



CHATHAM HOUSE

Chatham House, 10 St James's Square, London SW1Y 4LE
T: +44 (0)20 7957 5700 E: contact@chathamhouse.org
F: +44 (0)20 7957 5710 www.chathamhouse.org

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Transcript

International Law and the Obama Approach

Harold Hongju Koh

Sterling Professor of International Law, Yale Law School; Legal Adviser to the US Department of State (2009-13)

Chair: Philippe Sands QC

Barrister, Matrix Chambers; Professor of International Law, University College London

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Philippe Sands:

Good afternoon ladies and gentlemen, welcome to Chatham House for an hour's conversation and an opportunity for you to ask questions to Harold Koh. My name is Philippe Sands; I teach international law at University College London, I'm a barrister. I've known Harold Koh for many years and it's a real pleasure to be here with you and with him today.

Harold Koh doesn't need a lengthy introduction; he has an enormously distinguished career as a scholar and as a public servant. He has taught at Yale Law School for many years, he was a very distinguished dean at Yale Law School. He has a global reputation as a wonderful scholar of international law, greatly respected by those who are with him and those who are against him, which is telling an important point. He has also had very distinguished public service both in the Clinton administration and, more recently, in the first term of President Obama's administration as legal adviser to the secretary of state, Hillary Clinton.

We're going to touch on as many issues as we can, we'll follow the format of having about 20, 25 minutes of conversation and then we'll throw it open to you for questions and we'd invite the questions to be as short and focused as they possibly can be so that we can get through as many as possible. Can I begin with that moment in 2009 when you came into the seat, so to speak, of legal adviser. The context was previous administration of President Bush which had a, let's say, semi-detached relationship, is the perception, to international law. What were the immediate things in your in-tray?

Harold Koh:

So thank you Philippe and let me say the feeling is mutual, I've been educated here in the UK, have come for 30 years and it's always great to be here with friends and interested collaborators on some of the issues. I did not get into my job until June 2009 for the simple reason that my confirmation was blocked because of my criticism of the Bush administration, and this actually sent the major signal of what was going to be the difference, which was that I had been unanimously confirmed under President Clinton, had then gone on to a mainstream job, dean of an Ivy League law school, and then found myself essentially in a kind of limbo.

Finally it was actually broken by the fact that Hillary Clinton broke her elbow, because on that day apparently it was the last day when I could get confirmed before the session and she was so angry and her throat wasn't broken, so

she called and demanded that I get a hearing and I did. So I got in on 26 June, which is almost halfway through the first year.

What was surprising to me was how much had already happened and been set in stone, or the basic lines had been set. I would characterize the Bush administration as having a doctrine of hard power and essential indifference to international law. You use the polite term semi-detached, but I think in many respects, especially in the first term, the attitude was that in new areas of technological activity or in new developments where the international law that is written does not exactly apply, you should treat it as some sort of black hole to which these old rules are quaint or inapt.

So it became clear that the Obama/Clinton group had to set up a different kind of approach, and the basic approach defined by President Obama was 'engage around our values' and the basic approach defined by Secretary Clinton was what you call 'smart power'. People thought this was a slogan and what we tried to do was to give this content, and if you go and look on Google under Hillary Clinton and smart power you will find dozens of speeches that she gave on the subject. The basic thought was that the United States is not a hegemon, it needs to exert leadership through values, that smart power means that you should use a range of tools, particularly multilateral engagement around issues of law, and that while hard power is not removed from the equation it should be a piece of a much larger package that includes diplomacy, development, public-private partnerships, work with international institutions and the like.

So I think over time this became what I call engage, translate and leverage. On each issue, smart power meant figuring out who the other interested stakeholders were and engaging with them, trying to figure out where there was a common position. If there was a legal issue and a relevant set of legal rules trying to translate the rules to new situation, then if you had a core set of beliefs you would try to then leverage that into a governance structure. Maybe the easiest and simplest example is of the rights of lesbians, gays, bisexuals and transgender persons. This is something that other administrations had not touched with a ten-foot pole but Hillary Clinton decided to engage – namely go to the Human Rights Council of Geneva where we had previously had no relationship until Obama came in – and then make a speech saying that LGBT rights are human rights. In other words, translating a new set of discriminated persons into a traditional concept, namely traditional human rights and human rights protections, and then combine that with other private initiatives and also domestic initiatives like eliminating 'don't ask, don't tell' in

the military, standing up for marriage equality to try to push a movement toward equal treatment of people based on sexual orientation.

I've given a lecture here in London that reviews how this was done in a whole bunch of areas: human rights, the International Criminal Court, climate change and, not the least, response to 9/11, and so you may not like the approach or you may disagree with how this translation was done in any particular instance but there is a distinctive Obama approach, which is the title of these remarks – different from I think a hard power or black hole approach – which I would call smart power: engage, translate and leverage.

Philippe Sands:

Can we hone in on one area to just test how far it went? I, in that period of President Bush's administration, spent quite a lot of time working with a rather wonderful clinic that you'd been very supportive of at Yale Law School, Hope Metcalf and other colleagues, on the practice of detainee interrogations, which went way beyond, in my view, what international law permitted and I think you were rather public also in expressing serious concerns about what had happened. I think it's no secret, it's public material – your predecessor had supported waterboarding in 2002. President Obama comes into power, he has this new mindset that you've just described, but the rubber hits the road on some pretty big issues. President Obama says famously, 'I want to look forward not back', so we're not going to address the issue of the legacy on the torture.

But a price is paid for that, because it surely undermines the United States' ability to work in the Human Rights Council and point the finger at others – who will have worse records on torture and human rights, but if you're not bringing your own house in order, if you're not looking into what happened, having accountability, at having even some sort of truth and reconciliation, how can you stand on the world stage and say 'it's a new era, we're going forward, we're going to follow our international obligations'?

Harold Koh:

Well first of all torture stopped.

Philippe Sands:

It did, yes.

Harold Koh:

And waterboarding stopped and nobody claims that it has been done again and nobody has accused the Obama administration of inhumane treatment, interrogation or anywhere else, and no one has accused us, or the former us, of using the fruits of tortured information. So I think that's a significant development. If you're looking for a total outcome, it's past, present and future, which is nothing now, no use, nothing in the future and nothing in the past. What happened with regard to the past was that the president referred this to the attorney general, the attorney general referred it to a special prosecutor and investigations were conducted and then results were given as a result of that.

Philippe Sands:

In relation to certain specific acts, but not the totality of the acts.

Harold Koh:

Well yeah, again I wasn't working for the Justice Department and that's a call that they have to make, but I think that the critical point was: did the administration intend to turn a page? Yes. Did they in fact start to turn that page?

I thought turning the page meant several things: number one, no torture, and I think they were very successful on that account. Number two, an announcement that they would close Guantanamo, the president made an announcement on that, started progress and then Congress resisted and it slowed down. A week ago or two weeks ago he announced that he would renew that effort. A third part of it was to bring both detention and other kinds of activity on conflict with Al-Qaeda into a legal frame, domestic and international, and that was done recognizing that the Geneva Conventions apply, etc.

Then the last part was how to actually address detainees going forward and the key there was an announced focus on prosecutions, but again many of those prosecutions stalled. So by May of 2009 when the president gave the National Archives speech, he had announced a desire to turn the corner, had started the process of turning a corner and then frankly I think other priorities took over – healthcare, the economy – and there was enough resistance on this point that he did not get back to it until a few weeks ago.

Philippe Sands:

I want to come back to that recent speech and the direction that we take in the second term, but I want to push you a little further on the failure – and it was a failure in my view – to look back to what had happened in the past and deal, for example, with the obligation to investigate and if necessary to prosecute or to refer to prosecutions or investigations taking place elsewhere. That didn't happen; there were a couple of investigations. Does it not undermine the ability of the United States to hold others to account on these kinds of issues if it has not brought its own house in order? Bringing its own house in order isn't just stopping it – it has stopped, I agree with you entirely – but things happened in that period between 2001 and 2009 on which there's been no scrutiny, no investigation, no accountability. Is that good enough? Would you, left to your own devices, have done things differently?

Harold Koh:

Well we have a separation of powers system. The president doesn't announce prosecutions. The president has an attorney general, he refers it to a process and the process plays out. It could be done more or less rigorously and with more or less outcomes in terms of convictions, etc. I have my own views, which I'm not going to express here, about the outcomes there but I think that the net result of it was that as we move forward this piece was turning along. I didn't know what the outcome would be on accountability determinations until two or three years into the administration. When you're doing something as opposed to talking about it a number of things are set in motion and you hope that those things will play out in a perfect scenario. It turns out that does not always happen, but that doesn't mean that people either had bad motives or that amounts to a failure. In fact, I still have a lot of hope for the way a lot of these things will play out.

By the way, I think the mistake was not so much the failure of prosecutions as the failure to endorse the truth and reconciliation process, which was proposed by Senator Leahy at the beginning of the administration and it wasn't picked up on by the administration. I think that that would have been probably the most effective way to address it, and this opportunity was missed before I even came into the government.

Philippe Sands:

So the horse had bolted, it was gone, there was nothing to be done about.

Harold Koh:

As I said, in the six months – people talk about the first 100 days, it's actually the first 80 days and I came in about day 300 and a lot happens during that period. That's one reason people now prefer to be not confirmed by the Senate because they can be there on day one.

Philippe Sands:

You touched on President Obama's recent speech, which is sort of resetting the agenda. Where are we on the global war on terror? Is there still such a thing?

Harold Koh:

No. And by the way that's not a change. If you look over the speeches of the Obama administration the word 'global war on terror' was never used, not from day one, not since 2009. It's the press that kept the notion going and it was the Obama administration that tried to restrain its use.

What he said a week ago is there is no global perpetual war on terror – we're engaged in a series of specific actions designed to dismantle particular terrorist networks that are threatening the United States, particularly Al-Qaeda, the Taliban and their associated forces. So we're talking about several thousand people where many of whom the leaders are gone, and we're talking about people who are located in several different countries but not everywhere in the world. So this is an absolutely point: if we all agree that there is no global war on terror then those who are opposed to that notion shouldn't use it.

Philippe Sands:

You gave a lecture in the Temple recently that I attended – the first Tom Bingham memorial lecture, which was a wonderful occasion – and after you'd given your lecture there were a large number of questions. Were you surprised at how many of the questions focused on the issue of drones and the use of drones?

Harold Koh:

Yes and no. No, I wasn't surprised, because I think it's a thing people ought to be concerned about. There's a lot of strong feeling. When President Obama gave his speech a woman stood up in the back and started protesting and they engaged in a long conversation about it, and to the president's credit he said, look, these raise very difficult issues. Frankly a lot of the frustration that had built up was because of a lack of transparency by the government to make its case. Remember that until two weeks ago President Obama never acknowledged that he had participated in any drone operation. The only targeted killing operation he had personally acknowledged was Osama bin Laden, so for that speech to even happen was a major change of policy with regard to transparency. But I was surprised.

This is the other side of the equation because drones are a tactic. I mean, are people going to get up and ask me about bullets or spears or catapults or guided missiles or cyber commands? Technology evolves and technology can be used for conflict or not. If the technology is inherently illegal like landmines or chemical weapons it should be per se prohibited, but there are many technologies that can be legal if used in the context of laws of war and illegal if used in violation of the laws of war, and I would consider drones to be among them.

Philippe Sands:

I mean it would also be my view that there's nothing inherently unlawful about the use of a drone. On a battlefield situation one can quite imagine circumstances in which its use would be perfectly lawful.

Harold Koh:

More than that. You can imagine a situation where it'll be superior.

Philippe Sands:

Well hang on, let's put that on one side.

Harold Koh:

Because it is targeted to the person who is the combatant and not to a civilian.

Philippe Sands:

Let's put that kind of use on one side and let's talk about the use that I think the questions in the Temple were more focused on – which is the use outside the traditional battlefield, the use of drones in places like Yemen, in places like Pakistan, perhaps in other places that we don't know about. What is your principal concern – and I'm asking you here to take off your hat as former legal adviser and put on your hat as scholar at Yale Law School. What is your principal concern with the use of drones in those circumstances, targeting both non-Americans and Americans?

Harold Koh:

So first of all I think there has been a very broad misreading of the scope of the claim being made by the Obama administration with regard to strikes off the battlefield. There is a perception, and I think it's inaccurate, that the Obama administration has asserted a right to hit anyone in self-defence off a battlefield whether or not there's lawful process available and with whatever lack of precision seems appropriate to the decision-maker under the circumstance. That's the caricature, but it's one I hear all the time even by highly sophisticated audiences.

The exact position, stated with great clarity and specificity the other day by the president, is that when a leader of one of these groups with whom the United States has declared armed conflict consistent with the laws of war – namely Al-Qaeda, the Taliban and associated forces, that's less than 3,000 people – if one of those people leaves the hot battlefield, as in another area, say Yemen or Somalia, and has been conducting activities that makes them a continuing or imminent threat, in self-defence it is permissible within the context of laws of war to target them, and only them, with what he calls near certainty that there are no civilian casualties and near certainty that they are the person who is under identification.

Whether you like it or not it is a much narrower theory, and he said capture is the first option, so there is an exhaustion of local remedies. So the next time somebody says 'oh could you take out somebody here in London with a drone?' the president's answer is no, of course not, there's a law enforcement mechanism, there's Scotland Yard, there's the Metropolitan Police, you go to them first.

So I think the real question for lawyers who are being careful to pass this is the claim that the president made, one that is overbroad, inherently illegal – obviously you need to hold him to it; he stated these rules, the question is will

he follow those rules? If he does follow them I would argue that the core of the programme is legal.

Philippe Sands:

Including under international law, putting aside domestic US constitutional issues?

Harold Koh:

I believe it's legal under international law. I wouldn't defend it if I didn't think it was.

Philippe Sands:

To target that category of people in principle anywhere in the world?

Harold Koh:

Well the other way to put it, Philippe, is if Osama bin Laden was in Afghanistan and he went to Yemen, does he acquire immunity because he left the battlefield even though everything else he's doing is exactly the same, including planning to hit your house?

Philippe Sands:

So if we can use these techniques of delivering targeted weaponry against them in these circumstances in principle anywhere in the world in a situation of conflict as you put it, why can't they use them against us?

Harold Koh:

Because they'd have to meet all the same conditions. Oh, you mean why can't Al-Qaeda?

Philippe Sands:

Yes. Why can't they turn around and say, okay, we'll apply exactly the same standard?

Harold Koh:

I haven't noticed Al-Qaeda following any laws recently. They're basically trying to kill civilians.

Philippe Sands:

It's not just about legality, it is also about legitimacy. I mean the reason I'm asking these questions is in Britain in the 1970s there was an intensive debate about how to deal with the IRA.

Harold Koh:

Well there's a huge difference, Philippe. The IRA had political aspirations; they had a political wing, Sinn Féin. Gerry Adams now is in parliament in Dublin. Al-Qaeda and Osama bin Laden did not aspire to political status; they have one mission which is killing civilians.

Philippe Sands:

But the IRA aspired to the status of being treated as combatants in an armed conflict and that was always refused by successive British governments, not just for issues of dealing with the legal consequences, but because it would turn people they considered to be criminals into warriors and that would have a nefarious effect.

Harold Koh:

Well this is where the translation comes in. The question is: is the only tool available to you to fight a terrorist organization which does large scale effective attacks, including 3,000 people in the Twin Towers – is the only method available law enforcement when they come into a law enforcement zone? Or can you, as the Congress of the United States did in September 2001, declare a war on them? And then announce it'll be conducted consistent with the laws of war.

Now there's a very important thought experiment here, which I ask you to stick with me on this. If Al Gore was president on 18 September and he came out and said, 'Look 3,000 people were just killed from many different nationalities, I'm going to work collectively to respond to this within the frame of law. I've asked Congress to declare war on them. I've asked our Supreme

Court to say that it's a lawful war' – which they later did – 'and I am going to do this within the context of laws of war transparently and openly.

'But here's what I'm not going to do: I will not invade Iraq, I will not torture anybody, I will not open Guantanamo, I will not use military commissions, I will not conduct extraordinary rendition. But here is what I will have to do and quite soon: locate the leadership against whom we've declared war and remove them from the battlefield by capture or kill, using those technological means that are available to me, and I will do it openly and according to standards.'

If he had done that my view is everyone would say it was both lawful and wise. So what does this show you? The patience that everybody has with the United States was exhausted by these other mistakes; the political capital of the United States and their capacity to achieve results was exhausted, the targets spread out, making the task more difficult, and then the Obama administration made mistakes also – was insufficiently transparent with regard to its standards and exactly what it was saying and what it was trying to do. Then it became a great cause to love until finally the president addressed it two weeks ago.

My view is he should have spoken earlier and more clearly and made it clear that he thought that the programme was legal and necessary, and necessary to end the third war. If he's ended a war with Iraq and ends a war with Afghanistan, he wants to end the third war with Al-Qaeda – and that's what he finally announced, and I would say better late than never.

Philippe Sands:

So it's not a global war on terror, that's gone, but it's a war. I mean the legal basis for it is the characterization of armed conflict...

Harold Koh:

Right. And our Supreme Court ruled – and I know this doesn't govern you – that this is a non-international armed conflict against a non-state party. In other words, the traditional non-international armed conflict is between a government and an entity within the state like the government of Colombia against the FARC. Here, the non-state actor is a group of individuals who aren't limited to Afghanistan only and the question is – by the way, this goes to your prior point – nobody is saying that these people deserve full-fledged status of someone who is themselves fighting according to laws of war, but it

does mean that they're entitled to the minimum humanitarian standards including Common Article 3, the Geneva Conventions and everything else, and that's what our Supreme Court said.

What the Obama administration made clear upon coming in was in addressing this issue going forward we need a sustainable strategy – and this is I think the most important thing that happened the other day. There was an aberrational response to 11 September. It persisted into the Obama administration and the Obama administration had the choice to just let it go forward or to pull it back into a more balanced frame. This is what you called a reset, and what the president did the other day at a time when he could have said nothing is: I'm going to go back at this, I want a sustainable approach. I want to end the war with Al-Qaeda, and in the tools I'm using, I'm going to use a smart power package in which the lead of it is addressing hearts and minds of people in the Middle East, foreign aid, diplomatic protection.

But there is an irreducible element of removing people from the battlefield by either capture or by kill that he says, I will still need to do. If I don't do it this group will remain viable, dangerous and ready to attack, and he said I can't in good conscience do that. So what he essentially did was to give flesh to what he had said in a more general way years earlier.

Philippe Sands:

But part of the difficulty is that once the door was opened after 11 September it spread into other areas, I mean you've been around the last few days, you'll have seen the news reports in the UK about allegations of GCHQ being involved in eavesdropping on internet use and other communications by British nationals which will be inconsistent with UK law, but it is being supported through activities through the United States and the National Security Agency. There seems to have been a change in the United States, ironically initiating with a Republican administration, which appropriates to the state, to the government, now the power not only to take people out in third countries, but to listen in.

Harold Koh:

But Philippe. three things are going on: technological capacity, legal authority and rights. So on technological capacity, data mining now gives extraordinary possibilities to assemble information and the question is when does that

violate a reasonable expectation of privacy? So what the president came out and said, and it has to be tested in court – and it is by the way, I mean there are two lawsuits already filed – I’m sure that if Snowden is prosecuted he will raise these issues. But the core of it was that you cannot gather information this way, when in fact a lot of what is apparently being described as connecting dots and connecting calls. So there are obviously examples where this was done; whether that was overbroad or not remains to be determined, that’s a technological issue.

The legal authority issue is Congress passed a law called the Patriot Act. I didn’t like it. It was widely supported by Congress. It has a section that permits this. It’s been authorized repeatedly under it, the Foreign Intelligence Surveillance Court issued an order under it, and now someone’s challenging this as potentially unconstitutional. And I think that’s a very interesting question, and asking for at least a legal opinion justifying it. So I think that opinion should come out, the government should defend it in court, but it’s an uphill battle if it’s been authorized by the president and Congress and repeatedly affirmed by court.

Then the third part of this is the individual rights of those who are challenging this and whether they have capacity to go into court to challenge it. In this case I think they very likely do because they hold contracts with these companies. I think the fundamental question comes down to this: when you are sitting there typing into Facebook or Google or something your private information, are you aware, and is your privacy violated, if it turns out that metadata from that is being used to connect the dots with regard to terrorist networks?

Philippe Sands:

You’ve dealt with three elements, there’s a fourth element and that’s the international dimension which you can unpack into two aspects: international legal requirements that constrain that type of behaviour but also the impact in third countries, including the United Kingdom. I think people in Britain have been genuinely shocked at the possibility that outside of the protections they don’t have under the US constitution they may be sitting on their computer on Facebook, on Google, whatever – the material is making its way to the National Security Agency, which is then going behind the door and making it available to British services, allowing the British services to avoid the constraints of domestic UK law. That’s the allegation; I don’t know whether that’s true or not.

Harold Koh:

Well you guys have a TV show which we watch called *MI5*, right? I mean the United States has the CIA and the FBI, and the CIA is supposed to operate outside under the National Security Act and the FBI is supposed to operate inside. The major revelation is that an organization called the National Security Agency is actually doing domestic data gathering. That was news to me. It's obviously highly classified and they have tremendous technocapacities. As I understand it, here in the UK you have the Metropolitan Police and you have MI6 and then you have this thing called MI5, which as I understand it does domestic activities, domestic surveillance. Now it may well be that GCHQ has gotten information from the FBI that now violates UK law, but I would say on this the UK has been the pioneer not the United States.