Transcript Q&A

International Law and the Obama Approach

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Question 1:

I’d like to ask you about the question of leakage or extension of the category. You may be right that under international law it would be legal to attack the enemy on or off the battlefield, but this concept of the enemy – in your opening remarks you referred to the Taliban as an enemy of the United States, where the Taliban isn’t Al-Qaeda – this was the Bush confusion that seems to have carried on. If you’re attacking members of the Pakistani Taliban it’s dubiously legal I would have thought, but also counter-productive because in Pakistan the problem is also the ISI and that there are no legal means in Pakistan of getting these guys who aren’t attacking the United States anyway. It gets very confused and becomes rather dubious legally I would have thought.

Harold Koh:

So you make a point that I think is fair and a point that I think is less fair. The point that I think is fair is that two different rationales are operating at the same time: an armed conflict rationale and a self-defence rationale, and they are overlapping, and that the self-defence rationale applies to attacks on the US homeland principally. The armed conflict rationale applies to the original conflict that was declared in September 2001 against the people who attacked the United States on 11 September. Now that was Al-Qaeda but there was no doubt that Al-Qaeda was at the time supported by the Taliban, and that when the United States and NATO allies went into Afghanistan – and I went to Afghanistan and visited many of these places – there are parts of the country where Al-Qaeda and the Taliban are quite literally going into the field next to each other carrying guns and killing NATO forces, including British forces. Now then you have a group called the Pakistani Taliban who have a relationship to the Afghan Taliban but, as you say, are not identical.

So the obvious question which is the key on this is: what do you do when so many years have gone by that the enemy has mutated? Do you say that every subsequent mutation makes the war continue, in which case it’s a forever war, or do you do what Obama said the other day, which is this war will end and the core of it is ‘defeat Al-Qaeda’, the core of it, to reach a conclusion with the Taliban in the context of Afghan evolution. It may well be that there’s a negotiation. Hillary Clinton set forth a set of conditions under which the Taliban would be a negotiating partner of the United States or others in Qatar and other locations.
Then the third is to be very careful about who you say are associated forces. If that’s done well and correctly I think that this 12-year war will end. Now that doesn’t mean that there aren’t new threats and people who sympathize with Al-Qaeda. After all, anybody who attack successfully a significant Western city now is very likely to claim inspiration from those who did it successfully the last, but the fact that you are, you know, a Beatles imitator doesn’t mean you’re part of The Beatles.

**Question 2:**

I went to one of the universities you taught and were dean at a long time ago and took an international law course there and what I’m interested in, and given, I think, your wonderful and earned reputation, I’d like you to tell us a little bit – a little differently from the specifics we’ve talked about here about what your views are of the evolution of international law, not only on the Obama administration but problems and issues that seem to be so new that perhaps they need new, if you would, formulas or new agreements and covenants, or even a new looking at that’s coming up at this stage.

**Harold Koh:**

Well that’s a wonderful opening for which I thank you. So I mean the 10-second version is that international law began as an interstitial set of customary rules that largely operate on the margins of state behaviour – that there is an attempted constitutional moment in the 1940s where you suddenly have a desire to end war and end depression and the creation of a UN system and a Bretton Woods system that would essentially allow good governments to manage the world. Then you had a Cold War, which made that vision impossible to achieve. But in recent times you have had the resurgence of something which I would call a Kantian vision. You remember Immanuel Kant’s great book? I have this cardholder, you can read it Philippe.

**Philippe Sands:**

My client is Immanuel Kant.

**Harold Koh:**

My office gave me this.
Philippe Sands:
I’ll keep that.

Harold Koh:
He hasn’t paid me my fee recently, but Kant’s vision is okay – we’re not going to have a world government but we will have a situation where nations, likeminded nations that believe in the rule of law, can cooperate within the frame of law. And that quite accurately represents what’s been attempted in the post-Cold War period. I mean there’s a moment of great optimism – the ‘new world order’ George HW Bush called it after the collapse of the Soviet Union. But the new set of threats that came in after 11 September made us realize that the problem was not just the Berlin Wall but highly empowered individuals with access to extraordinary capacities. A hacker with a laptop can bring down an entire financial system.

So the question now is how to use these positive faces and forces of globalization to target those who have a commitment to destruction, and that requires intense cooperation. Now, what I think the folly of the last administration is if you’ve only approached this as a hammer, a hard power approach, at a certain point your soldiers will get exhausted and the world will get exhausted with you, which is why I think the necessary shift was to the broader strategy which is: we go at this together, we do it around it our values, we engage, we try to translate relevant rules of international law, we partner with private entities and try to create regimes of governance to address new problems and that’s what has been the overarching approach.

I want to come back to this point because it’s so important. What Obama framed last week was not simply a tactical decision about drones or a tactical decision about Guantanamo, although they flow from… what he committed himself to was a sustainable, smart power strategy to counterterrorism, which turns on ending a 12-year war with Al-Qaeda and having a more balanced set of tools going forward, which does not rely so much on militarization. And I think that’s an admirable goal and I hope he achieves it.

Philippe Sands:
It was a really excellent question. Can I just follow up because, you’ve made the case for international law, but I think the question went further in this sense: you’ve spent four years in the hot seat; you’ve seen that the system for law-making internationally has basically broken down. The Security
Council has in effect ground to a halt. International courts are pretty limited. Globalization has spurred new actors, the corporate sector – to get outside of the terrorism field. I think the question you were asking is: is the international legal order as you and I teach it fit for purpose?

**Harold Koh:**

So I would call it what Stephen Jay Gould called *The Panda’s Thumb* in that there are improvisational devices that fill the gap. They may not be perfect. As you know pandas don’t have thumbs, opposable thumbs, which marsupials have, but they do have these crude evolutionary devices and the evolutionary device created by international law is soft law forms.

So a good example is climate change; there is no form for climate change. Kyoto collapsed, they had Copenhagen, they couldn’t come to an agreement. Obama and Clinton burst into a meeting and demanded that they have a politically binding agreement – no law – politically binding agreement where global temperature goal. Then at Durban they shifted this into the concept, what they called an agreed outcome with legal force, and now they have shifted this activity into a group of countries called the Arctic Council which have patterns of activity layered on top of Law of the Sea rules. So what they’re building is kind of a layer cake of law and non-law that hopefully will come back eventually into the kinds of stronger international institutions with which we became familiar in the wake of World War II.

**Philippe Sands:**

Can I take that as a no in the answer to my question?

**Harold Koh:**

It’s not crystalline but that’s all we got. Take for example the cyber conflict. So wouldn’t it be great if all the nations of the world could gather in San Francisco and create a charter about non-use of force in cyberspace? That’s not likely to happen, so what’s happened instead is a series of forms that a group of government experts, the WCIT, World Conference on International Telecommunication, are setting forth, of a set of norms that have now made it clear that there are some countries who are in the law tent, namely the countries with which we are closest, and then some like China who are espousing a different set of rules or black hole rules. And my view is: start the soufflé and hope it tightens up.
Question 3:

My question, Professor Koh, is about the minimum humanitarian standards including Common Article 3 of the Geneva Conventions. I wonder if in the interests of transparency you might be able to specify a little further which other humanitarian standards apply in addition to Common Article 3, such as, does the US recognize that all of Additional Protocol II has customary status in international humanitarian law?

Harold Koh:

So the United States, in the first year that I was legal adviser, announced that we intended to follow Additional Protocol II and submit it for advice and consent at the Senate. They haven’t taken it up yet, and we also announced that we would treat Article 75 of Additional Protocol I, which mirrors and in some ways expands on Common Article 3, as customary international law. So we’re not operating in an environment where 67 senators are leaping forward.

There’s an interesting moment which was, well before I came into the government, I was testifying about how these humanitarian norms applied to terrorists. And a Congressman said to me, ‘You know, professor’ – and by the way in Washington, professor is not a term of respect – he said, ‘You know, professor, the terrorists didn’t sign the Geneva Conventions.’ I said, ‘You know, senator, the whales didn’t sign the whaling treaty either.’ This is not about contract, it’s about minimum standards – as you put it – and it’s not about who they are, it’s about who we are. Now this is not a radical concept, I mean John McCain has espoused the exact same thought.

Question 4:

Just building on the discussion of the legal status of the Prism programme operating in international jurisdictions – many commentators over the past few days have suggested that based on the available information, the NSA and the participating private companies would be in violation of European Union data privacy laws. I’d just be interested in hearing your thoughts on that argument.

Harold Koh:

I’ll be honest I don’t know enough about how it in fact operates to say with certainty, pass judgement on this legality under either US law or international
law. I do know that the programme has been authorized under provisions of US law whose constitutionality is being tested and will be tested, and I’m sure that in the context of that testing the programme will end up being narrowed in some way.

Question 5:

I have two questions, and they pick up on two points you raised in your presentation. First of all, you mentioned on closing Guantanamo Bay and I quote, ‘and then Congress resisted’, end of quote. And this of course has happened on numerous occasions during the Obama administration. So in the remaining years of the Obama administration what possibilities and even opportunities are there for the president through his executive power to still engage multilaterally with law?

Second question, you mentioned drones, you said if the technology is inherently unlawful – and you mentioned landmines and chemical weapons, especially because of their failure to distinguish between combatants and civilians – yet drones would not fall in that category. There’s of course another type of weapon that spectacularly fails to make a distinction between combatants and civilians, and my opinion this is the nuclear weapon, and would be very interested in your opinion on in what category that weapon falls. Thank you.

Harold Koh:

So on the first, President Obama made pretty clear in his speech – and I gave a speech about a week earlier setting forth exactly what is to be done. You said how the president can use his executive power to enforce international law, that’s a very important point. Executive power in the United States can be a tool for flouting international law, and we’ve seen examples of that. Or it could be used, I think, constitutionally in the US system to bring about results that are consistent with international law over the objection of a Congress that’s interested in keeping open an offshore prison that everybody thinks is madness.

So right now there are 166 people in Guantanamo. Is it possible to get this number down? I think it is. Step one is, there are about 80-plus people from Yemen, a number of them were held in Guantanamo even after they were approved for transfer because of dangerous conditions in Yemen. Those conditions have improved. You could see a special envoy negotiating with the
Yemeni government, negotiating a block move of about 80 people, they could be put into a rehabilitation facility in Yemen and a process being done for release, and suddenly Guantanamo is half its size.

Number two, he said he would move military commissions to the United States. So if you have people being tried in military commissions and there is a number they would be off. Number three, plea bargains is a familiar way in which the cases are resolved through the domestic criminal system. People have been held for 12 years, you could offer people plea bargains of 13 years in which point they accept the plea bargain, they come off in a year. Now the key of that, it seems to me, is that someone has to have a conversation with their lawyers and the Congress is in theory prohibiting people from being brought to the United States to accept a plea bargain and go into a US prison by their own consent, instead holding them in a million-dollar-per-person-per-year facility, which is a black eye to the United States. So one part the president needs to work out is: will you give way on this?

Another point – and I think there is a group of 40-plus people who were put in a category of long-term law of war detainees. If the war ends there is no legal authority to hold them, at which point they would simply be released for lack of authority. Now if you wanted to prosecute them for their past acts and offer them plea bargains that’s possible also, or the president could simply decide to move them to a facility in the United States. And he pointed out that nobody has escaped from any Supermax facilities or many of our facilities, and the cost there is a tiny percentage. So all of this requires work, all of this requires commitment. The chief of staff of the White House, Senator McCain and Senator Feinstein just went to Guantanamo and issued a joint statement saying they want to close Guantanamo, and I thought that was an important step. But it is very clear that if the president wants to have this done his political will needs to be behind it.

I’m opposed to nuclear weapons; I think the nuclear non-proliferation movement should continue. I favour no first use. I think that Obama actually has done a pretty good job on the nuclear security issue, creating a nuclear security summit. The danger we face now is not so much – and maybe there are people who think that the greatest threat for nuclear weapons comes from North Korea, but more likely it comes from loose nukes that are caught by people who are essentially outside of any framework of diplomatic discussion. So I think that that’s where the rubber will hit the road over the next period.
**Philippe Sands:**

One area that executive power has been significant for is we’ve all noticed the change that has taken place, in fact it predated the Obama administration, in the relationship between the United States and the idea of an international criminal court, and that has gathered steam under your direction I think. How much support did the president give you in engaging with the International Criminal Court, which opens doors for that organization’s future direction?

**Harold Koh:**

The United States had an inexplicable policy on the International Criminal Court as far as I knew, which is we had prosecuted – along with the Brits at Nuremberg – had created the concept of international criminal justice through a tribunal, had supported every ad hoc tribunal that existed – Yugoslavia, Rwanda, Lebanon, Sierra Leone, Cambodia – and then President Clinton had in 1995 announced he supported the concept of International Criminal Court. But in 1998 at the Rome Conference at the very last minute the US didn’t sign. But on the last month of the Clinton administration he did sign and then the Bush administration famously tried to unsign, and then through his conduct it started to walk that back. So that was the absolutely crystalline state of affairs when we took office.

We were helped by two things: one, we knew that it was very difficult to get a change in the law to ratify the Rome Statute. We had signed the Rome Statute, so to get advice and consent takes 67 votes – we were well short of 67 votes – and there was a statute, the American Service-Members Protection Act, which there was no political will to revisit by the Congress. So the conclusion was: well why don’t we engage, translate and leverage? So it turned out we had been boycotting every single meeting; we didn’t know anybody. One reason people lived in fear of the ICC is they didn’t know who was doing what and never spoke to them about what they thought was a good or a bad idea going forward.

So we attended all meetings going forward including at Kampala, The Hague, New York. Secondly we engaged in discussion over the revision of the Rome Statute to include the crime of aggression, and most fundamentally we shifted from, you know, sort of hesitancy toward particular prosecutions to supporting every single prosecution. So now we have a posture where we have a strategy of positive engagement without changing laws – we support every prosecution. We have now an alignment between our ad hoc strategy and our
standing strategy, and it will take a while before we can muster the political votes to move to the next stage but I think at least now it's repositioned.

**Philippe Sands:**

Will that support be sustained when the Office of the Prosecutor begins to turn its attention away from countries mostly in Africa to countries that are part of the sort of Western powers? Because at this point the ICC has been very focused on a group of countries that don't frankly undermine, threaten, the US position or the British position. But what if the ICC changes? Are you comfortable that the level of support now for the ICC as an institution would withstand the bellyaching that would happen if the ICC began, for example, to investigate – it's amazing to me it's never happened – US treatment of detainees in Afghanistan? Afghanistan is a part of the statute, astonishingly.

**Harold Koh:**

So we have an independent prosecutor and that prosecutor does not have access to the kinds of information that governments do. One thing, people don't like the vision of the CIA but when you're doing things and the CIA is telling you what's going on, no one can say that you don't have your actions in context. Where a prosecution could be politically explosive, if there's some fact you don't know and you're the independent prosecutor. That's why you have to engage, because if the prosecutor's going to do something and there are 20 unanticipated consequences, at least you should let the prosecutor know what's going to happen and why, in the grand scheme of things, this might not be the best thing to do at this particular moment in time. That's not to in any way restrain them so much as it is to inform their discretion.

Now we like to use the image of the ICC as a bicycle – it's from Holland, so no wonder – it's wobbly but it's riding, but you really don't want to put too much weight on it and you really don't want to set up roadblocks that it's going to hit because, frankly, it's had one conviction, it has tentative support, it only has two permanent members of the Security Council who have ratified and a number of the cases are in jeopardy, and then the core group of countries where the defendants are now resisting. I think Libya was a good example: where do you really want to pit a weak ICC against a weak Libyan government on a collision course that ensures that one of them will fail? Who benefits from that?
Question 6:

You spoke earlier about highly powered individuals, hackers, and putting actions in context. And then we were speaking about cyber activities etc., and you’ve spoken earlier about the administration having a new mindset, turning over a new page. I just wonder whether it is possible to have a new mindset, turn over a new page in terms of intelligence gathering with this new threat. I got the impression that you weren’t a great supporter of the Patriot Act and that being the legal justification and I just wonder where you think this is all going, because we have individual rights of privacy but, of course, there are some very serious threats which individuals in different countries can have and I just wondered if you could say what the way ahead is and put it in context?

Harold Koh:

So after 11 September there is something called the *9/11 Commission Report* and it had a number of findings, and one of them was that very often the information necessary to head off a terrorist attack is in the system, it just doesn’t get to the right people at the right moment. So the question is not getting more information; the information is in the system. You recall this daily briefing, presidential daily briefing, which says Al-Qaeda is set to attack within the United States. So it’s not as if the US government didn’t have this information, it’s that the correct levers weren’t motivated so people are responding to this information.

Now, bureaucracies are bureaucracies and we’re in a very funny situation where the more information being generated, then the more information you could have access to. I sat through many, many briefings where tons and tons of information were poured out with virtually no analysis. My own view is – and that some of the organizations that were pumping out information also had agendas so they would bring forward the information that supported their agenda. So a lot of it I think is developing a kind of filtering process and a process by which hard estimations are made.

Now, very much to the US government’s credit, there is something called the ‘sense of the community’, a process where different intelligence groups say with differing degrees of confidence whether they think the information they have predicts a certain outcome. And they’re forced to vote on it like a court. And when this process is invoked you have a very analytical method. Someone like John Brennan, the new director of the CIA, has made it very
clear that his goal is to return the intelligence agencies to this core mission of analysis and I wish him success in doing so.

**Philippe Sands:**

I’m very sorry to say that we’ve run out of time. You’ve had a clear account of why it is I’ve yet to meet a single student of Harold Koh’s at Yale who has not loved his classes, even if they’re in fundamental disagreement with him. You have an openness and you’ve been hugely attentive to the questions, for which we’re extremely grateful, and obviously very reflective of each of them. Thank you very much for giving us all this time.