimed that the *Hamdan* decision in 2006 recognizes the existence of such a conflict, but in fact it merely said that if the conflict existed then it would be governed by Common Article 3 of the Geneva Conventions.

20 Anthony Dworkin, "United States is "Looking At" the Place of Fundamental Guarantees in the War on Terror", Crimes of War Project, 1 March 2006, http://www.crimesofwar.org/onnews/news-guarantees.html

21 "Operational Law Handbook (2007)", The Judge Advocate General's Legal Center & School, US Army, 25 June 2007, pp. 43-46.

Detention

The issue of detention has been at the heart of transatlantic disagreements since 9/11, and EU countries and the United States continue to have somewhat different views on the subject. Although President Obama has directed that Guantanamo Bay should be closed, his administration claims that the United States has a right to hold people it believes are closely linked to al-Qaeda as security detainees in an armed conflict, no matter where they are captured. On 13 March, the administration filed a brief in connection with habeas corpus litigation from Guantanamo that asserted a right to hold "persons who were part of, or substantially supported, Taliban or al-Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners". The brief further argued that "individuals who provide substantial support to al-Qaeda forces in other parts of the world [apart from the battlefields of Afghanistan] may properly be deemed part of al-Qaeda itself."[22]

While continuing to claim a global detention power, this legal brief tightened the standard for detention that had been applied by the Bush administration by requiring "substantial support" rather than merely "support". It also dropped the use of the term "enemy combatant" that had been employed by the Bush administration, and based the authority to detain on US statutory law rather than the president's inherent power as commander-in-chief during wartime, as the Bush administration had asserted. More recently, President Obama argued in a major speech on counterterrorism that the United States might need to detain "a number of people who cannot be prosecuted for past crimes, but who nonetheless pose a threat to the security of the United States".[23] He said he would exhaust every avenue to prosecute these people where it was feasible. He also promised to bring US standards for detention into line with international law.

European countries' views on the legitimate scope of detention during military operations remain unclear. EU member states participating in NATO's ISAF mission in Afghanistan initially transferred detainees to the United States as a co-belligerent, but since 2005 it has been NATO policy to hand all detained individuals to the Afghan government within 96 hours. This policy has attracted criticism because of reports that detainees have faced torture or inhuman treatment at the hands of Afghanistan's National Directorate of Security. However NATO has not developed an alternative, due partly to the lack of consensus among European members about whether they have a legal right to detain individuals in an armed conflict against a non-state group in a third country. NATO failed even to agree a common memorandum of understanding to govern the transfer of detainees to Afghan authorities. This was in part because some European states strongly opposed any provision that would have allowed Afghanistan subsequently to transfer the prisoners to third countries like the United States.[24]

During earlier military operations in Kosovo and Iraq, European armed forces maintained detention facilities either in the context of an international armed conflict and occupation, or with the authorisation of the UN Security Council. The situation in Afghanistan is particularly complicated because the Afghan government does not itself hold Taliban fighters as security detainees, but instead treats them as suspects within its criminal justice system. The complexity of the issue of detention was illustrated by the decision of the Danish government in 2007 to launch an inter-governmental discussion process on the handling of detainees in military operations (the "Copenhagen Process") that aimed to establish best practice standards that could be adopted by the UN Security Council for future missions.

While European nations do not share the US notion of a global armed conflict, the majority of those whom the United States wishes to continue detaining are fighters captured in Afghanistan or Pakistan, albeit of different nationalities. In large part, the difference between the European and American positions can be reduced to a dispute about the geographical extent of this armed conflict and the forms of participation that would justify detention. These questions are not straightforward in the case of an armed group such as al-Qaeda that does not fight through anything resembling conventional military engagements.

European objections to Guantanamo were based above all on the indefinite nature of the detention regime, the lack of clarity about what (if any) legal protection detainees were entitled to, and the sweeping and often arbitrary nature of American decisions about whom to detain. If future US detention policy is focused more tightly on those directly linked to al-Qaeda and apprehended in regions of disorder, and incorporates much better safeguards to ensure that there are adequate grounds for each individual detention, it should be less objectionable from a European standpoint. It might therefore be possible for European officials to work with the United States to try to agree basic principles governing detention that both transatlantic partners are willing to adopt. As part of this process, Europe should seek input into the task force that President Obama has set up to advise on US detention policy, perhaps through a submission drafted by the EU counterterrorism coordinator .

One core principle might be that detainees have the right to an independent hearing. Individuals detained as a security threat (apart from those detained as prisoners of war based on their status as combatants) should be entitled to appeal their case before an impartial body providing adequate due process with the least possible delay. This should include a right to be informed of the reasons for which they are

22 "Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay", United States District Court for the District of Columbia, 13 March 2009, pp. 2, 7.
23 "Text: Obama's Speech on National Security", NYTimes.com, 21 May 2009, http://www.nytimes.com/2009/05/21/us/politics/21obama.text.html?_r=1

24 Sibylle Scheipers, "Detention in the War on Terror", unpublished paper on file with author.

being held. There should also be a requirement of regular review, and recognition that detention can only be ordered on an individual basis for imperative reasons of security.[25] The nature of the review bodies might depend on the circumstances in which the detainee was captured and the length of detention.

It might be desirable to go further, and specify that all civilian detainees should ultimately be entitled to judicial review of their detention. It is not clear, however, that there would be a consensus for this principle, given existing uncertainty about the reach of human rights law, the lack of an entitlement to judicial review for civilian detainees in the Geneva Conventions, and the fact that US courts are currently considering cases about whether US-held detainees in Afghanistan are entitled to judicial review. At the least, a right of judicial review could be guaranteed for anyone who had not been detained in a zone of active hostilities.

It would also be desirable to recognize limits on the situations in which states can detain people without charge. The European Union and the United States should reaffirm that security detention is only permissible in situations of armed conflict, public emergency, or where authorized by the Security Council. A rule of this sort would not resolve disagreements about the definition of armed conflict or about whether an external terrorist threat can constitute a national emergency. But it would at least confirm that there are limits of principle on the exercise of security detention.

Secret Detention

When President Bush announced that he was transferring fourteen detainees from the CIA's custody to Guantanamo Bay in September 2006, he made it clear that the secret detention programme was not being closed down. President Obama directed that the CIA close its existing detention facilities and not operate any detention facilities in future. He also required that the International Committee of the Red Cross be notified and given timely access to any individual detained by the United States in any armed conflict.

It has been widely reported that two of the secret prisons operated by the CIA were in Poland and Romania, though neither state has acknowledged that they gave permission for secret prisons on their territory. More recently, the European Union has affirmed that secret detention facilities are "not in conformity with international humanitarian law and international criminal law".[26] The Council of Europe's Venice Commission has also declared the use of secret detention to be a violation of the European Convention of Human Rights.[27] EU member states and the United States should now be able to agree that in future they will hold all detainees in a registered place of detention and give their names to an independent organization such as the International Committee of the Red Cross.

Torture

Under President Bush, the United States produced new interpretations of international laws against torture that allowed the infliction of pain and suffering through methods such as "waterboarding" (near-suffocation with water) against suspected terrorists. The overwhelming consensus in Europe is that these methods fall well within the definition of torture. The divergence in transatlantic understanding of the relevant treaties was strikingly illustrated when the Foreign Affairs Committee of the British Parliament argued in 2008 that "given the clear differences in definition, the UK can no longer rely on US assurances that it does not use torture, and we recommend that the government does not rely on such assurances in the future." [28] A 2007 report by the International Committee of the Red Cross on the treatment of the fourteen "high-value" detainees held by the CIA, leaked to the press in March 2009, concluded that in many cases the detainees had been tortured.[29] In April 2009, Spanish judge Baltasar Garzon announced that he was opening an investigation into what he called "an authorized and systematic plan of torture and mistreatment" developed by members of the Bush administration.[30]

President Obama has already struck down the Bush administration's legal opinions on interrogation practices and expressed his opposition to torture in the strongest terms. The greater emphasis that he appears to place on prosecuting terrorist suspects wherever possible provides an additional reason for his administration to shun any coercive form of interrogation that might render confessions inadmissible at trial.

This shift creates the possibility of a renewed consensus between the United States and Europe on torture. Where differences persist, for instance regarding the precise definition of cruel, inhuman and degrading treatment in the Convention against Torture, these are not significant enough to present an obstacle to transatlantic understanding. The European Union and the United States should also attempt to formulate standards governing the questioning of, and provision of information regarding, detainees held overseas by other countries, in line with the UK government's recently-announced review of the subject.

25 For a similar set of requirements, see Ashley Deeks, "Administrative Detention in Armed Conflict", Case Western Reserve Journal of International Law, Vol. 40, No. 3, 2009, pp. 403-436.
26 "Press Release: General Affairs and External Relations", Council of the European Union, 15 September 2006, p.17

27 "Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners", European Commission for Democracy through Law (Venice Commission), 17/18 March 2006.
28 "Human Rights Annual Report 2007", House of Commons Foreign Affairs Committee, 9 July 2008, p. 25.
29 "Report on the Treatment of Fourteen 'High-Value' Detainees in CIA Custody", International Committee of the Red Cross, February 2007, p.26, available at http://www.nybooks.com/icrc-report.pdf
30 Daniel Woolls, "Spanish judge opens Guantanamo investigation", Associated Press, 29 April 2009.

Extraordinary Rendition

The policy of "rendition" whereby individuals are transferred from one country to another outside any legal process of extradition was not invented by the Bush administration. What was new in the Bush administration's use of rendition was that suspects were transferred not to face legal process but for the purposes of interrogation. The renditions carried out under President Bush have been criticised particularly because of the well-documented use of torture by the countries to which individuals were transferred.

The Obama administration has indicated that it is likely to continue the practice of transferring suspected terrorists to other countries outside legal process. Obama's newly-appointed CIA director, Leon Panetta, said in his confirmation hearing that "where we returned an individual to the jurisdiction of another country, and they exercised their rights to try that individual and to prosecute him under their laws, I think that is an appropriate use of rendition." [31] One of the task forces set up by Obama is directed to "study and evaluate the practices of transferring individuals to other nations in order to ensure that such practices comply" with domestic and international law. This would include the obligation under the Torture Convention not to "expel, return or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture".

European states have not—as far as is known—carried out renditions for the purposes of interrogation, but they have on occasion transferred people extrajudicially for trial. Former US secretary of state Condoleezza Rice described the French rendition of Carlos "the Jackal" from Sudan to France in 1994 as a historical precedent for US policies.[32] More recently, European countries have been criticised by human rights organisations for deporting people to countries that are known to use torture, relying on diplomatic assurances that the individuals concerned will not be tortured. European states have also petitioned the European Court of Human Rights to relax the standards applying in such cases. However, in the *Saadi* decision in 2008, the Court affirmed the absolute nature of the ban on torture, stating that the obligation not to expel or extradite someone who would face a real risk of torture in the receiving state was not subject to any exceptions, no matter how "undesirable or dangerous" the conduct of the person involved.[33] This ruling should provide the basis for a common European reaffirmation of the existing standard.

European objections to President Bush's use of rendition focused primarily on its essentially lawless nature and the use of torture by the countries to which prisoners were sent. The European Union and the United States should therefore be able to endorse a common position on the transfer of terrorist suspects even if the United States continues to use rendition, as long as it respects its obligations under international law. Specifically, EU member states and the United States should reaffirm that they will not transfer anyone to a country where there are substantial grounds for believing they would be subject to torture or cruel and inhuman treatment. Even with such a principle, both EU member states and the United States are likely to continue to rely on diplomatic assurances from receiving countries that they will not torture. The policy will remain controversial, but states do not appear ready to abandon it.

Fair trials

President Obama has made clear that his administration will follow a hybrid approach to prosecuting terrorist suspects. When feasible, the United States will try them in US domestic courts, as it did with the Qatari citizen Ali al-Marri, who pleaded guilty to the charge of conspiring to provide support to a terrorist organization in April 2009. In other cases, it will bring suspects charged with violating the laws of war before a revised version of the military tribunals set up by the Bush administration. President Obama announced on 15 May 2009 that he was seeking reforms to these military commissions—including a ban on evidence obtained through cruel, inhuman or degrading treatment, and restrictions on the use of hearsay evidence—that would "begin to restore the Commissions as a legitimate forum for prosecution, while bringing them in line with the rule of law."[34] He said he would also work with Congress to seek additional reforms in the future.

Europeans frequently criticized the military tribunals as they were constituted under the Bush administration. Shortly after they were first announced, the Spanish investigative judge Baltasar Garzon warned that "no country in Europe could extradite detainees to the United States if there were any chance they would be put before these military tribunals."[35] In May 2006, the British attorney general, Lord Goldsmith, said that he was "unable to accept that the US military tribunals proposed for those detained at Guantanamo Bay offered sufficient guarantees of a fair trial in accordance with international standards."[36] Later that year the US Congress passed the Military Commissions Act of 2006, which revised the military commission process. However, it retained a number of provisions that appeared incompatible with European conceptions of due process, in particular the possible use of evidence obtained through coercion, which Obama has now promised to reverse.

It remains unclear at the time of this announcement how extensively the Obama administration plans to use military trials for terrorist suspects. Many in Europe will

31 Eli Lake, "Panetta backs rendition, but not torture", The Washington Times, 6 February 2009.
32 Condoleezza Rice, "Remarks Upon Her Departure for Europe", US Department of State, 5 December 2005, http://2001-2009.state.gov/secretary/rm/2005/57602.htm
33 *Saadi v. Italy*, European Court of Human Rights, No. 37201/06, 28 February 2008.
34 "Statement of President Barack Obama on Military Commissions", Office of the Press Secretary, The White House, 15 May 2009.
35 Aryeh Neier, "The Military Tribunals on Trial", New York Review of Books, 14 February 2002.
36 "UK calls for Guantanamo closure", BBC News, 10 May 2006, http://news.bbc.co.uk/1/hi/uk_politics/4759317.stm

be uncomfortable with the idea that defendants should face military tribunals that will inevitably be associated with Guantanamo Bay and the record of President Bush's "war on terror". But if the European Union establishes a dialogue on principles for counterterrorism with the United States it may be able to exert some influence to limit the use of these commissions. More significantly, while the EU should not attempt to prescribe the form of legal process that the United States uses to prosecute terrorist suspects, it can insist that any US proceedings comply with international standards of due process.

EU officials should emphasise to their US counterparts that a common framework for counterterrorism will only be possible if all trials of terrorist suspects conducted by the United States, including those before military commissions, meet these standards. The European Union and the United States should be able to agree that anyone suspected of a terrorist offence should be entitled to a fair trial before an impartial and regularly constituted court offering key procedural guarantees, including the presumption of innocence, the right to be tried in one's presence, the right to call witnesses and to cross-examine the witnesses called by the prosecution, the right not to be forced to testify against oneself, the inadmissibility of evidence derived from torture or cruel treatment, and the right to have the sentence pronounced publicly. If the revised military commissions comply with these rules, they should not prevent the European Union and the United States from reaching agreement on a new framework of principles, even if European states continue to regard their use as ill-advised.

Targeted Killing

The use of targeted killings remains probably the greatest point of difference between Europe and the United States in the field of counterterrorism. The United States claims the right to kill individuals whom it believes to be terrorists in situations anywhere in the world where they cannot be arrested. It also implicitly claims a right to kill innocent bystanders during such an operation, in line with the principle of proportionality established in the law of armed conflict. [37] As discussed above, these killings may involve the use of force on another state's territory without its consent, if the United States believes that state is unable to prevent terrorist activity itself. President Obama has already authorized strikes from pilotless drones against al-Qaeda officials in Pakistan. The Bush administration carried out strikes in places such as Yemen where no armed conflict, as traditionally understood, was taking place.

Many European officials believe that such strikes carried out without the authorization of the country involved are unlawful. They also point out that popular opposition generated by civilian casualties, the danger of misdirected attacks, and the apparent infringement of national sovereignty frequently outweighs any advantage in killing suspected al-Qaeda officials. Outside a region of armed conflict, most European lawyers would regard targeted killings as illegal unless they were necessary to prevent an imminent risk of loss of life. In 2002, Swedish foreign minister Anna Lindh described a US missile attack on six alleged al-Qaeda operatives in Yemen as "a summary execution that violates human rights".[38]

Yet even on this contested subject, the divide between EU member states and the United States may not be as wide as it first appears. Most known or acknowledged targeted strikes carried out by the United States have occurred in Pakistan and are arguably connected to a recognisable armed conflict that stretches across the Afghanistan/Pakistan border. European officials generally acknowledge that some Taliban and al-Qaeda personnel in Pakistan direct or participate in armed attacks against the Afghan state and US and NATO forces. In such cases, the primary legal question, in the eyes of at least some European governments, is one of territorial sovereignty and whether Pakistan has consented to the use of force.[39] Often there can be ambiguity about whether a state has in fact agreed to an attack on its soil; states sometimes give consent in private while protesting in public. Some US experts believe that Pakistan has given permission for drone attacks and provided intelligence to support many of them.[40]

Outside regions of armed conflict, Europeans would look to human rights principles to regulate the question of when a state can kill individuals it alleges to be terrorists. Human rights rules impose strict limits on the use of lethal force by the state, but as set out in the European Convention on Human Rights they do allow the state to shoot to kill in some circumstances: when the use of force is no more than absolutely necessary in defence of any person from unlawful violence, to effect a lawful arrest, or in action lawfully taken for the purpose of quelling a riot or insurrection. There might be room for future discussion about whether the use of armed force to suppress international terrorist organizations could ever qualify as action against a global insurrection.

However it remains unlikely that European states would be willing to endorse any principle that authorized the killing of suspected terrorists outside zones of armed conflict. Equally, there is no sign that the United States is prepared to give up the option of using targeted strikes in such circumstances. For these reasons, and because of the ambiguity that surrounds US use of targeted strikes, it may not yet be possible to forge a transatlantic consensus on this issue.

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37 The principle of proportionality prohibits parties to an armed conflict from carrying out attacks that may be expected to cause civilian death or injury, or damage to civilian objects, that would be excessive in relation to the anticipated military advantage of the attack.

38 Brian Whitaker & Oliver Burkeman "Killing Probes the Frontiers of Robotics and Legality", The Guardian, 6 November 2002.
39 ECFR interviews with European security officials, November & December 2008.
40 Jackie Northam, "Drone Attacks in Pakistan Under Review", NPR, 2 February 2009, http://www.npr.org/templates/story/story.php?storyId=100131283.

A Declaration of Common Principles

Now that the far-reaching claims of the Bush administration have been removed, it should be possible for the European Union and the United States to reach agreement on a core set of guiding principles for the fight against terrorism. These principles would provide a basic framework of consensus within which discussions on remaining areas of difference could be pursued. Over time, this framework could form the basis for an emerging transatlantic standard of best practice and might allow for the development of agreed interpretations of the law. As outlined in the discussion of policy areas above, the principles would apply across the spectrum of action against international terrorism, encompassing both armed conflict and law enforcement, in recognition of the fact that some fundamental rules should govern state action irrespective of the precise legal qualification of the situation involved.[41] This would have the advantage of providing consistency in the face of complex new threats where there may be disagreement about whether the threshold of armed conflict has been met.

In June 2004, following the Madrid bombings, the European Union and the United States issued a joint 'EU-US Declaration on Combating Terrorism' at the end of their annual summit.[42] The document made only a passing reference to the importance of respecting human rights and the rule of law, as its text was primarily directed toward enhanced practical cooperation. It should now be possible to agree a much more comprehensive and fundamental declaration. This statement, which could be described as an 'EU-US Declaration on Essential Principles in Combating Terrorism', should set out in clear and concise form the central principles that Europe and the United States intend to follow. It should reaffirm, in line with the United Nations Global Counter-Terrorism Strategy, that Europe and the United States unequivocally and strongly condemn terrorism in all its forms and manifestations. It could also express a European and US commitment to combat terrorism in a balanced way through a wide range of preventive and judicial measures including military operations where appropriate and legally justified, and reaffirm the signatories' determination to cooperate fully against it.

It would be important in the text to avoid any suggestion that currently applicable laws were being weakened through seeking the lowest common denominator between states with different treaty obligations and interpretations of the law. The declaration should state explicitly that it does not modify or supplant any existing legal obligations, that it does not represent an attempt to break away from counterterrorism standards being developed through the United Nations, and that the EU and the US are fully committed to work through multilateral institutions to strengthen international rules and procedures in this area. Instead it should be presented as a forward-looking statement of policy, setting out the principles for counterterrorism that best accord with the values espoused by the European Union and the United States and enshrined in human rights law and international humanitarian law.

Such a declaration would help to draw a line under the divisions and controversies of recent years, and provide an important asset in the ideological battle against al-Qaeda. Counterterrorist officials in several European capitals, interviewed for this policy brief, unanimously agreed that a declaration of common principles would be a valuable way of enhancing the image and legitimacy of the transatlantic alliance in combating violent extremism. A publicly declared framework of principles could also provide a powerful example to the rest of the world and put Europe and America at the forefront of global efforts to define appropriate standards for responding to new forms of terrorism. This would help take forward the recommendations in the Madrid Agenda, agreed at a high-profile international conference organized by the Club of Madrid in 2005.[43] In this way, the European Union and the United States could work to reverse one of the less-noted results of the "war on terror", whereby the Bush administration's policies gave rise to or encouraged similar practices among US counterterrorism allies such as Pakistan, Uzbekistan, Saudi Arabia and Afghanistan.[44]

Some Europeans might worry that such a declaration would compromise European standards, by appearing to accept US policies in areas such as detention or military trials where the EU countries and the United States continue to disagree. European governments and publics may have different views about whether President Obama has struck the right balance so far between the demands of human rights, US national security and domestic politics. But the argument of this policy brief is that Obama's early actions display a genuine concern to bring US policy into line with fundamental principles of international law, and thus represent a significant change from his predecessor. Moreover, his administration has not yet taken many important decisions about how these policies will be implemented. By engaging with the new administration, the European Union will gain influence in shaping their development. EU member states should be willing to overlook some remaining differences of interpretation with the United States to secure the important benefit of a shared commitment to work together in support of the rule of law.

Ideally, a declaration of principles could be issued at the first EU-US summit following the completion of the American task force review process, which will take place under the Spanish presidency in the spring of 2010. The signing of a declaration during Spain's presidency of the European Union

41 For a comparable approach, see Jelena Pejic, "Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence", International Review of the Red Cross, Vol. 87 No. 858, 2005, pp. 375-391.
42 "EU-US Declaration on Combating Terrorism", Council of the European Union, 10760/04, 26 June 2004.
43 The Madrid Agenda, produced at the international summit on Democracy, Terrorism and Security organised by the Club of Madrid in March 2005, recommended a number of steps that would represent a comprehensive response to terrorism based on international cooperation. See http://www.clubmadrid.org/cmadrid/index.php?id=543.
44 Ahmed Rashid, *Descent into Chaos*, (Allen Lane, 2008) pp. 306-12.

would have particular resonance as Spain has suffered the most destructive terrorist attack of any European country.

Working towards an agreement with the United States will require EU member states to spell out their own common vision of essential principles for the full spectrum of counterterrorist operations. The primary challenge for the EU will not be to resolve entrenched differences between EU states—such differences as have emerged are mostly concerned with narrower operational questions—but to undertake the kind of systematic appraisal of the framework for counterterrorism that EU states have shirked so far. To do this, and to resolve any disagreements that might appear in the process, the European Union should launch its own internal review.

This review should be driven forward by the Czech and incoming Swedish presidencies. It should be discussed in the Committee of Permanent Representatives (Coreper), with input from the counterterrorism coordinator, from the Council Working Group on Public International Law (COJUR), and from the European Commission directorates-general for Justice, Freedom and Security and External Relations. Sweden, which has a longstanding interest in human rights, might make it a priority to establish a new and more principled basis for the counterterrorism policies of EU countries and the United States. Spain might also take a close interest as the country that would host the prospective declaration in 2010. The new European Parliament should be involved in the discussions and should encourage member states to endorse the idea and work with the US administration. While the review is conducted, EU officials should also hold regular meetings with their US counterparts to ensure that European and American thinking is coordinated.

Closing Guantanamo: Why Europe Should Help

President Obama's announcement that he would close Guantanamo Bay was the first and most visible sign of a new approach to counterterrorism. Obama has set an ambitious target in promising to close Guantanamo Bay within a year and has said that he hopes to resolve the status of as many detainees as possible before that time. He has also made it clear that he would like European countries to assist in this process by resettling some of the estimated 50-60 detainees whom the United States no longer wants to detain but who cannot be returned to their own countries because they might be abused.

Following an initiative by the Portuguese foreign minister, European member states discussed the issue at a General Affairs and External Relations meeting in January and subsequently at two Justice and Home Affairs (JHA)/Mixed Committee meetings.[45] At the Mixed Committee meeting in early April, ministers agreed to work towards an EU response to the closure of Guantanamo and tasked Coreper to present a proposal on an EU framework for accepting detainees. Ministers specified that this framework would involve decisions taken on a case-by-case basis by individual member states, based on comprehensive information and intelligence provided by the United States.[46] A decision on establishing this common framework is due to be taken at a JHA Council meeting in early June.

In 2009, the United Kingdom has accepted a former UK resident from Guantanamo and France has taken an Algerian citizen who has family members living in France. Other EU countries that have said they will consider accepting detainees include Portugal, Spain, Ireland, Italy, Lithuania and Belgium; EU member states that have declared they do not expect to take any of the remaining prisoners include the Czech Republic, Austria, Poland, the Netherlands and Sweden.

The situation in Germany appears particularly complicated. In the past the foreign minister, Frank-Walter Steinmaier, has said that Germany should consider taking some of the detainees, while the interior minister, Wolfgang Schäuble, has indicated he is reluctant to accept any. However, according to news reports, the United States has now suggested that Germany take several of the Chinese Muslim Uighurs remaining at Guantanamo, and this has raised an additional concern that it might affect Germany's relations with China.[47] The United States has also suggested that it may allow some of the men—perhaps including a number of Chinese Uighurs—to settle in the United States, which may help reduce opposition in Europe to accepting detainees.

Accepting former Guantanamo Bay detainees for resettlement would involve a degree of security risk and could present political and legal complications in some countries. Any country that accepted detainees would have to integrate them into society and perhaps keep them under surveillance. But by agreeing to do so, European countries would contribute to resolving an injustice that European countries have frequently criticised. They would also show their commitment to re-establishing a counterterrorism alliance with the United States based on international law and human rights, and gain influence with the United States in devising common standards in this area. EU member states should make sure that their decisions about resettling Guantanamo detainees reflect these broad strategic concerns as well as narrower issues of domestic security.

Although the decision on accepting individual prisoners will be taken by member states, it is important that the EU succeeds in coming up with a common position on the subject. Establishing a single framework for negotiations with the United States would eliminate the danger of individual European countries reaching bilateral arrangements with

45 The Mixed Committee is made up of the EU countries plus Iceland, Liechtenstein, Norway and Switzerland, which are associated to the Schengen Agreement.

46 "Press Release: 2936th Council meeting, Justice and Home Affairs", Council of the European Union, No. 8478/09, 6 April 2009.

47 "German Foreign Minister Opposes Taking Uighur Guantanamo Inmates", Spiegel Online, 18 May 2009.

divergent standards and requirements. Because of individual freedom of movement within the Schengen area, there is also a strong collective interest in any decision to resettle detainees; such decisions may require the sharing of information with other countries or special visa arrangements to restrict the travel of former detainees in some cases.

Most importantly, if the EU sets a common framework for negotiations with the United States, the process of resettling detainees could give a strong boost to a wider discussion on the principles and legal structures applicable to counter-terrorism. In this way, it could help in the development of a shared transatlantic understanding on issues that have remained unresolved since 2001.

Conclusion

Seven and a half years after the attacks of September 11, 2001, Europe and the United States still lack a fully shared understanding of how to respond to terrorism. The presidency of Barack Obama offers the chance to move forward to a transatlantic consensus on counterterrorism that represents the best of European and American values, and that can be publicly affirmed as a model for confronting new security threats within the framework of the rule of law.

The EU should immediately begin an internal process of assessing core principles for combating terrorism, and establish contacts with the United States to ensure that there is European input into the American task force reviews. The dialogue between the EU Working Group on International Law (COJUR) and the US State Department's legal advisor, which was halted when President Bush's team left office, should be resumed under the new administration. The European Union should strongly urge the United States to reaffirm its commitment to respect fundamental guarantees of humane treatment in armed conflict as part of customary law, and seek clarification on US interpretation of the place of fundamental human rights in overseas military operations. At the same time, the EU should agree a common position on resettling detainees from Guantanamo, and encourage member states to take individuals, where appropriate, as part of a wider understanding between the EU and US on recasting the struggle against terrorism.

The European Union and the United States should begin work towards drafting a public declaration on fundamental principles for confronting terrorism, to be signed under the Spanish presidency in 2010. This declaration should make clear that the fight against terrorism comprises many different aspects, and that it must always be conducted within a multilateral framework and in accordance with international law and fundamental human rights.

The declaration should set out a list of guiding principles that EU states and the United States undertake to observe, including that: any individual detained as a security threat is entitled to have their case reviewed through an independent hearing with the least possible delay, and thereafter to regular review; security detention is an exceptional measure, and can only be ordered on an individual basis in situations of armed conflict, public emergency or where ordered by the UN Security Council; no one should be held in secret detention; no one should be subjected to torture or cruel and inhuman treatment; no one should be transferred to any country where there are substantial grounds for believing they would be in danger of being tortured; no one should be convicted of a criminal offence or sentenced except after a trial before a regularly constituted court that meets all essential procedural guarantees.

Such an approach would allow the European Union and the United States to set aside the legacy of their divided response to international terrorism, and deepen their cooperation in a way that recognizes both the severity of the threat that terrorism poses and the importance of a principled stand in confronting it.

Annex: An overview of international laws mentioned in the text

The **Geneva Conventions of 1949** are the cornerstone of contemporary international humanitarian law (IHL), also known as the law of armed conflict. Every country in the world is a party to them. The four Conventions cover the treatment of wounded and sick members of the armed forces on land; wounded, sick and shipwrecked members of the armed forces at sea; prisoners of war; and civilians in time of war. The Geneva Conventions apply during an armed conflict between two or more states that are party to them—effectively, during any international, i.e. inter-state, armed conflict.

Common Article 3 of the Geneva Conventions stands apart from the rest of the Conventions because it alone applies during armed conflicts that are "non-international", that is conflicts in which at least one of the opposing forces is a non-state armed group (or a collection of such groups). According to the International Committee of the Red Cross (ICRC) the armed conflict in Afghanistan, which was initially international in nature, is now governed by Common Article 3, as it pits the Afghan government and multinational forces against the non-state forces of the Taliban and al-Qaeda. Common Article 3 sets out basic humanitarian rules that govern the treatment of all persons in the hands of the adversary, including protection against murder, torture, and humiliating and degrading treatment.

The **Additional Protocols of 1977** were introduced to fill a number of perceived gaps in the Geneva Conventions. The First Additional Protocol applies in international armed conflict and sets out additional protections for civilians, including a set of "Fundamental Guarantees" (in Article 75) that apply to anyone detained by the opposing side. The Second Additional Protocol establishes a more limited set of rules for civilians in non-international armed conflicts. The First Additional Protocol has been ratified by 168 countries and the Second Additional Protocol by 164 countries. All EU member states are party to both Protocols. The United States is not a party to the Protocols.

Customary law is an important source of IHL. It consists of those rules that states generally follow out of a sense of legal obligation even when they are not bound to do so by any treaty. Much of the First Additional Protocol, such as its rules on distinguishing between combatants and civilians in the conduct of military operations, has acquired the status of customary law; even countries that are not party to the Protocol, like the United States, recognise these rules as binding. However the Bush administration caused some controversy when it refused to repeat assurances given by earlier US administrations that the "Fundamental Guarantees" of the First Additional Protocol formed part of customary law. Customary law is also important in internal (or "non-international") conflicts, where applicable treaty law may be limited. There is no definitive codification of customary law; the ICRC published its views on the body of customary IHL in 2005.

The **International Covenant on Civil and Political Rights** (ICCPR) was adopted by the UN General Assembly in 1966 and entered into force in 1976. It is based on the ideas of the Universal Declaration of Human Rights (which did not have binding legal force) and includes safeguards against arbitrary deprivation of life, torture, and arbitrary arrest or detention, along with rights to freedom of expression, freedom of assembly and many others. Parties to the Covenant may derogate from (that is, suspend the application of) some provisions in time of public emergency, but the prohibition of arbitrary deprivation of life and the prohibition of torture are non-derogable. The ICCPR obliges each state that is party to it to observe its rules with respect to "all individuals within its territory and subject to its jurisdiction". The UN Human Rights Committee has interpreted this to apply to all people within a state's power or effective control, but the United States has consistently argued that the ICCPR only applies to the treatment of individuals within its territory. The ICCPR has been ratified by 152 countries; those that are not party include Burma, China, Cuba, Pakistan and Saudi Arabia.

The **Convention against Torture** was adopted by the UN General Assembly in 1984 and came into force in 1987. It obliges all states that are party to it to prevent acts of torture in any territory under their jurisdiction, and not to return any individual to a country "where there are substantial grounds for believing that he would be in danger of being subjected to torture". European countries interpret this to forbid returns to countries where there is a "real risk" of torture, while the United States interprets it to apply when it is "more likely than not" that an individual will be tortured. The Convention also requires states to investigate anyone suspected of committing torture, and also requires them to prevent any acts of cruel, inhuman or degrading treatment. The Convention against Torture has been ratified by 136 countries.

The **European Convention on Human Rights** (ECHR) was adopted in 1950 under the auspices of the Council of Europe. All EU member states are party to it. It is enforced by the European Court of Human Rights, which can hear cases brought by individuals and can require states to offer a remedy for any violation of rights. The ECHR protects everyone within the jurisdiction of states that are party to it, and a complex body of case law has evolved regarding the circumstances in which it can also apply outside a state's territory. Although the question is still disputed, there is at least widespread agreement that the ECHR protects individuals held in a regular place of detention overseas (for instance, Iraqi prisoners held at a British army base in Basra). The ECHR allows derogation in time of war or other public emergency threatening the life of the nation, but does not allow derogation from the right to life (unless as a result of a lawful act of war) , from the prohibition of torture, the prohibition of slavery, and the right not to be punished without law.

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