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THE EMERGING LAW OF 21ST CENTURY WAR

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Introduction:

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P R O C E E D I N G S

MR. TALBOTT: Good morning everybody. This is going to be I think even more edifying and certainly a more settled event here at Brookings in comparison to the one we had yesterday. I see a couple of heads nodding around here. We were honored by having the President of Turkey here and we were not so honored by having some fairly vigorous protests outside, up and down Massachusetts Avenue yesterday. So today we're going to step back a little bit from some of the more angry and fear driven issues of the day and look at the world from the standpoint of international law.

Let me say a couple of words about the origin of the Stephen Breyer lecture here at Brookings. The Associate Justice himself is a friend of this institution. He is a friend of many of us who work here. He is certainly a friend and an admirer of our lecturer today, Harold Koh. He has over the years had various connections with Brookings including writing his first book under the imprint of the Brookings Institution press. I think that was about 35 years ago, maybe even longer than that. We've had events for him on his recent books that have come out. Back in 2014 the Brookings Institution entered into a partnership with The Hague Institute for Global Justice and we decided to work together on an annual lecture followed by discussion of the sort that we are going to have today. I'll come back to the Institute which is represented here by Abi and I'll say a word or two about him in a moment. But I would like also, because of my own personal background with Harold, to say a few things about him.

I had the distinct pleasure of working with him in government during the Clinton Administration when he was the Assistant Secretary of State for Democracy and Human Rights and, as we all remember from the 1990's, there were challenges on virtually every continent on these issues. Harold was not just a thought leader and not just somebody who brings the discipline of his profession to diplomacy but he was very much an activist

and a superb diplomat and, I might add, his diplomatic skills were often evidenced inside the United States government. Because making sure that human rights and democracy is a key part of the American foreign policy agenda has not always been an easy task and an easy challenge and he was more than up to it. When the Clinton Administration ended my late wife and I went up to the groves of academe in New Haven, Connecticut and nobody was more helpful, hospitable and a better mentor to me during the academic year that we spent at Yale then Harold and I will always be grateful to him and to his wife and to his family for taking care of us then. And as you all know he has been active again in government in the State Department and has now returned to Yale where he is Sterling Professor of International Law. And it is hard to imagine somebody more suitable both to the topic today and also to the time that we are living in.

After Harold speaks to you, he is going to be joined by Michèle Coninsx who is the President of Eurojust, an acronym that makes pretty clear what it is all about, and Abi Williams who is the President of The Hague Institute who will be part of the discussion and also moderate the discussion that the two of you will have with Harold. Now it is my great pleasure to welcome here to the lectern Ingrid van Engelshoven who is the Deputy Mayor of The Hague and who is therefore representing the other half of the partnership that is bringing this event to you today. You'll have a few words for our guests and then we will have the pleasure of listening to Harold.

MS. VAN ENGELSHOVEN: Ladies and gentlemen good morning and it is my honor to welcome you here on behalf of the City of The Hague and I want to start with thanking Justice Breyer for giving his name to the lecture. It is our honor to be able to use his name. I also want to thank Brookings for its hospitality and I want to congratulate you on your centennial. It was in 1916 when Robert Brookings worked with government reformers to create this first independent institution devoted to political study

to fact based study of public policy. Fact based and that is so needed in these days. Today it is an honor to listen to such distinguished speakers such as Michèle Coninsx, President of Eurojust, Professor Koh already introduced, Abi Williams who as the President of the prestigious The Hague Institute of Global Justice will be our skilled moderator today. You all expected to hear from Ard van der Steur, the Netherlands Minister for Justice and Security but the Minister has decided to stay in The Hague in view of the letter to parliament that has to come and the many questions that need to be answered in the run up to the debate next week about the Brussels attacks. Of course we regret very much that he is not here but as a politician I understand fully why he stayed in The Hague.

The Brookings Institution is most influential, most quoted and the most trusted think tank in the world. So this is the place and this is the time to discuss crucial matters together. I think it is excellent that this meeting is being jointly hosted by Brookings and The Hague Institute for Global Justice. Our Mayor Mr. Jozias Van Aartsen and the former American Secretary of State Madeleine Albright serve as the founding father and mother of the institute. Earlier this year our mayor had a personal conversation with the Secretary General of the UN Mr. Ban Ki-moon. During this meeting Mr. Van Aartsen said that the City of The Hague is promoting UN Sustainable Development Goal 16 for peace, justice and strong institutions. In this area the City of The Hague has a reputation to maintain. We are internationally known and recognized as a legal capital of the world. We have a strong tradition in the areas of peace, justice and the institutions. We see opportunities for development and therefore we cooperate; for example, the renowned Asser Institute on international law.

These days there is much interest in the development of knowledge in the field of cyber security and this is exactly where The Hague can contribute. In the field we are the

gateway to Europe. Thanks to cooperation between businesses, government bodies and knowledge institutes, regional, national and international. And the use of this triple helix corporation is condition for success. In fact the message these days is very straightforward: do cooperate. Commerce, think tanks, government bodies. If everyone stays inside their own safe environment no innovation is possible. But if you put your hats above your own organizations fence you can come up with solutions no one could ever think of. Today the topic of the Justice Breyer Lecture on International Law is the emerging law of the 21st Century War, a subject that really matters. I could mention the recent atrocities in Brussels and Turkey, the continual strife and unrest in the Middle East, and the conflicts in Africa. This is a time for reflection, time for new insights, time for new initiatives. There is only one way to emerge from these crises: cooperation, national and international. The Hague security delta already has a wealth of knowledge in the field of cyber security. The cyber world promises many benefits. We have an incredible amount of digital information available to us. The smart use of this data for instance big data for humanity or for peace as it is known can be used to avert conflicts, maybe even wars. And The Hague wants to take the lead in all this. But digitalization brings new problems with it as well. Critical infrastructure comes under pressure if criminals can take control of it. We need new international regulations and laws in a digital world. Another question today is how do we protect digital privacy in a world without borders where terrorism has to be dealt with. There are many more questions popping up when you think in this respect about our topic, the emerging law of the 21st century war. So let's share our vision, be open to each other. Brookings can help us to bring our very best qualities to the surface and we will need to do that to get closer to a safer and more just world. And the City of The Hague wants to be your partner in this. I wish you a very pleasant lecture and I do invite Professor Koh to the stage.

MR. KOH: Thank you, Madame Deputy Mayor, and thank you to the sponsoring institution the Brookings Institution with whom I've had a wonderful cooperation over the years. The City of The Hague which I've visited and admired for decades and The Hague Institute for Global Justice under its brilliant leader Abi Williams. It is a great honor to be here to deliver this lecture. My own perspectives as Strobe described are, having been an international law professor for 35 years, 20 years as a human rights lawyer, 10 years in the US government and 5 years as dean of a law school. Don't add these up, some of these are overlapping. But in each of these capacities I've had the great honor to work from and learn from Justice Stephen Breyer who is our great transnationalist justice of this era and who follows in a tradition of justices mentioned here. Just to single out two, Melville Fuller and former President William Howard Taft were founders of the American Society of International Law almost 100 years ago. It is Justice Breyer, who in his various works and his most recent book The Court in the World, his opinions have sought to give the decent respect to the opinions of mankind that the Declaration of Independence originally mandated. If there is a core idea that drives his transnationalist jurisprudence it is simply this: that there is a transnational public law emerging, rooted in shared norms that have a similar meaning in every national system. For example the idea of cruel, inhuman, or degrading treatment, civil society internally displaced and the emerging law of transborder trafficking. What I want to talk today about is the emerging law of 21st century war which I think has been in many ways the most discussed and the least understood of these bodies of law.

Here I am again going to pay special tribute to my friend and mentor Strobe Talbott with whom we had worked together during the Clinton Administration particularly during the Kosovo Crisis. But when we got to Yale in September 2001 one of the first discussions we had after 9/11 was about whether this would be a situation where law

would be abandoned or whether law would be modified to address the whole range of emerging problems. It was Strobe's commitment, which I very much shared, that the law might change but there would be law. We would not enter what we could call a law free zone. And what we've seen in the years since is that new tools of 21st century law have emerged: cyber conflict, drones, special operations, private security contractors, now increasingly discussion about autonomous and semi autonomous robots. And people ask the question, what are the rules? What is the emerging law of the 21st century?

There are two basic competing notions that come into play. A notion put forward by some is the notion that we are in a law-free zone, that because these technologies did not previously exist that there is no law to apply. Or that there is a world of legal black holes in places like Guantanamo or tribunals which don't have to answer to law like military commissions. The other view which is the one that I think has prevailed is the notion that we are in a moment where we translate what Montesquieu calls the spirit of the laws to the present day situation. There are many interpreters but it is extremely important that this translation exercise occur in particular because we are in a time when both the domestic and international legislative systems are in stalemate and peculiarly paralyzed. So if there is law to be applied it is law that derives from the spirit of the laws that governed 20th century and 19th century conflicts. It takes only a moment of reflection to see that there is a big difference between a black hole and a translation exercise. In a black hole we are operating outside the law. In a translation exercise you may debate whether the translation is correct but there is no doubt that we're operating within the framework of the law and not denying application of the law altogether.

What I want to argue today very quickly is that in these particular areas, a body of law has emerged which is transnationally shared with other developed nations, particularly our European colleagues. Now, let me start with the basic question which is,

is the Obama administration's approach the same as the Bush administration's approach? This is a simplistic idea sometimes set forward by media. Let me suggest six ways in which there are crucial differences. First that this administration does not speak of a global war on terror but the notion that there are military operations outside of hot battlefields against terrorist networks that are constrained by international law principles of state sovereignty. Secondly under domestic law that we do not operate on unenumerated constitutional powers of the President alone but on congressional authorizations plus constitutional power that, as a matter of international law, these domestic authorizations are informed by the laws of war, although there are those in even the D.C. circuit who disagree. That we do not use an either or approach – is this war or law enforcement? – but that we combine them into a hybrid paradigm. So what may be appropriate for an ISIL leader in Syria may change from a war approach there to a law enforcement approach if that ISIL leader is found in, say, Brussels. Fifth that we do not simply operate based on labels; calling someone an enemy combatant doesn't suddenly say that anything against that person goes. Instead it is a fact-based inquiry, as the Deputy Mayor said, about who the individuals are who are being subjects of military action. And finally, an absolute commitment to humane treatment both in detention and interrogation.

These are important differences and they fit into what I would say is a broader Obama administration legal theory of an integrated targeting and detention approach as part of a general strategy of smart power. You've heard this from this administration repeatedly, particularly Secretary Clinton. A notion that targeting should be lawful, detention should be both legally authorized and done under lawful conditions with the fruits of illegal detention not being used in subsequent proceedings. And lawful cooperation with other states were also at war and relying on law enforcement

authorities. I know that my colleague from Eurojust will say more about this in the discussion session.

So where do these legal rules come from? Three sources: international criminal law as it has developed since Nuremberg, particularly now in the International Criminal Court Rome Statute which addresses genocide, war crimes, crimes against humanity and, after 2017, the crime of aggression; the law of armed conflict, sometimes known as international humanitarian law; and international human rights law when it is not ousted by other bodies of law as a controlling *lex specialis*.

What does it mean to be in an armed conflict? We're in an armed conflict when we're fighting with an organized armed group which has a particular nature, intensity, and scope. And that armed conflict can either be an international armed conflict or a non-international armed conflict as declared by either the state itself or by the International Committee of the Red Cross. We're very familiar with two kinds of armed conflict, US versus Germany, an international armed conflict in World War II. A non-international armed conflict of the type we saw in Columbia the government versus the FARC -- a civil conflict -- but what we've seen is the emergence of another kind of non-international armed conflict between a nation state and a transnational terrorist network. And it was Justice Breyer among others who in the Hamdan case in 2006 identified the conflict with Al Qaeda as this kind of non-international armed conflict.

We are in a war not with terror but with Al Qaeda, the Taliban, and associated forces. This administration has construed ISIL or Daesh as part of these associated forces, the key being that they be cobelligerents in the sense of having entered the fight against the United States alongside other armed groups. And the hot battle, grounds active theaters, – Afghanistan, Iraq and Syria – Russia says it has been invited there by Asad. The United States is participating there against ISIL. What law must the US

follow? Wel,l under traditional laws of war the law of initiating war, (jus ad bellum), and the law during wartime (jus in bello) under domestic law following the constitution and the authorizations for use of military force. Which brings us to what has been the position of the US government since the second half of the Bush administration: the United States is in a non international armed conflict with Al Qaeda, the Taliban, and associated forces in response to the 9/11 attacks and subsequent attacks and may use force consistent with the laws of war and its inherent right to self-defense under international law and that the Congress has authorized appropriate and necessary uses of force through statute in response.

Now this raises several issues. What constitutes a valid armed conflict, when are you acting in individual or collective self-defense, and when has the state in which the action occurs consented to the use of force on its territory or demonstrated itself to be unwilling or unable to suppress the threat (the classic example here being the raid on Osama bin Laden)? In conflict the conduct of force is governed by well established rules, distinction between civilians and military, necessity, proportionality in the use of force and rules of humanity. So when you hear people talk about carpet bombing, it is illegal. Now I heard recently this candidate mention the notion of selective carpet bombing which is an oxymoron if I've ever heard of it but to go on under the Geneva Conventions (the four Geneva Conventions, article three), the rule of humanity says there should be no violence to life and persons including torture, no taking of hostages, no outrages on personal dignity, no sentences without due process. The additional Protocol One which the US has treated as customary international law amplifies these guarantees and outlaws all forms of violence against those persons who are non-combatants.

Now, it does not matter that Al Qaeda has not signed the torture conventions of the Geneva conventions. I recall a meeting I had with a senator who said to me:

professor (by the way, inside the beltway professor is not a term of respect,) he said professor, the last time I checked, Al Qaeda hasn't signed the torture convention or the Geneva Convention. I said, Senator, the last time I checked the whales hadn't signed the whaling convention either. This is not about contract, it is not about a bilateral agreement, it is about what our minimal standards of humane treatment, or as Senator McCain put it well, it is not about them and who they are but about us and who we are. And it contains the notion in Additional Protocol Two which the US respected on the key provisions no “acts or threats of violence the primary purpose of which is to spread terror among the civilian population,” including such banal threats as making the sand glow.

Now, you will hear some say we should proceed to water boarding or a hell of a lot worse than water bording. The short answer, which you saw in the retraction which came from this candidate's campaign, is unfortunately that is illegal and if the president has taken an oath to uphold the constitutional laws of the United States that is probably an impeachable offense. Because the torture convention says justification may not be justified by a state of war or a threat of war and that all acts of torture wherever they can occur must be criminalized. Senator McCain made the policy point as well. These statements mislead Americans about the realities of interrogation. I would urge you to read Shane O'Mara's book, *Why Torture Doesn't Work*. He's a professor of brain research, experimental brain research, at the University of Dublin. His point is very simple: at a cellular, neurological level it does the opposite of what it is intended to do so it is a pointless act. Or as Orwell would say, the only point of torture is torture.

And then this brings us to The Hague. The international court of justice has said that the International Covenant on Civil and Political Rights does not cease in times of war if there has not been a derogation. In the Palestinian Wall case that the court must take account of both international human rights law and international humanitarian law

and so we apply a provision by provision approach. There are some human rights provisions which may be impracticable in time of war, for example elections, but others like the right to free of torture and cruel treatment are nonderagable and cannot be relaxed. Charlie Savage of the New York Times and his new book *Power Wars* recounts a debate in which I was involved. I left behind when I left the State Department on my last day as legal advisor a memo which said I did not believe that it was legally available for policy makers to claim that the torture convention did not apply outside the United States. And in 2015 this administration made explicit; the Assistant Secretary for Human Rights Tom Malinowski the torture ban applies in all places at all times with no exceptions and then my successor as legal advisor Mary McCleod echoed the same notion.

So that is the law of interrogation. What about detention? Increasingly as the president made clear in his National Archive speech seven years ago, civilian trials are preferred, military commissions must comply with the Constitution. Transfer of detainees from Guantanamo continues and as of yesterday they report that, of the 91 left, 17 will soon depart hoping to leave that number at something like 45 at the end of the summer still with time to go. An executive order on periodic review and now embodied in the National Defense Authorization Act an absolute statutory guarantee of humane treatment.

Now, I am often asked, you are a human rights lawyer – how can you defend drones? The answer is quite simple: all torture is illegal. The President cannot be torturer in chief – this is an absolute ban in all circumstances. But, ironically, killing in warfare can be lawful if it is done according to the laws of war. You may not like it but if you are a lawyer in the government it is your inescapable duty to draw the line between uses of force that are or are not lawful. If we are indeed in an armed conflict we can engage in certain kinds of lawful, lethal warfare. For example, targeted killing can be

lawful when conducted against someone not in government custody, as self-defense, or as part of a armed conflict if that person has no immunity under the Geneva Conventions and can indeed, as President Aharon Barak of the Israeli Supreme Court suggested, be more consistent with human rights norms because of the lower possibility of collateral damage. What makes targeted killing lawful is that the action is authorized, that the person targeted's rights have been adequately considered and that the rights of the sovereignty of the country have been adequately respected. If done correctly it is not extra-judicial killing, it is not extrajudicial execution, it is not assassination, and it can be carried out by special operations as in the case of bin Laden, or by drone. Which means that drones may be lawfully used for targeted operations. There are some weapons that are inherently illegal in my judgment – chemical weapons, anti-personnel land mines, unexploded ordinance cluster bombs – but not drones. How they're used determines whether or not they are lawful.

So take this thought experiment. Suppose that after Congress had authorized the use of military force if the president who had been the person at the time who had won the popular vote had come out and said the following: "Yesterday or a week ago we were attacked. Three thousand innocent people were killed for going to work. We will have to respond. Here is what I will not do: I will not torture anyone, I will not open Guantanamo, I will not invade Iraq, I will not conduct kidnappings or extraordinary rendition, I will not violate people's rights by surveillance, I will cooperate with our allies in a transparent fashion but if the only place I can find bin Laden and his supporters is in a cave in Tora Bora and the only way I can reach them is by drone I will use that lawful method, please support me." Now, with a lot of water under the dam since that speech was not made but what it tells you is it is not the drones that are illegal. Tt is the way in which other things have been conducted that have put a cloud over so much of what US

has done since 2001.

Now, President Obama upon taking office made clear that his goal was to obey law even in times of armed conflict – he said this at his Archive speech and again in his Nobel Prize speech. At the National Defense University in May 2013 he emphasized that a smart power approach can include drones as an effective discriminate tool to help dismantle specific networks that threaten the United States. And he made clear his preference for capture over kill, respect for state sovereignty, the notion that self-defense can include the notion of continuing eminent threat or elongated eminence against someone who clearly is determined to strike against senior operational leaders, so long there is a near certainty of no civilian presence. Now, these are policy rules, they are in presidential policy guidance, I would hope that they could be embodied into executive order, but to my mind these rules are consistent with the laws of war. If you translate them into codes of conduct and internalize them through private contracts they can even govern private security contractors as has been done in something called the Montroe Document.

What about robots? The law of war does not yet treat autonomous robots as a per se illegal instrument. Semi-autonomous robots have human beings in the loop and can be programmed to operate under the same set of principles – or, the operators can use the same set of principles – as in the NDU speech and it is very clear that fully autonomous robots which engage targets independent of human interference or supervision – think Arnold Schwarzenegger in *The Terminator,* not as Governor of California – fully autonomous robots obviously probably entered the zone of per se illegal weapons.

What about cyber intrusions? This is a difficult area we will discuss further. We need to distinguish between cyber monitoring, defense and espionage, hacking which

can be done by private parties, network exploitation which is a form of intelligence and network attack which can have broader, physical consequences. For example, using a computer to open a dam, shutting down a hospital is no different than bombing the dam or bombing the hospital. In 2012 at Cyber Command I gave a speech called "The 10 Rules of Cyber Conflict" which made clear that international law applies in cyber space; it is not a law free zone or black hole. It can be use of force and the laws of *jus ad bellum* and *jus in bello* apply, with states being responsible for the actions of proxy actors. A series of legal experts in an exercise called the Tallinn Manual have elaborated this. To further legalize cyber conflict we need to translate the laws of war to make it even clearer that cyberspace is not law free zones, to incorporate government standards setting exercises into other exercises, and to promulgate these through diplomatic negation before forums like the Group of Governmental Experts.

Finally, we end with Syria a tragic story that you all know: the civil war, the violation of armed conflict, the migrant crisis, the border closings, the discrimination against those who are feared to be ISIL, 250,000 plus dead, seven million displaced, five million refugees, two million of those children like this poor infant. President Obama suggested that the approach here (and this is in his very last State of the Union speech a few weeks ago) is a smart power approach to conflicts like Syria. One of the issues being raised over and over is whether it is lawful to enter Syrian territory. Raised earlier in the administration is it lawful to give humanitarian assistance later, is it lawful to support Syrian rebels, now one of the questions as Aleppo remains divided and as refugees flock to the border between Aleppo and Turkey is, is it possible to give them some sort of humanitarian protection? Here some claim that the UN charter article 2(4) is absolute. That it is a violation of sovereignty to enter. I think it is a moment to question this as we did in Kosovo itself. If this were true any member of the Permanent Five could commit

genocide against its own citizens, veto all Security Council resolutions and no one could do anything about it and maybe somebody can explain to me how that is consistent with the values of the UN including human rights.

Some have called humanitarian intervention illegal but legitimate. I consider this a cop out. As a Canadian commission headed by Lloyd Axworthy pointed out, if the Security Council fails to discharge its responsibilities, concerned states will not rule out other means and forms of action. In his Nobel lecture, President Obama made clear that he believed that use of force for humanitarian grounds as in the Balkans can be justified. It is not clear the fact that it is lawful means that it must always been done and he clearly has concluded differently with regard to Syria. But I do think that we do need to question the notion of illegal but legitimate as the ending point. Did we say that same sex marriage is illegal but legitimate or did we move to make it lawful? It seems clear to me that in the black letter realm the rules that claim to be absolutist were calling to my mind more of an approach I associate with the late Justice Scalia then with Justice Breyer, creates an intolerable bias towards inaction in the face of gross abuses in their time to define a narrow responsibility to protect in the name of human rights. I have an article coming out which suggests this particular test that when you have disruptive consequences likely lead to eminent threats to peace and security other remedies have been exhausted, the humanitarian use of force is limited necessary and proportionate. If action is done collectively as NATO did in Kosovo to prevent illegal means like chemical weapons to be used for illegal ends like war crimes, the use of force in these circumstances is legally justified. You can analogize it to the Good Samaritan principle in tort law. Tort law rarely preauthorizes people to use force but if they do, they hold them exempt for wrongfulness after the fact. You recognize the tension with the letter of the law but you invoke an affirmative defense. I might ask whether it isn't the task of

international lawyers to develop the law in this area in service of human dignity.

A final point: the looming crime of aggression which will be activated in 2017. I cite you here to an article that was just published in the American Journal of International Law. If western leaders in NATO, for example, engage in humanitarian intervention in a place like Kosovo, can they be charged with aggression at the International Criminal Court? And if that were done wouldn't that deter human rights action? Isn't it perverse to say that the only remedy that people have for crimes against humanity, war crimes, and genocide is episodic, after the fact punishment and that there is no remedy of prevention and any effort to undertake the prevention will be criminalized? This cannot be the law. Lawyers can figure out a better solution.

So in closing, let me say what I believe is the lessons of this. In today's armed conflict the laws are not silent. Even though the means are mutating, there is an emerging 21st century law of war. It doesn't follow verbatim from 20th century law but it is a good faith effort not to have a black hole but to translate the spirit of those laws to the present day. These laws govern interrogation, detention, drones, special operations, private security contractors, and the Responsibility to Protect. Our challenge going forward is how to clarify these rules, make them more legal, more transparent and more subject to external oversight. Or if you just need to remember this lecture in one phrase, we do not have to apply the Turner doctrine, Tina Turner that is. You know the song, what's Law got to do with it? What's law but a sweet old fashioned notion? That is not true in this area. The laws of war do not fall silent simply because conflict is evolving. We have a great deal of emerging law to develop, apply, codify, and enforce and that is what I call the translated law of 21st century war. This is my tribute to Brookings, to Strobe, to Justice Breyer, to the City of The Hague and to global justice. Thank you.

MR. WILLIAMS: Ladies and gentlemen welcome to this panel

discussion on the emerging law of 21st century war. The panel provides us with an opportunity to delve deeper into the substantive issues which Professor Koh has outlined in this year's Breyer lecture. It is a great pleasure to be back at Brookings and for The Hague Institute to partner with Brookings and the Netherlands Foreign Ministry particularly the Dutch Embassy here in Washington and of course The City of The Hague to host the third annual Justice Stephen Breyer Lecture on International Law. I thank Professor Koh very much for his stimulating and thought-provoking lecture. We hope through this series to shed light on pressing questions of international law and to elucidate the work of The Hague-based institutions in the process.

There is a little dispute that the means and methods of waging war have changed significantly in the decades since the laws governing the conduct of modern warfare were drafted. The nature of armed conflict has also changed significantly since the Geneva conventions of 1949 and their additional protocols were drafted. Modern warfare is increasingly asymmetrical and spreads easily across national borders. States, even those that are allies, have different understandings of how to interpret and apply the laws of war to new means and methods of warfare, sometimes within the same theater of operation. So a shared understanding of the emerging laws of war in the 21st century is therefore imperative in order to facilitate more effective and coherent responses to the multiple crises, the threat in global security. We're fortunate therefore to have with us this morning two distinguished panelists who will discuss the emerging laws of war and the challenges of compliance. Our keynote speaker Harold Koh who is the Sterling Professor of International Law at Yale Law School and the President of Eurojust, Michèle Coninsx. I will begin by posing a series of questions to our panelists and after approximately 35 minutes or so I will open up the discussion to the audience.

So let me begin with Harold Koh if I may. While there is broad agreement

between the US and EU as to the importance of a rules-based approach to warfare, are there significant differences in how these actors interpret key elements of international humanitarian law and can differences among allies in interpreting the laws of war undermine the possibility of complimentary, coordinated, and ultimately effective action?

MR. KOH: So first of all I think that there is widespread agreement. The agreements far outweigh the disagreements and will probably continue to do so as this whole exercise is increasingly becoming active in Europe - which, by the way, I think lends itself to the notion of greater collective standards setting. It is high time for an agreed statement of principles; it is high time for public discussion of these shared principles. What I think are the two main points of this agreement that have emerged is on what happens when a state has not explicitly consented to a military action on its soil. To what extent can you invoke the notion of unwilling or unable as a proxy for state consent? So for example if you have a country which knows that a NATO legal action will take place on its soil, they will not protest but neither will they come out and explicitly say “we agree.” At what point is that unable or unwilling approach sufficient to give the state consent necessary to overcome state sovereignty? We see this lack of clarity in Syria. We’re in an absurd situation where Asad has consented for the Russians to participate. Asad is silent on the US using force against ISIL but Asad will not consent for the US to provide assistance inside Syria. So the notion of state consent in one circumstance has been overcome and at the exact same time with regard to the most pressing humanitarian need is being treated as if it is a somehow absolute consideration.

The other main difference is about self-defense. People point out – correctly, I think – that the original notion of self-defense is against an eminent attack and if you have lots of eminent attacks you should be in a state of armed conflict not in a repeat state of self-defense. But what has become clear over time is that when there are groups

that are constantly planning attacks, you don't have to wait until the next attack is about to be implemented to act against them. So for example if Al Qaeda acts against the United States by airplanes into towers, printer cartridge bombs, shoe bombs, underwear bombs, the last mode of delivery will change, which means that you must be able to have some ability to respond in self-defense before that penultimate moment. Now the question is how far back can you go before the notion of eminent self-defense is lost and becomes preemptive self-defense and the notion that the administration has used in its own presidential policy guidance is continue in an eminent threat. That is based on the notion that there are a group of individuals – hopefully a small group – who do nothing but plan attacks. So each attack is a continuation of the previous one. That's different from declaring the place where those attacks are occurring theaters of armed conflict. You don't declare Brussels the theater of armed conflict because there was an attack there. In fact, that can be addressed through law enforcement and is being addressed that way now.

MR. WILLIAMS: Let's turn to Brussels, Michèle Coninsx. Eurojust seeks to improve cooperation and coordination amongst member states to facilitate investigation and prosecution of cross-border crimes, including terrorism. In light of the recent attacks in Brussels, what are the challenges of compliance with international regimes when multiple states are involved?

MS. CONINSX: When we talk about terrorists attacks we talk about attacks which are planned and organized across the borders of different states. This was shown in the Paris attacks last year and the Brussels attacks, and it will not change. This is a given fact. This means that it is self-evident that we have to strive for, as has been said by Ms. Engelshoven, for a national coordination, cooperation and international cooperation. These are the key words: to stick together, join forces, have a common

objective in fighting terrorists.

Eurojust is the agency which is involved in national justice corporation and coordination so it is at the heart of our activities to bring judicial and law enforcement authorities together around terrorism criminal networks. In tackling terrorism however we are confronted with national criminals and international laws, conventions, treaties, and hence it is becoming more and more complex. If you, for instance, wanted to prosecute a terrorist, you might hit questions around international criminal law or international human rights law. So it is extremely important to have a reflection and analysis on a talk basis. This is exactly what we do for every single terrorist attack. We are coordinating or we are ensuring traditional cooperation. The European Union has always favored the criminal justice approach and that coincided with the existence of Eurojust. We started to see daylight in 2001, 2002 coincided with the 9/11 attacks and we have since then been facing different terrorists attacks. The Madrid bombings in 2004, the London bombings 2005, we had foreign terrorist fighters network in 2005 being disrupted by the Belgium authorities in 2005 in close cooperation with the United States and continue to 2014 with the attack against the Jewish museum and of course 2015 which was a year of a lot of drama ending up by the last attacks.

But we have seen that all along the way that European law we have the fundamental framework decision in 2002 which was meant to define for the first time in history what is terrorism at the EU level. It has continued in 2008 where recruitment and training and public provocation were being penalized and recently we have also adopted the UN resolution 2178 and the second additional protocol in the Convention on the Prevention of Terrorism into initiative taken by the commission on the directive. How can we tackle foreign terrorist fighters? What about traveling for terrorists purposes? What about the financing of the traveling and the organization of travel of the foreign terrorist

fighters? What about passive training? These are to be taken into account now under the initiative of the commission. So we see that from 2001, we have not left any occasion aside to streamline the legal frame at EU level, always based on the criminal justice approach and we will continue to do so. We will gradually at Eurojust follow up on the impacts of those changes because what is being regulated through directive and decisions have been implemented in the national laws of the member state and that has been gradually done and throughout the analysis of convictions which is monitored by Eurojust we see what is the impact of the implemented laws and to what extent international humanitarian law conflicts with terrorism laws, what has been adopted and accepted by the judges, what has been accepted to be terrorist activity translated into terrorist offenses, or what is and has to be translated into international humanitarian law. So we follow up strictly with what we call the terrorism convictions monitor but I will give more insight.

MR. WILLIAMS: There has been a lot of criticism about the Belgian authorities and the performance in light of these attacks. You have a unique perspective both as president of Eurojust and a former Belgian prosecutor. Do you think these criticisms are justified?

MS. CONINSX: I think we have to be after each and every single terrorist attack to be critical to ensure that what was not going well will not be repeated by other future and potential victims but when it is criticism for criticism not based on any in-depth knowledge of the reality based on the true and correct information it is destructive and that is unacceptable. It will divert attention of policy makers, politicians to what they already have to do and that is to focus on the thing right now. I know – and I'm still a Belgian federal prosecutor – that we managed in January 2015 to abort a terrorist attack in Bellevue on January 15. I know that in July 2015 (inaudible), for example, Reda Kriket,

the names you certainly have heard about through newspapers were being convicted by a Brussels tribunal and they were the subject of international arrest warrants in the meantime. I know that a lot of attacks have been aborted but the problem we're faced with now of foreign terrorist fighters is an immense complex problem. It is not about a world structured terrorist group. We're separating from a specific territory. Tt is about isolated lone persons and terrorists it is about the loose groups which sometimes don't move at all and which are incited and invited to act in a terrorist way through the internet and not easy to detect. In other terms we have to be lucky at all times. They have to be lucky only once. We have been, and not only in Belgium but in a lot of European states, being capable, able to disrupt, think about the French recent action in the last weeks that we have been able to disrupt terrorists activity but we might not be lucky at all times because of the way the modus operandi of the foreign terrorist fighters. We cannot focus only on those going back and forth to Syria and coming back, focus on the (inaudible) would be not a wise thing. We cannot focus on structured groups, we cannot focus on people who have only a criminal record for terrorism, we have to focus on a lot of things at the same time. So it is crucial again to have a multidisciplinary approach in a state and across the states. This is not easy.

We are learning from each and every single attack and spreading the good news to best practices. This is also one of the tasks of Eurojust. We have been starting to work on foreign terrorists fighters since 2012 when we first were informed about Sharia4Belgium movements in Belgium and we have since then not left any moment, opportunity to continuously work on the approaches of the 28 different member states in facing foreign terrorists fighters. Will we always be successful, no, is this to be criticized, no. The answer is judicial cooperation, law enforcement cooperation, coordination within the European Union and with other partners including and especially with the United

States.

MR. KOH: Abi, Michèle makes a very important point that shouldn't be lost. There is a myth operating out there that the Europeans favor a law enforcement approach and that the Americans favor a war approach. In fact that is not the dichotomy. So, for example, the Boston Marathon bombing was handled by law enforcement, the Belgian situation is handled by law enforcement, the French situation is being handled by law enforcement. Nobody argues that that ought to be dealt with by military action. So, for example, but it goes to the point about a state that is able and willing. A former presidential candidate now out of the race said things like under the administrations rules you can use a drone against someone sitting in a café in New York. That is obviously not so. That person can be detained by a law enforcement process so why would you ever import a way paradigm into that situation? So the exact same person, after the Belgian attacks Secretary Ash Carter announced that there had been a drone attack on a senior leader in a place that was inaccessible by other means where at the same time law enforcement action is occurring in Europe. These things go together. It is a combined paradigm, it is not either/or.

MR. WILLIAMS: Harold, you served as legal advisor to the State Department dealing with issues including the detention of enemy combatants and drone warfare. Is it ever the case that compliance with international law is at odds with the formulation of an effective domestic security policy?

MR. KOH: First of all I should acknowledge in the audience we have a legal advisor in the State Department Brian Egen who is, I'm touched that he is here. His counselor Catherine Amirfar is also here. He is giving a major speech tonight at the American Society of International Law which is more important than this speech. I encourage you to attend. It is the job of the legal advisor of the State Department to

ensure that we're living up to our international legal commitments without threatening our security situation. So we certainly believe that these things can be reconciled and we work very closely with the Justice Department. I know Michèle works very closely with Attorney General Lynch and senior officials of the Justice Department on international criminal action. So these things have all developed over time. It is a multipronged philosophy. The State Department has a counter terrorism office that specializes in counter terrorism diplomacy. In a multifaceted problem you don't just use one tool. You use many, many tools and if there is a point of my presentation, it's that these different tools should be targeted to the things to which they are both most effective and can be most clearly conducted in a legal fashion.

MR. WILLIAMS: Michèle you've mentioned foreign fighters and Eurojust assists member states with the investigation and prosecution of foreign fighters in the EU but it is also highlighted that member states may encounter difficulties when prosecuting foreign fighters due to the complexity of qualifying their actions as breeches of international humanitarian law. How do you think those difficulties can be overcome?

MS. CONINSX: Well, we have seen lately clear messages from the tribunals that in every single case of a terrorist trial of the masters of the tribunals have been -- it is not international humanitarian law it, is terrorist activity that should translated into terrorists offenses and been judged and convicted as such. In a case I'd like to refer to is the emblematic Sharia4Belgium conviction that took place on February 11, 2015; there was an appeal in January of this year confirming in the first instance conviction where a defense lawyers there were 46 defendants were pleading for the application of the international humanitarian law referring to the conflicts in Syria as a non-international conflict, armed conflict, referring to the fact that the defendants were linked to that armed conflict and that the terrorism law was not applicable. They made reference to this so-

called article 141 of the criminal code which is making exception. This is not terrorism this is international humanitarian law. Why was this being corrected by the Judge? They thought that there was between the defendants Jabhat al-Nusra and no reason to say that Jabhat al-Nusra was having its activity in the frame of the non-international armed conflict and they were not to be considered as armed groups or troops as seen in an armed conflict during the period of an armed conflict that they had not the same characteristics and that their activity had to be seen as pure terrorist activity. That reasoning has been applied by recent convictions in the Netherlands in 2013, 2014 and 2015 for different terrorist activities which were being labeled by the defendants as international military law activities and foreseen as pure terrorist activities.

Now we are monitoring very closely all these convictions have fine tuned analysis of these convictions and do share them with all the anti-terrorism prosecutors of the European Union in order to inspire the prosecutors who do go to court in order to inspire their time of the Judges that what is happening in Syria when it is done to establish a caliphate, an Islamic state, is not to be seen as armed activity and armed conflict, it is to be seen as terrorist organization. This is being ruled also by the European Union in eleven of the framework decision of 2002. It is explicitly foresees the exception that some of the activity is not to be seen as terrorism activity in certain circumstances and that this exception has to be included in international laws. We have made reference to this exceptional circumstances but the judges believe at all times their reasoning of the prosecutors. So it is on a basis being discussed in courts. So far the messages of the tribunals are very clear and not in line with the international humanitarian law but in application of the national and international terrorism rule.

MR. WILLIAMS: Harold, you mentioned the Responsibility to Protect which was adopted at the world summit at the UN 10 years ago with a lot of hope and

expectation. R2P was invoked for the intervention in Libya but of course has now been facing serious difficulties particularly within the Security Council with divergent views on how to be among the permanent members. Two questions: first, do you think there is a basis for invoking R2P for action in Syria which was missed, and second, is there anything that can be done to bridge the differences now within the Security Council regarding the Responsibility to Protect?

MR. KOH: So, first of all, as lawyers we talk about whether the option is available, whether it is lawful when there is no Security Council resolution to take action under certain circumstances to prevent great humanitarian suffering. Whether it is available is different from whether and when you ought to use it. It just means that the lawyers are not taking the policy option off the table. I really want to make this point ver explicit. No, the question if one country is going to veto every single resolution do we really believe that the Russians or any other country in the P5 could commit genocide against their own citizens and veto all resolutions and the whole world can do nothing forever? I mean if this is true Asad could gas every child in Syria tomorrow and hide behind the Russian veto and the international law in the name of sovereignty supposedly permits this to happen. This is not a pro-peace position, it is a pro-slaughter position. More than that, and we have to emphasize this, it is not a non-intervention position when everybody else has already intervened in Syria. Now, was there a moment… the issue came up or has come up in a number of respects: first, could you give humanitarian assistance to groups inside of Syria or is that a violation of international law? Secondly, could you arm certain rebel groups to act inside Syria, and a third possibility, could you enter Syrian sovereignty for the purpose of creating a humanitarian zone? Not that many people are calling for that at the moment although some presidential candidates are. And finally, could you enter for the purpose of preventing the mass use of chemical weapons?

It seems to me that that option is not taken off the table by lawyers, and people who say the law is absolutely crystal clear have not addressed the changes in the law that you described. As I said, the notion that this illegal but legitimate strikes me as a cop out. If you have something you believe to be legitimate like same-sex marriage you take the necessary steps to make it lawful. The notion of the Good Samaritan principle is if someone does it, even if they weren't authorized to do it ahead of time, they shouldn't be punished for it by being prosecuted as an international crime. How can it be that someone intervenes to prevent genocide and then they're accused of committing aggression? That makes absolutely no sense. So international law, there's a claim of a clarity, absolutist clarity of black letter rule that has been up for grabs for many, many years and that's what you described. We just have to acknowledge the reality which is let's not fall back to black and white when the reality is very gray.

MR. WILLIAMS: You said that international lawyers focus on whether an option is available to policy makers and if policy makers choose to use that option that's another question. There's a legal option which of course is the veto and the right to veto under the Charter, which the P5 have. There is now a proposal and a move to get members in the UN to sign up to abstaining from the use, to encourage the P5 to abstain from the use of the veto in issues of mass atrocities. Now, do you think that should be the way forward to make sure that a veto does not apply and is not an option when mass atrocities are being committed?

MR. KOH: Well, it would be great. The P5, certain members simply will not forsake the veto even if every other country in the world says that they shouldn't veto. We had the astonishing spectacle of Vladimir Putin attacking the US in the fall of 2013 for not respecting sovereignty in Syria by threatening an attack with regard to chemical weapons when he himself had just invaded Ukraine. I mean that is the height of

hypocrisy that we should not clothe in legal protection because it is just not true. Now let me go back to a famous historic example. During the Cuban Missile Crisis people presented the option, a false set of options: ground invasion, do nothing, or unilateral strike, and the lawyers looked to the notion of an interdiction or a quarantine and some people argued that it was an illegal blockade. In fact, most academic international lawyers criticized that fourth option. Now, 50 years later, this is considered a decision making exercise in progressive development of legal arguments that is consistent with better policy. So the law and policy evolved in this, area, if there is a message that I'm trying to convey here. We know a difference between a flatly illegal option and one which is lawful and should be made legally available. And finally, and I think this is a very important point, the absolutist rule creates an institutional bias toward inaction and passivity that is not mandated by the rule itself. After all, the purposes of the UN are to protect human rights. So how can it be that sovereignty becomes the number one value in interpretation of article 2(4)? It is not true to what the organization represents in this day and age. If that were so. Kosovo would have been illegal, if that were so, acting in Rwanda would have been illegal, if that were so stepping in tomorrow if there was broad scale genocide anywhere in the world protected by a

veto would be illegal.

MR. WILLIAMS: I'd like to invite members of the audience now to pose questions to the panelists. I'll take questions in sets of three and ask that you state your name and give your affiliation and do keep your questions brief so we can get in as many as possible. There is a roving mic and we'll start with the lady in front.

MS. BOFERCHECK: Thank you, my name is Diane Bofercheck and I'm from the Center for Naval Analysis and I have a question for Professor Koh. I appreciate your talk very much and I was wondering what you think the most important things the

American military should be doing right now in line with what you spoke about.

MR. SCHOETTLE: Thank you. Peter Schoettle, retired State Department. In the 19th and 20th century military aggression was easy to spot. Armies moved across borders. My question to you is what should be the threshold for cyber aggression?

MR. HURWITZ: Thank you for a very good presentation. I'm Elliot Hurwitz, I'm a former State Department, World Bank and intelligence community person. I remember vividly after 9/11 as a contractor in the World Bank watching the actions of the George W. Bush administration and I'd like to ask Professor Koh about whether he believes that the actions of the George W. Bush administration post-9/11 were legal or illegal?

MR. WILLIAMS: Good. Harold?

MR. KOH: Well, first of all, there are several different questions. I think the US military is critically important in terms of its internalization of the Geneva Conventions. I do not believe that the US military would obey an order from the civilian commander to torture somebody in violation of the Geneva Conventions because they have internalized those rules. I think you heard some of that which actually forced on the presidential candidates to recant his position and to fall back to saying he would do whatever was lawful or something like that. Although every time he goes on TV he recants the recantation.

The second point, I think, makes the point very graphically. Let me put it this way if I'm on my computer in Washington and I'm monitoring what is going on in a computer abroad, that is cyber monitoring. It might even be cyber espionage and it might be authorized by covert action laws. If we determine because the networks that are operating are illegal that we can copy their files that suddenly becomes computer network

exploitation. But if you determine that somebody is about to use the foreign computer system to destroy a dam or a hospital in the United States you can block it electronically. And if you determine at a certain point that this is the widespread offensive intent of a foreign government, let's say the Sony hack or something, you may be in a situation in which you do a very broad scale immobilization of somebody's system. All of this happens within a split second. It may be an electronic response to something being detected in the process of what began as simply as surveillance. That is what makes it so difficult. In the old days someone offensively moved troops across a border it takes three or four days, that's obviously aggression. Nowadays it can happen in less than a blink of an eye and you really don't know. Now, let's be frank about this: there are countries with huge cyber capabilities, huge Asian countries with huge cyber capabilities, who would love therefore for this to be a law-free zone. Because then they could do what they can and, in the Thucydides phrase, the weak suffer what they must. The Group of Governmental Experts made a different decision in response to US and European support which is that this should be a zone in which legal rules are clarified on exactly this kind of question and the most difficult question being what is somebody uses a proxy actor to act instead of acting directly. In other words, it is not a governmental computer that does it but it has been farmed out to somebody else.

To my former State Department colleague, I've identified in many ways in which I believe that the George W. Bush administration acted illegally, foolishly, or both. And much of our time since has been trying to return to a lawful path. And there is a great irony here: if a road forks, the classic Robert Frost road forking, when you're a professor, as I am, you can say the mistake was made back in 2003 if only we hadn't done X or Y, if only we hadn't invaded Iraq. You'd be right and then go get another cookie from the faculty lounge. When you're in the government you're already down the wrong path,

you've already gone down the wrong fork and your job is to move that second path toward where it should be. And it takes a long time and while you're on that path there will be people saying see, you're still on the same path, you must be just like the other guys, and the answer is don't you see we're trying to bend it toward law, we're trying to bend it toward justice. We can't go back, we have to go forward. At this point, we're many years past these original mistakes and there were mistakes, there were grotesque mistakes, but the job now is to get this into a better frame. What I've stated here is let's not buy into this fiction that there are no rules. There are rules and let's not be confused if there are times when these rules are violated by the people who are implementing them because then you can say these rules have been violated. But we should also be clear that there are emerging rules that meet these new situations and we're not in a law free zone.

MR. WILLIAMS: Michèle I wonder whether you wanted to come in on any points but particularly maybe on the cyber issue because last year the Netherlands hosted the global conference on cyber space and there the conference highlighted the need to explore the development of voluntary, non-legally binding norms for responsible state behavior in cyber space. I wonder whether such efforts undermine international law by offering states a less rigorous pass to dealing with this issue. Maybe you might have some thoughts on this.

MS. CONINSX: Well, I can only give a judicial perspective on how to tackle cybercrime. Cyber crime is one of the three priorities in the European Union. Besides terrorism and illegal immigrant smuggling, it is among the top priorities and it is per definition a borderless crime as has been underlined and we see a massive use of the internet and social media and encrypted messages used by terrorism. We see that trafficking of all kinds are taking place on the darknet. We had last year some operations

run together with the United States in tackling tor network and tackling different malware producers. This is part of reality. Not later than last year where the World Economic Forum established a steering committee with different players from the public and private sector in order to see how together we can tackle cyber crime. Across the borders and across the sectors again this year in (inaudible) a lot of attention was given to the role of law enforcement authorities and judicial authorities. There are different ways to tackle the problem but the multidisciplinary way bringing together all of the expertise and having exercises, simulations, being prepared to face the worst case scenario is part of the exercise monitored by the steering committee. We have to get prepared altogether. We know that defense is indeed having a lot of knowhow and expertise; well, let's benefit from that expertise, let's benefit from the expertise available that has been set forth in previous discussions. The solution might not be found in one way or another it is by having, on a specific problem, well-thought and reflected solution. But the solution is certainly to be found in cooperation again.

MR. WILLIAMS: Thank you. We'll take another round of three questions.

MR. GAGLIANO: Thank you. Lou Gagliano, I'm an independent consultant dealing with technology. The question that I'd like to pose is to take the Apple situation and apply it to the EU where the EU Commission is responsible for establishing regulations as to privacy standards. Let's assume for the moment in respect to what just happened in Belgium that an Apple phone was critical in terms of detection of what may or may not have happened. How would the EU regulations apply to an Apple-like situation in the EU's Belgium tragedy?

FEMALE SPEAKER 1: Hi, I'm a student at American University. Professor Koh you talked about areas of the law that need to be translated to today's world and areas of the law that are law-free zones like you called them and I was

wondering if that necessity for translation implies some inherent inadequacy of the law and why there isn't a concentrated effort to update international law to fit better with the modern world and why we're relying what seems to be an outdated system or if you disagree and think it's not.

MR. SEDNEY: Yes, my name is David Sedney with CSIS formerly with the US State and Defense Departments and my question is for Professor Koh. You laid out a set of differences between the Bush and Obama administrations. However, since I left the US government, in discussions with people who are not part of the US government, people have raised the issue of what are called signature strikes. The International Crisis Group did a paper a year or so ago describing these alleged signature strikes saying there are greater civilian casualties involved with them than there are with other kind of such strikes. As you laid out your validation under international law, the use of drones, does your justification for those extend to these so called signature strikes? (I'm not making any statement as to whether such strikes occur.)

MR. WILLIAMS: Thank you. Michèle, why don't I start with you on the EU regulations?

MS. CONINSX: Well, I think that there are ongoing discussions and the one who should respond to this question is the Commissioner from Justice. Now what I do know is from a law enforcement perspective and from a criminal justice perspective is that we have to step up the dialogue in the judicial cooperation with the United States and the United States has taken up its responsibility and has sent a prosecutor experience in cyber crime to Eurojust to ensure the dialogue and the traditional cooperation – accelerated judicial cooperation – between the US and the European Union. We need action, reaction, and rapid reaction, and through the presence of an experienced cyber crime prosecutor we have this kind of reactions. You all know that all the service

providers are situated on the US soil that we need rapid access to digital and electronic evidence, well, this is being something we have been working on and it is leading to successes. For the decision making at the highest level, I'm not the one who is going to answer.

MR. KOH: So to our friend from the EU, there are no law-free zones. I didn't distinguish between translated zones and law-free zones. I said that people try to call things law-free zones and they're not. I believe in universal human rights and there is no zone in which human rights law does not operate. Why don't we have a better process of updating it? Look at our political environment. We have a congress that can't legislate; we have a congress that won't ratify treaties even if they were negotiated. We have an international process that rarely renegotiates treaties or updates them to the current situation, and we have a veto system and a UN system in which certain states have disproportionate and sometimes preclusive power which means that a formal process of updating rarely occurs. Which means that if technology moves faster than law that we have to develop these rules through interpretation, and that's what these rules that I laid out were. What I gave you is drawn from lots and lots of different sources and what I'm saying is the fact that someone can't figure this out doesn't mean it is a law-free zone, it means that they didn't figure it out or that someone didn't lay it out clearly enough.

Now David Sedney asked a very good question about signature strikes. So let's be clear that the original theory of targeted killing is personality strikes in which you know who the person is and they are a senior leader of Al Qaeda who is attacking you. The paradigm case being Osama bin Laden. Now, the original notion of a signature strike is can you strike at someone when you don't that 100 per cent sure that they're there but all their signatures are there. And in that sense the raid against bin Laden was a signature

strike because they didn't actually know 100 per cent that he was there, they never saw him. It is just that all of his signatures were present. So, in the original sense, my view is that a genuine signature strike in which the signature is a substitute for correct identification of a legal target is lawful. What I think has been troubling though is the notion of using the notion okay signature strikes are lawful to suddenly say, okay then a house draped in a particular way that could be Al Qaeda means you can attack the house without knowing anybody who is in there. Or that certain indicia allow you to do a broad attack without any real sense of who is there. So, for example, two weeks ago there was an attack on 150 people at an al-Shabaab camp. The Defense Department said we're not at war with al-Shabaab. This has to be explained by self-defense. They were going from a graduation ceremony to do an attack but we don't know more than that. Now, if we're in a war with al-Shabaab we should say we're in an armed conflict with al-Shabaab and produce the information that shows that all of al-Shabaab is interesting in fighting the United States as opposed to various internal objectives within Africa. If what we're doing is a signature strike you have to explain why someone there, an individual or a personality, met a targeted killing standard and why you believe that there is a near certainty of no civilian casualties. So again, I'm not saying that the rules have been perfectly applied in every situation. In fact, there may be situations that prove why we need to get these rules even more clearly defined because otherwise the word signature could be expanded or misused in a way that people can't recognize.

MR. WILLIAMS: Good. Another round of questions.

MR. BASS: Thank you. I'm Jerry Bass, I'm retired, one of the few non-lawyers in D.C. Regarding the wars, and wars change now certainly and it is easy and it is good that we have rules of engagement et cetera because I think people should have guidelines and rules, but unless you’re there and under stress or attack you'll see rules

differently than others, possibly, on how you have to defend yourself et cetera. Nowadays with what is happening with a lot of hiding behind civilians i.e. we hit a hospital, I think, in Iraq that's something because possibly there was something there but maybe we just made a mistake. In Israel we see Gaza with missiles being fired and on the other side of that having to go back and hit a hospital or hit a school or something that may be hiding those missiles to protect. With hindsight it is easy to sit back and look at things but we do things differently sometimes too. We probably would have done something different possibly in Syria if we had known 250,000 people would have been killed earlier on. So there is all these gray areas but how do you justify the gray areas and all of this with setting up the rules of war where now civilian casualties unfortunately happen I think the drones actually if I recall killed 1,500 or 2,000 innocent civilians. It was recorded in the early Obama years and maybe they've changed some of that.

MS. MASTER: Hi, Caitlyn Master, a Ph.D. candidate at Cornell University. My question is for Professor Koh. I'm interested in how you define international norms in regards to international law and if you or do you see counter terrorism laws ever reaching this threshold?

MR. ROBERTS: Thank you. Lee Roberts, I'm a student at George Mason University. My question is for both panelists and pertains to one aspect of 21st century warfare that Professor Koh listed but upon which I did not dwell namely special operations regarding a specific instance. As Professor Koh alluded to, in 2011 the United States launched a raid into Pakistan to kill or capture Osama bin Laden. While the service members who conducted the raid were technically under the administrative control of the CIA whom the Pakistani government had approved to operate within the country. I believe I'm reasonable in saying that this distinction is lost on the world and indeed on Pakistan itself who protested a violation of its sovereignty by the American

military but didn't protest too loudly or too long due to the shakiness of their position in light of bin Laden's discovery in Abbottabad. Is the bin Laden raid apparently tacitly approved by the preponderance of the global community an anomalous moment that is unlikely to serve as precedent? Does the effective violation of a state's sovereignty by unapproved special operations have implications or is this really yet to be determined?

MR. WILLIAMS. Thank you, Harold?

MR. KOH: So, first the question that was asked by my colleague. I think the fog of war is greatly diminished by the internet. We didn't have an internet at the Cultural Revolution, we didn't have an internet at the bombing of Dresden, we didn't have an internet when they dropped atomic bombs on Hiroshima and Nagasaki and thousands and thousands of innocent civilians died. But it was placed under the notion of a fog of war. Now everybody has a cell phone, everybody has a video camera, many of those people have access to the internet, claims can be rebutted but also, by the way, claims can be repeated without verification. For example, you said X number of people were killed by drone. The United States has not confirmed or denied those numbers. I know they actually dispute how high the numbers are so it is worth having some clarification of this point. It seems to me that we are in a period now in which if someone attacks a hospital claiming it is not really a hospital but is actually a place in which it is a disguised attack center, command and control center, you can verify that with modern technology in a way that was not possible before.

To my friend from Cornell, are you an international relations major or a law student? (MS. MASTER: International relations). So, international relations has long had the notion of regime theory. Peter Katzenstein: norms rules and decision making procedures underlying a particular issue where they don't use the word law. But the notion of norms is sort of shared principles. When those are bodied into either treaty or

customary international law they become law under the statute of the International Court ofJjustice. What I'm suggesting here is a set of emerging norms that I think should be law and that involves subjecting them to a law making exercise. Or simply being asserted as a matter of law rather than a matter of discretionary policy.

Now, finally, when Abi asked me at the beginning “what are areas of controversy,” one is what is unable or unwilling? The question you asked put it exactly right. Did Pakistan consent to the raid on bin Laden or were they simply unable or unwilling to prevent him from attacking the US from Abbottabad. We don't know, but in that situation, the US action was essentially done, it seems, with some sort of tacit acceptance by the Pakistani government. Now, some people would want more formal approval by the Pakistani government; you're unlikely to get it. But as you say, if the Pakistani government is objecting to their sovereignty being invaded, why did they let an acknowledged leader of Al Qaeda be in a country where they claim that they were not harboring terrorists? Now that explains why some of these concepts can be stated with some legal precision but the proof of the pudding is in the application which is a lot harder.

MR. WILLIAMS: Okay, another round of questions.

MR. BARTH: It’s an honor, thank you for coming today. My name is Jordan Barth. I am a senior at American University studying government. My question is for the both of you. What do you see as the role of the media in this new 21st century war?

MR. GROSS: Good morning, my name is Dave Gross. I'm a retired special operations senior leader and I appreciate your comments about the United States military not pursuing actions that are unlawful or unconstitutional. My question would be to you, Professor, concerning the authorization of military force does the current

provisions and authorizations cover future actions on the continent of Africa against enemy's such as Boko Haram, al-Shabaab, Al Qaeda and other actions, or is there additional work that needs to be done in terms of assessment or interpretation of the AUMF?

MR. WILLIAMS: Michèle any thoughts on the role of the media?

MS. CONINSX: Well, I like this question very much. We need a proper dialogue with the media. The impact of incorrect information would be devastating on ongoing operations, criminal investigations, and prosecutions. Sometimes it can lead to the criminal proceedings and hence leading to potential risks for future events. Also the aspect of the social media where every citizen becomes a journalist without any control, without any frame, where a lot of incorrect or correct information might be disseminated in time also having an impact. What I heard from law enforcement units being operational in Paris and Brussels is that operations cannot be hidden from the media any longer and become part of a reality, so putting in danger the police and law enforcement authorities on the spot and uncovering also activities which remain out of the eyes of the society at large and hence give more possibilities for terrorism, new ideas, creative ideas for terrorists in the future. So a good dialogue to see what ways we can work together, what do you need to know, what must society know at this point in time that would be a very good.

MR. KOH: So on the media I think Michèle has done a good job distinguishing, you know every tool is doubled-edged. The media is a huge human rights enforcement device and has done an extraordinary job in illustrating human rights abuses that are being unaddressed. On the other hand, the media has a role to play in holding our leaders accountable and sometimes it hasn't done a very good job. For example when presidential candidates talk about torturing people, the obvious question is, if you

take an oath to be president you'll swear to uphold the Constitution and law of the United States of America. Are you telling me that you intend to violate that oath immediately and, if so, why don't you let that be known now so people can decide whether they want to vote for a president who is going to be an outlaw immediately? They don't ask that question. Instead they move to other things that are more colorful in their own mind that get better ratings and I think that has been a failure.

To my colleague who worked on special operations, as I said, the Authorization for Use of Military Force is supposed to address associated forces which include cobelligerents which are organized armed groups that have entered the conflict against the United States and I don't believe that either Boko Haram or al-Shabaab as an entirety meet those standards. The problem, though, which I know you understand better than anybody, is that we have a congress that refuses to vote an Authorization for Use of Military Force. This is quite remarkable because this is the exact same congress that accuses other branches of usurping their power. It is their job to authorize force and set its limits and define who we're fighting against and they absolutely refuse to do that. So, obviously they could be too busy doing other things like voting on Supreme Court candidates; I guess they're not interested in doing that either. That's too bad. But I think the point that is absolutely critical is I don't know any military unit of the United States government that has ever gone into the field without clarification from their commanders what are our rules of engagement. Part of those rules of engagement are set by the Geneva Conventions and the laws and I don't know of any commander – and we have a large number of extraordinary, heroic people – who do that unless it is absolutely clear that they're conducting things that are consistent with the oath that they took when they joined the US military. So if we're going to hold soldiers to that standard we ought to hold our commander in chiefs to that standard. In fact it would be interesting to know how

many of our presidential candidates could give you a recital of the laws under which they're operating. I know one candidate who could tell you essentially 100 per cent of that. The others, I think, couldn't and I think that's what makes her an extraordinary figure.

MR. WILLIAMS: We'll take a final round of questions.

MS. MASSIMINO: Thanks. Elisa Massimino with Human Rights First. I don't want to beat a dead horse on this AUMF thing, and I can't believe I'm going to say these words, but to be fair to congress, there are some members of congress who are trying to push forward – Senator Cain, Senator Flake – a new AUMF to govern the new conflict that we seem to be in. But it doesn't help when the president says "I want congress to do this but I don't actually need congress to do it because I have the authority that I need under the old AUMF or AUMF's." So given the situation with congress and that there is not much progress being made by these two lone senators trying to push this forward, what do you think the administration could do before it leaves office to at least illuminate what it sees as the constraints on its use of military force? We've had so many hearings where administration representatives come and are asked who are we at war with and they can't really give an answer and that seems to me to be contributing to a lot of the debate that we have about drones and other kinds of issues that would be a lot more clear if there were a meeting of the minds between the American people and the government about who we're at war with.

MALE SPEAKER 1: My question is how long prisoners or detainees in Guantanamo can be kept? In the past when a war ended prisoners of war were released shortly thereafter. Can people in Guantanamo be kept as long as we have a conflict with terrorists?

MS. CLARK: My name is Jennifer Clark, I'm a research associate at the

Public International Law and Policy Group. We've talked a little bit about the legality of drone warfare. My question is more about the efficacy of decapitation as a strategy and what your impressions are as far as the effectiveness?

MR. KOH: So I think Elisa asked – her organization, Human Rights First, has done heroic work on trying to get congress to live up to its responsibilities. I think the administration actually has been pretty clear. They believe that under their interpretation of the 2001 AUMF, the administration has the authority to fight ISIL, in addition to Al Qaeda and the Taliban. Steve Preston, the former general counsel of the Defense Department last year at this American Society of International Law meetings said the list is exhausted. In other words, Boko Haram is not on it; al-Shabaab is not on it. And they acknowledged with regard to Shabaab there may be some leaders of Shabaab who are members of Al Qaeda, and I think that has been true for, you know, there are at least five senior leaders of Shabaab who have sworn *bayat* [allegiance] to Al Qaeda and this was massively documented. But I think the answer if you just rely on that is they can continue to fight Al Qaeda, they can continue to fight the Taliban, they continue to fight ISIL but if they're going to actually declare new theaters or fight against new enemies, they need new authority. I don't think … the administration is not in the business of saying there are people who we might have to fight who we don't have authority to fight against, so they haven't been explicit about it. But if you see what has been the limits of what they've stated, it is absolutely clear.

You can hold prisoners until the end of armed conflict and we're still in an armed conflict with Al Qaeda and the Taliban. You actually have to demonstrate that those individuals continue to pose a threat and some people who have been held for 13 years can be reevaluated under the periodic review board (the executive order on periodic review) and released. What we see happening now is that the number of 91 – they said

they're going to drop by 17 in the next few weeks– if they remove all cleared for transfer people you'll be down to 45 by the end of the summer. Then we're suddenly in a zone where the question is exactly what is going to happen. The president says he doesn't want to leave this for the next president, which I hope is true, and we'll see what happens with regard to Guantanamo. My view is it should have been closed a long time ago. I don't think it makes any sense to the United States to be running an offshore prison camp, particularly if the claim is it's outside the scope of law. Those claims that it was outside the law have been completely rejected by the Supreme Court so now it is fully subject to law. We don't want other countries to be opening up their offshore prison camps which they claim are outside the scope of law. That is just more legal black holes. So, Guantanamo should have never been opened. There is no reason to bring anybody there. So presidential candidates who say bring people to Guantanamo, why on earth would you do that? I'm amazed by this. People who are in Syria, why on earth would you bring them 90 miles to the United States at a time when we are criticizing the other part of Cuba for holding people indefinitely and without due process of law? This is the most ludicrous suggestion you can imagine. And this administration has brought nobody new to Guantanamo, so the numbers have been dropping slowly, much more slowly than they should have been. Guantanamo should have never been opened, Guantanamo should be closed and once closed it should be closed forever.

MR. WILLIAMS: This has been a fascinating conversation and I'd like to thank both our panelists, Harold Koh and Michèle Coninsx, for being with us today and for the open and stimulating way you've engaged with the audience so please do join me in thanking our two panelists.

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