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# Twenty-First-Century Problems -- Twentieth-Century International Law

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# TWENTY-FIRST-CENTURY PROBLEMS—TWENTIETH-CENTURY INTERNATIONAL LAW

*Harold Hongju Koh\**

It is great to be back here with so many friends. I have former students, colleagues from the State Department, and members of the two law schools.

As Dean Scharf said, in my last four decades, I have spent more than thirty years as an international law professor, five years as a dean, twenty years as a human rights lawyer, and ten years in the U.S. government.

Just to give you some pictures, the upper left-hand corner is me appearing before the U.N. Human Rights Council in Geneva; the upper right is at the Kremlin for the Nuclear Security Summit; the bottom left, Afghanistan; and the bottom right, Guantanamo. I first went to Guantanamo in 1992, and I have been there now, I think, nineteen times.

On the left, Iraq; in the middle, Greece, for the financial crisis; on the far right was with Secretary Albright at the funeral of Kim Dae-jung, former President of Korea and Nobel Prize winner. And, I appeared in many courts: the International Court of Justice on the left, in the Kosovo case; the European Court of Human Rights in Strasbourg; the African Court of Human and Peoples' Rights; and as the head of our delegation to the International Criminal Court.

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I took many flights, and this is the most famous. This has become classic. We were flying into Tripoli after the Libya intervention on a transport plane from Malta, and because Secretary Clinton was there, we were put on these four nice seats. We got on, and they started taking pictures of us. So I texted to her “look over your shoulder,” and that’s what she is reading.

I worked on issues, both natural and manmade: Wikileaks, the earthquake in Haiti, the Fukushima meltdown in Japan, the Arab awakening, human rights issues, international criminal law, cyberspace, economic and private international law issues, and public health. Here I am with Chen Guangcheng, the blind Chinese dissident with whom I spent a number of days in Beijing, and here he is in his apartment at NYU.

The most challenging issues concern the fallout of September 11th, which is now nearly thirteen years ago. So, in my capacity as Legal Adviser at the State Department, I played a number of roles. I mentioned in the introduction to Dean Scharf’s book that I was a managing partner of a law firm of about 200 lawyers, about 350 people total. I was the general counsel to Secretary Clinton. It is like being the general counsel of any government agency—we buy buildings, but they are in Kabul. We get visas, but in Baghdad.

I was the internal conflict manager. I was the internal conflict manager in the department for a far-flung department as Ambassador Hodges knows. A unique role of the Legal Adviser is to be the designated spokesperson or conscience of the U.S. government on international law.

If the U.S. is doing something that speaks to the issue of international law, I think it is the duty of the Legal Adviser to explain why we think the position is legal, and then, finally, if we get sued in any forum, whether in an international court or in a domestic court, I am the designated defender, or I was the designated defender.

I was Of Counsel on numerous Supreme Court briefs, and I also appeared and argued in several different international tribunals. So what are some things that I find, as I have now left, that people don’t fully grasp?

By the way, here is a picture of my brother Howard, who is the Assistant Secretary of Health and Human Services. He is the highest-ranking public health official in America. My mother loves the picture because it looks like President Obama works for us.

The inference is you are not the only lawyer. As I said, in the State Department, there are over 200 lawyers. At the Defense Department, how many lawyers do you think there are? Can anyone guess? How about 17,000; the Justice Department, probably about 10,000 to 15,000 lawyers; Treasury, National Security Council, CIA, Director of National Intelligence, Homeland Security.

So a U.S. government condition has to be brokered between all of these agencies, not to mention the White House Counsel’s office and

the National Security Council's lawyer's office. One issue, as academics often say, is that the legal opinion of the government stopped where it got interested, and the short answer is, that's where they stopped agreeing.

What they didn't say is because they couldn't get an agreement on the position. So they just stated what they agreed upon and kept moving forward.

Secondly, and this may be obvious, you are not your own client. When you are a professor, you can just say whatever you think is right, but if Hillary Clinton is your client, she is pretty smart, and if she works for Barack Obama, he is pretty smart, and they are both lawyers themselves.

So the question is not what you think is the right thing to do lawfully; the question is whether what your client wants to do is legally available to them or not. So you can say that that is legally available; you can say that it is legally unavailable. For example, I think torture is legally unavailable as an option or, what is sometimes the case, in cases you say it is lawful, but it is lawful as a matter of policy.

And here is an incredible thing. I wrote a lot of books and articles. The precedent that you follow is not what you said in your private capacity. They don't care what Harold Koh wrote in a footnote when he was coming up for tenure at age twenty-nine. What they care about is the opinions of the Office of the Legal Adviser, which have gone back since 1848.

And when the people in my office looked at the precedents of the office, they looked to the precedents of the Office of the Legal Adviser, which is as it should be, because after all, where has more thought gone in: an opinion that has been brokered with thousands of other lawyers in the government on matters of life and death after a career in international law, or something you threw into an article in a footnote to complete a tenured piece?

Now, you have many roles as I have said. And perhaps most important, you must play the hand you are dealt. You don't get to choose.

There is a favorite story about the two guys from Galway who are walking down the road. I say this because St. Patrick's Day was yesterday, and my wife is Irish. And the one guy says to the other, "How do you get to Dublin?"

And the first guy goes, "You know, I wouldn't start from here."

So they said to me, "Would you like to be Legal Adviser in a time of peace and prosperity, or instead, would you rather be the Legal Adviser during three wars—Afghanistan, Iraq, and against Al-Qaeda, Taliban, and associated forces—in the worst economic crisis since the Depression?" And then, you move on to natural disasters in places like Haiti and Fukushima, and then throw into the mix the release of millions of documents in Wikileaks, et cetera. And then add to it the

most political environment in American history, which has created this set of deadlock, and you might say, “No, I wouldn’t start from here.”

But you don’t get to choose. You play the hand you are dealt, and I analogize to people who do criminal law. You could, over the course of a long career, be an expert on criminal law. Sometimes you do criminal defense work; sometimes you do prosecutions; sometimes you are a judge; sometimes you are a professor.

You are always doing the same body of law, but you are going to emphasize different things, depending on what role you are in. So you are not going to emphasize the same things if you are a white collar defense lawyer than if you are a prosecutor. That doesn’t mean you are inconsistent; it just means that you are playing a different role with the same body of law.

So I found this to be an interesting challenge. I consider myself in my lifetime to have the exact same commitments with different roles. I am a man of peace, I think. I have spent my life teaching international law. I believe I am a defender of human rights, and I happened to be for four years a lawyer for a nation at war, and I tried to do that to the best of my ability. It was not easy. It was in some ways a relief to return to the academic world where I can say just what I want and nobody cares.

But I think that’s because sometimes I am asked, as a human rights lawyer, how do I defend drones? And the answer is pretty easy. I think all torture is illegal no matter how it is used. I don’t think the President can be the torturer-in-chief. But it is the very nature of the laws of war, which is called international humanitarian law, that some killing is lawful if it is done in the context of the laws of war.

You may not like it, but if you were the lawyer for the U.S. government, it is your inescapable duty to draw a difficult line between lawful and unlawful, killing those who do or do not save innocent lives.

And you have to defend those lines. It is much better to have people that care about the rule of law and human rights than people who don’t care.

There is a baseball manager, who once said when he was getting flack for a decision he made, “That’s okay over there. Their job is to say stuff over there. My job is to do stuff.” And I would encourage everybody here to take their time in the government because there is a long, long way from a good idea to actually getting it done.

Now, obviously 9/11 changed our lives. It was itself a grotesque human rights violation: 3,000 innocent people getting killed for going to work. It signaled a new kind of war between a terrorist network that crosses borders and whose goal has been essentially to attack civilian targets and major western countries.

It demanded a strong response, but one that was also respectful of human rights. It is combined in a blog that I now write in the idea of

“just security”—not just security but a just security in which law is an important piece. Not “lawfare” as it is sometimes dismissed by some, but in fact, a way of thinking about how to defend our human rights while not making the 9/11 era the new normal, and I think that has been one of the great challenges.

Now, against this background, you face constant challenges, and I will give you this example. My very first day of work I came in, and somebody said to me “Harold”—this was 8:30 in the morning—we just got a call from Customs at one of the major ports. The cryogenically frozen embryo of a panda bear is being held in a metal tank, and it is being attacked by private litigants.” And the question is: Is this embryo entitled to foreign sovereign immunity?”

It occurred to me that I think the framers of the Foreign Sovereign Immunities Act may never have thought of this question.

Or I will give you this one:

We have a group of soldiers who are called Cyber Command. One of the great ironies is the various combatant commands have got these guys who are tremendously physically fit. The guys in Cyber Command look like Jack Black.

Their fingers fly across the keyboard. If you have a guy sitting in Fort Meade, Maryland, who hits a key stroke, and it creates an effect in another country in the world and brings down a server, is that subject to the Geneva Conventions or not? And guess what—the Geneva Convention and the framers of the Geneva Convention did not think about that issue.

More than that, the problem of having twenty-first-century problems and twentieth-century international law is that it cuts across the board. Why? Because the great spasm of international lawmaking came after World War II: the U.N. Charter, the IMF, the World Bank, and the ITL, which became the WTO.

Most of the national security legislation we have was adopted in the wake of Vietnam and Watergate in the early 1980s and 1970s: the International Emergency Economic Powers Act,<sup>1</sup> the Arms Export Control Act,<sup>2</sup> and the Intelligence Oversight Act.<sup>3</sup> I have written about all of these.

In recent years, we don’t have new laws. Congress, as you know, doesn’t approve treaties. Congress doesn’t pass many statutes. It is a branch of the government that even has great difficulty enacting a way to avoid our default on our debt or raising of the debt limit.

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1. International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–1707 (2013).
  2. International Security Assistance and Arms Export Control Act of 1976, 22 U.S.C. §§ 2751–2799aa-2 (2013)
  3. The Intelligence Oversight Act of 1980, S. 2284, 96th Cong. (as passed by Senate, June 3, 1980).

So the law will not change through normal amendment processes. So what is it, then, that allows us to adapt twentieth-century international law to twenty-first-century problems? Do we have a strategy—not just a way to solve a particular problem of the day, but do we have a strategy? And I want to argue that we do—it is called international law as smart power.

I am going to make a strong claim for that. Not only is it a strategy—it doesn't always work immediately—but the alternative, which is a hard power approach, tends not to work either. Worse than that, it tends to lead to structural failure.

My colleague at Yale, Paul Kennedy, writes about the decline and fall of the great powers.<sup>4</sup> He talks about how, century after century, the leading hegemon tried to use hard power, and then ended up in a situation that he calls imperial overstretch.<sup>5</sup> They simply didn't have enough soldiers, and then they collapsed, and then they were replaced by another world hegemon, which is briefly ascended and falls prey to the exact same phenomena.<sup>6</sup>

A sustainable strategy cannot be one in which we use troops and hardware and the threat of force to achieve every outcome, and it is also not one that plays to the advantage of having a system that we call international law developed from the second century.

Now, think this: There are two broad alternatives if you have twentieth-century law and twenty-first-century problems. One I will call the black hole approach, or you can think of it as the Tina Turner approach. What's law got to do with it? What's law but a sweet old-fashioned notion?

I would argue that that was the fundamental approach taken by the last administration in response to 9/11. We have been hit. It is a new situation. There are no legal constraints. We are in a black hole. We should respond and do whatever is necessary, and forget about the framework of international law that has been established.

Let's disengage from the U.N. Let's disengage from the International Criminal Court, and let's disengage from the Human Rights Council, all of these things. This is the black hole approach.

The Geneva Conventions under this scenario are "quaint," said the general counsel of the White House, Alberto Gonzales.<sup>7</sup> In other words, since they didn't anticipate the situation, they are irrelevant.

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4. *See, e.g.*, PAUL KENNEDY, *THE RISE AND FALL OF THE GREAT POWERS* 515 (1989).

5. *See id.*

6. *See id.*

7. Memorandum from Alberto R. Gonzales, White House Counsel, on Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban, to President George W. Bush 2 (Jan. 25, 2002), *available at* <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf>.

So what's the other alternative to black hole? I call it translation, the spirit of the laws.

In other words, the law that we have has some objective purpose. What is the response to a particular situation, which is most true to the spirit of the law that we have, even though it isn't written to address the current situation? It is an interpretive challenge in which you try to construe existing law to meet an existing circumstance.

So I want to argue—and if you remember nothing else, remember these three words—that the strategy of international law and smart power is engage, translate, and leverage. When in doubt, the United States should engage with other partners around our values, not disengage.

Second, when in doubt, translate. Don't argue that there are black holes. Rather, apply the spirit of the laws to meet the twenty-first-century challenges, and then, if you have a point of leverage, use law with other tools to produce policy.

Military force is certainly part of this package, but you don't try to do everything with hard power. You also use diplomacy, development, technology markets, international institutions, et cetera. Engage, translate and leverage.

And I would contrast this to an opposite view. Unilateralism, not engagement; black hole, not translation; going it alone, not leveraging your resources. Now, where did this come from? You could call this an Obama-Clinton doctrine. President Obama in his inaugural address said, "A new era of engagement has begun . . . where living our values doesn't make us weaker, it makes us safer and it makes us stronger."<sup>8</sup> In other words, engage around our values.

Then, Hillary Clinton argued that we should use a smart power approach, the full range of tools at our disposal, including respect for law, human rights, private partnerships, et cetera. People thought it was just a slogan, but my job was to give content to this.

Now, if you Google "Hillary Clinton" and "smart power," you will see dozens of speeches that she gave over four years sketching out this strategy,<sup>9</sup> which I think can be remembered as an Obama-Clinton doctrine.

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8. President Barack Obama, Address to Joint Session of Congress (Feb. 24, 2009), *available at* [http://www.whitehouse.gov/the\\_press\\_office/Remarks-of-President-Barack-Obama-Address-to-Joint-Session-of-Congress/](http://www.whitehouse.gov/the_press_office/Remarks-of-President-Barack-Obama-Address-to-Joint-Session-of-Congress/).

9. *See Clinton's Confirmation Opening Statement*, CBS NEWS (Jan. 13, 2009, 11:18 AM), <http://www.cbsnews.com/news/clintons-confirmation-opening-statement/>; Sec'y Hillary Clinton, Remarks on the Smart Power Approach to Counterterrorism at John Jay School of Criminal Justice (Sept. 9, 2011), *available at* <http://www.cfr.org/counterterrorism/clintons-speech-smart-power-approach-counterterrorism-september-2011/p25854>; Lucy Madison, *In Farewell Speech, Clinton Calls for "Smart Power" on Global Stage*, CBS

Now, how do you apply this strategy to four kinds of twenty-first-century challenges: human rights, international single justice, assisted reproductive technologies, and twenty-first-century war? I could give dozens of examples, but let me start. Take Burma: Aung San Suu Kyi was under house arrest.

She was a duly elected leader. With regard to Burma, we had imposed stiff sanctions, increasingly stiff sanctions,<sup>10</sup> and then the question: Do we engage with her? Do we engage with the Burmese regime? We did both.

Then, we translate a strategy for imposing sanctions, a ratchet up strategy with a ratchet down strategy, action for action, and then try to leverage that into rule of law and human rights.

Now, Aung San Suu Kyi is the chair of the parliamentary committee on rule of law and human rights in the Burmese legislature.<sup>11</sup>

Or how about this one:

LGBT issues. Now, the last administration did little on this issue. In fact, they disengaged from the Human Rights Council. Hillary Clinton was going to the Human Rights Council because we reengaged and got elected twice, and the question: What speech does she give on Human Rights Day?

So, she went and gave a speech in which she said quite simply that LGBT rights are human rights, and human rights are LGBT rights.<sup>12</sup> This is a pure translation exercise. Do you see, she said whatever you thought human rights were, they include the rights of LGBTs.

So all the apparatus and protection that we have developed over the years to protect human rights now protects these individuals. And she had said this before at the Beijing women's conference where she went as First Lady and said "women's rights are human rights."<sup>13</sup>

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NEWS (Feb. 1, 2013, 8:29 AM), <http://www.cbsnews.com/news/in-farewell-speech-clinton-calls-for-smart-power-on-global-stage/>.

10. See MICHAEL F. MARTIN, CONG. RESEARCH SERV., R41336, U.S. SANCTIONS ON BURMA 3-5 (2012), available at <http://www.fas.org/sgp/crs/row/R41336.pdf>.
11. AP, *Myanmar's Suu Kyi to Chair Parliamentary Committee*, THE ASAHI SHIMBUN (Aug. 7, 2012), [http://ajw.asahi.com/article/asia/around\\_asia/AJ201208070100](http://ajw.asahi.com/article/asia/around_asia/AJ201208070100).
12. Hillary Rodham Clinton, *Remarks in Recognition of International Human Rights Day*, U.S. DEPT. OF STATE (Dec. 6, 2011), <http://www.state.gov/secretary/20092013clinton/rm/2011/12/178368.htm>.
13. First Lady Hillary Rodham Clinton, *Remarks for the United Nations Fourth World Conference on Women* (Sept. 5, 1995), available at <http://www.un.org/esa/gopher-data/conf/fwcw/conf/gov/950905175653.txt>.

In other words, we are not going to treat human rights as rights that attach to a very limited group of individuals. Then, leverage this foreign policy initiative with a set of domestic initiatives: an elimination of Don't Ask, Don't Tell in the military; provision of same-sex benefits in both government and private jobs; challenging the Defense of Marriage Act; supporting litigation on same-sex marriage at the U.S. Supreme Court in the *Windsor*<sup>14</sup> and *Perry*<sup>15</sup> cases.

So, you have seen in six years a change in the treatment of LGBT issues in the United States of America and worldwide, and now it is Uganda that is on the defensive for having antigay legislation.<sup>16</sup>

Or how about Chen Guangcheng? He was a dissident.<sup>17</sup>

He was under house arrest in Shandong Province. He escaped. He broke his foot. He contacted the U.S. Embassy and asked whether he could come in. We could have said, no, we are not going to jeopardize our relationship with China for one guy. Instead, we decided to engage, bring him in, and engage with the Chinese government about his future.<sup>18</sup>

And one of the issues that was raised was, can he really be allowed to come into the embassy? I had to give a legal opinion on this while traveling in China, and people said, we can't possibly have a legal opinion which allows every single person in China who fears persecution coming into our embassy.

And I said, maybe not, but we could have a legal opinion, which says that the United States has a right to admit somebody for emergency medical care for a short period of time, and that's a sufficient basis for him to come in.

And then, working with a private institution and New York University, we leveraged this, first into his leaving the embassy, and then moving to the campus in New York, and he is now in the United States continuing his human rights work: engage, translate, and leverage.

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14. See *United States v. Windsor*, 133 S. Ct. 2675 (2013) (striking down the federal Defense of Marriage Act).

15. See *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (denying petitioners' standing to sue the State of California after it refused to defend Proposition 8, limiting legal marriage to heterosexual partners, before federal courts that ruled it unconstitutional).

16. Alan Cowell, *Uganda's President Signs Antigay Bill*, N.Y. TIMES (Feb. 24, 2014), <http://www.nytimes.com/2014/02/25/world/africa/ugandan-president-to-sign-antigay-law.html>.

17. See Akiko Fujita et al., *Chen Guangcheng: Chinese Dissident Arrives in US*, ABC NEWS (May 19, 2012), <http://abcnews.go.com/International/chen-guangcheng-chinese-dissident-arrives-us/print?id=16384545>.

18. See *id.*

How about International Criminal Justice? In your CLE materials—and I am eager to see whether I can get some CLE credit for my own speech—I have an article that I would ask you to read at some point called *International Criminal Justice 5.0*.

Obviously, the U.S. pioneered international criminal law at Nuremberg and Tokyo and then supported that with a series of *ad hoc* criminal tribunals: Yugoslavia, Rwanda, Sierra Leone, and Cambodia. But then, it put itself in the bizarre posture under the Bush Administration of attacking the standing of the International Criminal Court.<sup>19</sup>

So we are supporting ad hoc tribunals, and we are opposed to the standing tribunal, even though the ad hoc tribunals are phasing into standing international criminal justice institutions?

So the question is how to align those policies so they make sense, even though Congress has passed laws preventing us from financial support for the International Criminal Court.<sup>20</sup>

Part of the strategy that we put forward was we don't change any laws because we can't. We are not allowed to vote. But, we will turn the policy around. I said to my son, "It is like the time when we turned around the car in our garage without opening the doors. It is going to take a long time, and we better hope nobody notices."

But as you notice, we engaged for the first time. We went to all the different conferences. We shifted our position to one that now says we do not oppose the object and purpose of the ICC statute. We support all pending prosecutions, including the Libya referral,<sup>21</sup> and the policy has turned 180 degrees.

Or how about this one? Shortly after I became Legal Adviser, somebody came to me and said there is a lesbian couple that is living in a foreign country—I won't say which one—and they have had a fertilized embryo implanted into one of the members of the couple who is an American citizen. Neither the egg nor the sperm is from an American, but this woman will carry the baby to term over nine months in this foreign country and deliver that baby. What is the citizenship of the baby?

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19. See Elise Keppler, *The United States and the International Criminal Court: The Bush Administration's Approach and a Way Forward Under the Obama Administration*, HUMAN RIGHTS WATCH (Aug. 2, 2009), <http://www.hrw.org/news/2009/08/02/united-states-and-international-criminal-court-bush-administration-s-approach-and-wa>.

20. See Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 113(c), 116 Stat. 1350, 1359 (2002).

21. See Edith M. Lederer, AP, *US Supports War Crimes Tribunal for First Time*, WASH. POST (Mar. 2, 2011, 12:40 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/02/AR2011030200163.html>.

Now, we look at the law, and it says that the law requires that the child have a natural relationship with a U.S. citizen parent. That had been construed to mean a genetic relationship. What's the problem? Obviously, the woman is carrying to term a fertilized egg with which she has no genetic relationship. But the term is not "genetic;" it is "natural."

So we had a meeting, and my conclusion was "natural" means genetic or gestational. That's translation. I didn't find it anywhere, but it seemed reasonable within the spirit of the laws. The alternative is to leave the kid stateless. His mother is an American citizen. It struck me as consistent, and this is now the prevailing interpretation.

I say this because the great challenge, and one of the things I am working on for the future, is the human rights of clones. Maybe one of you here is a clone. I am not going to ask, but as they say, we have the technology. But have we done the necessary thinking on this?

Imagine this: Could every one of you come here with your cloned partner? Would you respect that person's human rights, or would your cloned partner be your slave?

Or how about this? If you suddenly had a heart problem, could you take the heart of your clone and have it implanted into you and use that person's body for your spare parts? Do you treat them like illegitimates or people with a different sexual orientation as they used to be treated, as lesser beings?

Now, they weren't born human, in the sense of being born live, but they are the product of modern technology. Assistive reproductive technology is now a common way to make families, and we don't have a human rights theory for clones, but we better get one. And that's something I am going to be hoping to spend a fair amount of my time on in the years ahead.

Or how about cyberspace? By its very nature, cyberspace is something that nobody drafting rules of international law in the twenty-first century thought of, or thinks about. There are actually four different dimensions.

There is freedom on the Internet, which, of course, we would like to promote, but on the other hand, Internet freedom can also pay for terrorist financing or communications to allow people to attack civilian targets. Interestingly, the Universal Declaration of Human Rights Article 19 presciently thinks about the right to receive secrets and impart information and ideas through any media and regardless of frontiers.<sup>22</sup> It is almost as though it was thinking about the Internet in 1948.

But there are at least four other dimensions of the Internet: intellectual property, piracy e-commerce, cyber security, and cyber

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22. *See*, G.A. Res. 217 (III) A, art. 19, Universal Declaration of Human Rights (Dec. 10, 1948).

warfare. So the question is: Can we develop a regime that balances the competing concerns?

Now, there are some countries, particularly China, that have offered a theory of black hole, which is there is no law. What has law got to do with it?

I wrote an article in the Harvard International Law Journal, which argued it is a translation exercise.<sup>23</sup> International law governs cyberspace. We engage through diplomatic law talk like the governmental experts, the World Conference on International Telecommunications. We make it clear that cyberspace is not a law-free zone, and we try to leverage it into various standard-setting exercises through projects like the Tallinn Manual,<sup>24</sup> et cetera.

Or take this: Most war these days is not conducted by soldiers; it is conducted by private security contractors. You know, Arnold Schwarzenegger. You see movies about this all the time: *The Expendables*, *The Expendables II*, *The Expendables III*. Do these guys have to follow the Geneva Conventions? They are not soldiers. What's the solution? Engage.

We developed a set of principles called the Montreux Document.<sup>25</sup> We translated it into an international code of conduct that now governs 500 companies. We leveraged it through contractors to internalize norms and to contract deliver. This is, of course, the subject of my academic writing, the norm internalization.

And then what about the Arab awakening? This is one of these things that happened on our watch, and Secretary Clinton said something very profound to me very early on. She said, "This is crazy. But you know what? Most of these people don't want to join Al-Qaeda."

We need a smart power strategy to address that. And what does that mean? It means that we try to win the hearts and minds of ordinary Muslims in their home countries, to try to get involved in economic and political development at home. But this will be a group of hard core Al-Qaeda who are not likely to become democrats.

You know, I'm sorry. Osama bin Laden was not about to convert and become the head of an opposition party. So on September 11, 2011, Secretary Clinton gave a speech called *Smart Power Approach*

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23. See generally Harold Hongju Koh, *International Law in Cyberspace*, 54 HARV. INT'L L.J. ONLINE 1 (2012), <http://www.harvardilj.org/wp-content/uploads/2012/12/Koh-Speech-to-Publish1.pdf>.

24. INT'L GRP. OF EXPERTS AT THE INVITATION OF THE NATO COOP. CYBER DEF. CTR. OF EXCELLENCE, TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE (Michael N. Schmitt ed., 2013), available at <https://ccdcoe.org/research.html>.

25. INT'L COMM. OF THE RED CROSS, THE MONTREUX DOCUMENT (2009), available at [https://www.icrc.org/eng/assets/files/other/icrc\\_002\\_0996.pdf](https://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf).

to *Counterterrorism*, where she said to use force for limited purposes in a broader framework that deploys diplomacy, development, education, and people-to-people outreach; and challenge the ideology, the propaganda, and the appeal. But in the short-term, precise and persistent force remains a necessary part of the package.<sup>26</sup>

Now, why do I say that? Because after I got into the State Department, and the use of drones began, a lot of people suddenly started saying this is just like the last administration. There is no difference. To which I say, imagine this thought experiment: Seven days after September 11th, Congress passes the Authorization for Use of Military Force against Al-Qaeda, the Taliban, and associated forces.<sup>27</sup>

Suppose the winner of the popular vote is the President of the United States,<sup>28</sup> and suppose he appears and says the following things:

“I am speaking now to the whole world. We have just been attacked. Three thousand civilians have been killed of many different nationalities. That’s a grotesque human rights violation. I want to tell you what I am not going to do, and I am going to tell you what I am going to do. I am not going to invade Iraq. I am not going to torture anyone. I am not going to open Guantanamo. I am not going to set up military commissions. I am not going to kidnap people and put them in black sites. All of these things are illegal. They are wrong, and they destroy our legitimacy.

But here is what I must do: I am going to apply a smart power approach to counter terrorism, in which our main goal is to speak to the people of modern Islam. With regard to those people who did September 11th, if they are in a cave in Tora Bora, I will use every technological means available to me as Commander-in-Chief, including drones, to suppress the threat. If I can arrest them, I will. But if I need to use weapons of war, I will use it consistently with the laws of war. I will be transparent. I will consult with our allies. I will consult with Congress, and God help us that this is over soon.”

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26. See Clinton, *supra* note 9 (addressing the shift in American policy on terrorism toward a broad-based effort of diplomacy and aid).

27. See Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (authorizing the President of the United States to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001”).

28. In the 2000 U.S. presidential election, Vice President Al Gore received approximately 500,000 more popular votes than did Governor George W. Bush, but Governor Bush won five more electoral votes than did Vice President Gore, resulting in Bush’s election as President. See *2000 Presidential Electoral and Popular Vote*, FED. ELECTION COMM’N, <http://www.fec.gov/pubrec/fe2000/elecpop.htm> (last updated Dec. 2001).

Do you see the point? It is not about drones. If he had said that, we would say, that's an essential piece of the picture. The fact of the matter is that drones are not a strategy; they are just a tool of war. They are not inherently legal or illegal. There are some tools of war that are inherently illegal like chemical weapons and land mines. Drones are not one of them.

Whether they are legal or not depends on whether they are used consistently with the laws of war. So the strategy is engage, translate, and leverage. Engage our allies. Translate legal rules into lawful strategies of targeting detention, and leverage this with a broader approach to counter terrorism.

Now, it took awhile. but finally, President Obama brought this policy explicitly there last May at the National Defense University. He said we have to define the struggle. There is no global perpetual War on Terror. We need to end a forever war. We should repeal, replace, and not expand the authorization for use of military force.<sup>29</sup>

Drones can be part of a smart power approach if properly used along with other tools that can be an effective and a discriminate tool to help dismantle specific terrorist networks that engage with the United States.

What he didn't say is this: It is one thing to say we are leaving Iraq if it is still violent there. It is another thing to say we are leaving Afghanistan if it is still violent there. But if we have not actually defeated Al-Qaeda, they could attack us again on our own soil, and then people will say, "What were we doing for 13 years?"

Now, it has been a long struggle, but it seems that the three aspects of this—and I have written a speech on this called *How to End the Forever War*—is, number one, disciplining drones. We need more transparency. We need more consultation, and we need more standard-setting.

Secondly, defining the enemy to end the war. We are not at war with everybody who doesn't like us. That's a lot of people in the world. We are at war with those people who would attack us on civilian soil and have proven capacity to do that, and that's essentially the Al-Qaeda, the Taliban, and associated forces.

As we disengage from Afghanistan, the issue of the Taliban will be a separate issue. But self-radicalizers, like the guys at the Boston Marathon, are not part of Al-Qaeda. We didn't declare war on them.

And third, using a comprehensive approach to ending all three wars: decline military engagement, continue civilian engagement, develop civil society, and enhance diplomacy to bring about diplomatic solutions in these conflicts.

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29. See President Barack Obama, Remarks at the National Defense University (May 23, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

And on Guantanamo, which has been a source of continuing disappointment, the President remains and says, again, he is determined to close it by the end of his presidency. And interestingly, if he does, and the war is declared over, he will lose his legal authority to detain.

And so in the last six months, more movement has happened there than has happened in the previous four or five years with a whole set of policy processes, and I am not going to answer in the Q&A exactly how this can be done, but it includes blocking transfers to Yemen; getting a new envoy to do an outstanding job; moving to trials preferably in civilian courts; releasing the releasable; and establishing periodic review boards.

Now, what about two other cases, humanitarian intervention? Case number one was Libya. Again, people think of “military” as a military operation. It was a smart power operation. Engage, translate and leverage. Join with many allies.

Translate: that Gaddafi has forfeited his responsibility to protect, which creates a gap that must be filled by outsiders. The United States helps to establish a no-fly zone and then maintain it with an arms embargo, along with an assets freeze, diplomacy, travel ban, and accountability before the ICC to protect civilians and rebuild the country.

Now, Libya is not a perfect environment by any stretch of the imagination, but the fact of the matter is that this worked. I am often criticized by my colleagues at Yale, and I say 10,000 to 15,000 people are alive today because of this approach. So I am not apologizing.

What about Syria? The problem here was they started again with a smart power approach: how to combine diplomatic strategy and engagement with smart power to achieve a number of objectives, secure chemical weapons, get a ceasefire, oust al-Assad, secure humanitarian aid, and secure accountability.

But the problems, of course, were persistent Russian vetoes.<sup>30</sup> No Security Council resolution was, therefore, possible. There was a limited threat of a capacity to threaten force if you think that the Security Council has a monopoly on these situations. So that created a mismatch between the soft power tools that were available and the broader objectives.

President Obama, unfortunately, has been better on politics, on principles than on the politics to achieve them. Suddenly after the acknowledged use of chemical weapons last August, the President

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30. See, e.g., Rick Gladstone, *Friction at the U.N as Russia and China Veto Another Resolution on Syria Sanctions*, N.Y. TIMES (July 19, 2012), <http://www.nytimes.com/2012/07/20/world/middleeast/russia-and-china-veto-un-sanctions-against-syria.html>.

threatened hard power and in such a surprising way that there was universal opposition.<sup>31</sup>

That changed the issue into our conduct and called into question his commitment to engage in soft power at ending the war. Suddenly, it looked like he was going back to the old way.

So what happened? Putin, Mr. Democracy, Mr. Human Rights, Mr. International Law Rights—and as written in the *New York Times*—where he says, “We must stop using the language of force and return to the path of civilized diplomatic and political settlement.”<sup>32</sup> That’s pretty hilarious. In other words, he plays the soft power card.

So what happened? The fact of the matter was the threat of force jump-started diplomacy. The Administration’s position led by Secretary Kerry mutated back to engage, translate, and leverage, and they shifted finally to where they should have been: a smart power approach. And although it is happening slowly, the organization against the proliferation of chemical weapons is moving weapons out. It won the Nobel Peace Prize.

What about the Ukraine? And here is where I will end. We have this situation, obviously Crimea; the Russians are trying to annex it. This by the way should call into doubt in all of your minds whether Vladimir Putin cares the least bit about sovereignty in Syria. He clearly cares not at all about sovereignty.

And he is using a transparent dodge to annex Crimea, and the U.S. has asserted that the people of the Ukraine must determine their own future in direct dialogue.

The referendum that just occurred—we have correctly called it under both domestic and international law illegitimate, contrary to the Ukrainian constitution, and illegal under international law.<sup>33</sup> The key weapon is targeted smart sanctions on the plutocrats who could influence Putin to change the outcome and attempt to insert U.N. monitors into Crimea and various techniques of multilateral outcasting.

Now, I was the person who argued for the independence of Kosovo at the International Court of Justice. This is a dramatically different situation. You should be very skeptical about referendums that occur under the barrel of a gun, and you should be very skeptical

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31. See Mark Landler & Jonathan Weisman, *Obama Delays Syria Strike to Focus on a Russian Plan*, N.Y. TIMES (Sept. 10, 2013), <http://www.nytimes.com/2013/09/11/world/middleeast/syrian-chemical-arsenal.html>.

32. Vladimir V. Putin, Op-Ed., *A Plea for Caution from Russia*, N.Y. TIMES (Sept. 11, 2013), <http://www.nytimes.com/2013/09/12/opinion/putin-plea-for-caution-from-russia-on-syria.html>.

33. See Somini Sengupta, *Vote by U.N. General Assembly Isolates Russia*, N.Y. TIMES (Mar. 27, 2014), <http://www.nytimes.com/2014/03/28/world/europe/General-Assembly-Vote-on-Crimea.html>.

about the claim that Crimea can declare its own independence when actually the people of Ukraine have to declare the independence for Crimea.

So this will be a battle ground in the months ahead. We will watch it play out. It will be a battle between the hard power approach of Putin, who is now moving more troops in, and the smart power approach on the other side who will prevail. Here is a situation where hard power is not a live option.

So the question is: Do we have the courage of our convictions? How consistently and multilaterally can we apply this approach to bring the issue to ultimate the resolution?

Yesterday, yet again in *The New York Times* front page, there was another story about Obama's policies of retrenchment, what is viewed as weakness.<sup>34</sup> I'm sorry. We don't have a better alternative than the one he has put into play. Some people like surgery, and other people use chemotherapy. And guess what? Sometimes chemotherapy works, but you have got to go with it.

But I hope I have persuaded you that not every episode may be a success, but there is a strategy here, and this is not Hugo Grotius' international law; this is twenty-first-century international lawyering. Treating international law as a critical element of smart power is a better way to do it and to address twenty-first-century problems: engaging, translating, and leveraging laws as a tool of smart power.

It is an extraordinarily interesting time to be an international lawyer. I am excited for you students who are getting into this field for the first time and watching all these things play out. I encourage you to think about this in broad strategic terms and not just what gets us through the next week.

So I am delighted. Thank you very much for this great honor. I am delighted to receive it and happy to answer any questions you might have.

AUDIENCE MEMBER: Professor Koh, I will start with the Henry King question. Just because we are on the subject of the Ukraine right now, isn't this a bit of a flip for you on the theme? Isn't this a classic twentieth-century problem that you have to start with, and try to solve with twenty-first-century methods or approach?

PROFESSOR KOH: Well, no, because I think that all of the different apparatuses of this are—so for example, under Ukrainian law, the Ukraine must vote. One question is the role of the diaspora in this.

Second question is: What does it mean for Putin to say for the people that they protecting Russians. Again, I didn't notice that they

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34. See David E. Sanger, *Obama Policy Is Put to Test*, N.Y. TIMES, Mar. 17, 2014, at A1.

were under threat, but I think that the most elaborate response is the smart sanctions approach.

During the Cold War, Russia was isolated. The Soviet Union was isolated. That made fewer levers to put pressure on. Now, there are deep interconnections. As we all know, the breakup of the Soviet Union led to the grotesque enrichment of very small numbers of people. Those people do things like buy basketball teams and spend huge amounts of money. Guess what? They like to travel. They like to put their money abroad. Those people have more influence over Putin than people realize.

Just remember all the people who said that the only way to respond in Iran was to nuke their centrifuges. And guess what? We are working our way now to a multilateral deal because the sanctions actually worked. Just think of all the people who said that we would never get anywhere with Burma, with these sanctions and the enormous changes that came about there.

So I think this is the difference between chemotherapy and surgery. But we are very sophisticated now in how these things are used. The whole U.S. government is involved and treasury sanctions are now involved—incredibly elaborate processes. And the most important thing is isolating and outcasting and tightening all of the screws.

Nobody thought that the Russians would give way for a Syria chemical weapons deal. By the way, one of the reasons I object to those who believe that the U.N. Security Council has a monopoly on the use of force in these situations is that the U.N. Charter's purposes are much broader than protecting territorial sovereignty.

What does it mean to protect territorial sovereignty in the age of the Internet? The purpose of the U.N. is to protect human rights and many other things.

And guess what? In the Cuban Missile Crisis, we did not say that the fact that the Russians were going to veto a resolution meant that we couldn't do anything. We figured out legal responses involving a quarantine that allowed a mechanism to operate outside the U.N. that didn't give it a stranglehold of the Russians.

I am surprised now because international lawyers claim if the Russians are going to veto, we have absolutely no choice. Let the slaughter continue. If that's really so, then any P-5 member, Permanent Five member, can commit genocide in its own territory, and nobody can do anything about it. That cannot be consistent with the object and purpose of the U.N. Charter. The human rights revolution extends to this.

Now, I want to make a tough point here: There are some people who are pacifists. Many of them came out of the Vietnam War. That's when I grew up. They do not believe that the use of force is ever appropriate. I respect that. I just don't think that that's how—I grew up in a different era.

I saw diplomacy backed by force create a situation in Dayton that led to a resolution of the Balkan crisis. He saw the lack of use of force in Rwanda lead to the slaughter of thousands. I really don't think that the goal of the law was to permit one nation to block action and let thousands of innocent civilians get slaughtered. If that's what the law condones, then we don't have a very good interpretation of the law.

And those people who say doing something would be legitimate but illegal, that to me is ridiculous. Did we say same-sex marriage is legitimate but illegal, or did we try to figure out a way in which you understand and reconcile your understanding of the law with what you think are the basic dimensions of justice in that circumstance?

You know, Kosovo was in 1999. This is 2014. The law has not evolved since then? International lawyers' thinking hasn't been able to figure out a way in which you could both preserve the integrity of the U.N. system and prevent innocent lives from being taken?

I said to Michael Scharf before, there is a great irony. You know, if you read Barack Obama's Nobel Peace Prize lecture, he said go with something quite similar to what I said. He said something like, "I have just been elected president. I am getting a Peace Prize at the same time as I am Commander-in-Chief of the strongest military force ever assembled, and my job is to extricate ourselves from three wars, and I am going to have to use force to do it."<sup>35</sup>

And he goes on, I believe, in humanitarian intervention. To paraphrase, he said, "I believe that force can be used consistently with rules, and it is my deepest dilemma as to how to resolve my basic commitments to peace, justice, and human rights with the duties I have to my citizens of my country."<sup>36</sup>

So it is not an easy time, and if you believe that force is part of the package, the question is: How do you use force effectively, not irresponsibly? You know, blood, force, trauma-like invasions of Iraq turn out not to be very helpful, and they completely tap us out.

So we have much more limited and targeted use of force. One of them happens to be drones, but let's face it, those people that are worked up about drones, ten years from now, if someone fires a drone, it is not going to be taken out with a drone. It is going to be taken out with a cyber command.

So let's not fixate on the technology. Let's fixate on the application of the law to the technology. The history of law of warfare is increasingly precise use of targeted weapons, starting with bows and

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35. See President Barack Obama, Remarks at the Acceptance of the Nobel Peace Prize (Dec. 10, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize>.

36. See *id.*

arrows to catapults, to bombs, to guided missiles and now to even more automated devices.

And then it will soon be cyber commands. And the question is how to bring those technological developments under a framework of law, and not under a framework of black hole.

AUDIENCE MEMBER: Thank you very much for speaking. This question goes to both the idea of adaptation but also to the new technology. I definitely get a sense throughout—and you mentioned it explicitly—that much of the lawmaking apparatus at the federal level is stuck. But, I see going forward a problem not unlike what we had in World War I, where the laws of war were set in a Napoleonic era, and then we had a period of trenches, of airplanes, of chemical attacks, and the harms committed to troops and civilians were so egregious. They went so far beyond any realm of adaptation that you literally had to rewrite the rules.

But, under the current paradigm, at least in the U.S., trying to get some sort of comprehensive future arrangement is next to impossible.

Is there a point when you see where the abilities of legal translation will fail, and if so, and if the paradigm doesn't change, what is a possible way out? There is only so far it can go, even under a very expansive State Department or administrative law regime, without some sort of lawmaking, some sort of legislative lawmaking power to change the system.

So is there a point where it has to change, and if so, what is that change?

PROFESSOR KOH: It is an excellent question. The materials that you have, the CLE materials include an article I published in the Georgetown Law Journal called *Twenty-First-Century International Lawmaking*. It describes the myriad of ways in which we now develop law, not just through formal treaty processes or statutory processes.<sup>37</sup>

My view is actually translation goes pretty far. I found very few examples where it really did fail. I mean, drawing distinctions between civilians and combatants, defining the scope of an armed conflict, defining the difference between illegal and legal is *jus ad bellum* and *jus in bello*. These are all still possible under translation. It just requires us to be more creative international lawyers, and you can create new forums that develop these rules. So the group of governmental experts is an ad hoc U.N. forum that is now addressing issues of cyber war. So a lot of this is engaging new lawmaking forums.

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37. Harold Hongju Koh, *Twenty-First-Century International Lawmaking*, 101 GEO. L.J. 725 (2013).

Now, your Dean Michael Scharf has written about the Grotian Moment. He argued, for example, that when we had ad hoc tribunals, and they were articulating the concept of drawing criminal enterprise, that became customary law, even without decades of state practice.<sup>38</sup>

So we now have many, many more occasions where a consensus that a certain set of rules ought to govern a new situation can be treated as guide and practice going forward. And guess what? In this process, lawyers are the imaginative ones. This is the message I want to give to the students. Lawyers are creators.

How many of you studied the Cuban Missile Crisis when you were an undergrad? When they started that process, they found missiles in Cuba. What were the three options that were presented? Number one, do nothing. That's not good. Then you have missiles in Cuba pointing at Washington. Number two, ground invasion months after the Bay of Pigs. That's not going to be so great. Number three, unilateral nuclear strike. Those three options are not great. What did they come up with instead? Quarantine. It looks like a blockade, but they called it something different, approved by a regional group, the organization of American states combined with track two diplomacy to get the missiles, the Jupiter missiles, out of Cuba.

And guess what? That solved the crisis. And you know what? Every single international law scholar who wrote about it the next year called it illegal, and now it looks like lawyers creating a fourth option that created a better result. In that process, it is the lawyer who says don't give me these three options and claim that they are the only ones when they are all bad. There is a fourth way to go.

And if you look for that fourth way, that is consistent with the spirit of the laws. When we were working on drones, there were some people who said we think what we are doing is right. We just don't want to defend it. And then other people say we can't talk about this, or we are going to have to release all the information, to which my view was, do you think what we are doing is legal? If so, we have a duty as the United States of America to defend what is the line between lawful and unlawful targeting, and what's the line between lawful and unlawful detention.

And people can disagree with us, but if they agree, we can eventually write it into treaties and statutes and other kinds of documents. So this is the challenge ahead, and lawyers are the critical part of this process. You are not just potted plants; you are not just scribes; you are creative participants in a policy process in which the law doesn't answer all the questions on its face. You have to help interpret the law in light of modern understandings.

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38. See Michael P. Scharf, *Seizing the "Grotian Moment": Accelerated Formation of Customary International Law in Times of Fundamental Change*, 43 CORNELL INT'L L.J. 439 (2010).

And guess what? Originalism didn't work so great. Doesn't work so great for our constitutional law, and originalism doesn't work that great in this setting either. But following the spirit of the laws, the object and purpose of the law, is what international lawyers are trained to do.