

## RETROSPECTIVE ON INTERNATIONAL LAW IN THE FIRST OBAMA ADMINISTRATION

This panel was convened at 5:00 pm, Thursday, April 4, by its moderator, ASIL President Donald Francis Donovan of Debevoise & Plimpton, who introduced the panelists: Harold Hongju Koh of Yale Law School; and Anne-Marie Slaughter of Princeton University.

### INTRODUCTORY REMARKS BY DONALD FRANCIS DONOVAN

Welcome all. I'm Donald Donovan. I have the great privilege of serving as the President of the Society at this time. This is a plenary event entitled "International Law in the First Obama Administration." I'm going to tell you in a moment what we are hoping to discuss here, but first let me introduce our two participants. It's a bit silly to be introducing Harold and Anne-Marie to this audience, so I'm going to do it very briefly.

Anne-Marie Slaughter is the Bert G. Kerstetter University Professor of Politics and International Affairs at Princeton. She was Director of Policy and Planning at the State Department during the first two years of the Obama administration. She has a long history with the Society, including service as its President from 2002 to 2004. And it was announced yesterday that, as of September, she will become the President and CEO of the New America Foundation.

Harold is the Sterling Professor of International Law at Yale. He served as Legal Adviser to the State Department during the first Obama administration, having earlier served, from 1998 to 2001, as Assistant Secretary of Democracy, Human Rights, and Labor. He, too, has long been an active participant in the Society.

We want to do two things this afternoon. We want to consider, as the program indicates, "International Law in the First Obama Administration," but there will be two dimensions to the discussion. We first want to talk to Harold and Anne-Marie about the role of lawyers and the challenges of lawyering in difficult foreign policy determinations with a legal dimension, and then, as the discussion moves on, we'll talk about some of the decisions they had to make and the competing objectives in some of the actual decisions that the administration faced.

We're going to conduct this event as a conversation. We'll first ask each of Harold and Anne-Marie to address a few questions briefly, and then move to a discussion with the audience. We have an enormous number of interested and highly knowledgeable people on the floor, so we want to make this a roundtable not just on the dais but in the room.

So if I may start, let's talk about the generic (if there is such a thing) difficult foreign policy decision facing the administration. What is the role of the lawyer? In a preliminary discussion, Harold and Anne-Marie pointed out that in their most recent positions, Anne-Marie was the client and Harold the lawyer, but of course Harold had been the client himself in his previous post, and Anne-Marie surely knows what it is to lawyer.

So perhaps, Anne-Marie, you could start and talk about how you perceive the role of the lawyer when you're facing a difficult policy decision.

### ANNE-MARIE SLAUGHTER

Thank you. So first of all, it's great to be here and to see this crowd. This Society just grows and grows and grows.

Let me ask you to imagine Secretary Clinton's 8:45 meeting every morning. For anyone who thinks that the role of a lawyer who is also a foreign policy person is diminishing, this

will give you heart. The Secretary herself, of course, is a lawyer—who went to a fairly decent law school from what I understand—and Jack Lew and Jim Steinberg, who were her two Deputy Secretaries of State, are both lawyers, and her Chief of Staff, Cheryl Mills, and her Deputy Chief of Staff, Jake Sullivan, are all lawyers, and then you move down the table and her Assistant Secretary for Legislative Affairs is a very good lawyer, and you move around the table, and I’m there as Director of Policy Planning, and, of course, I’m a lawyer. So there is no shortage of lawyers in the room. And then, of course, sitting directly across from me is the person who is “the” lawyer, who is Harold.

So one of the things I want to point out to start with is just what it’s like discussing foreign policy questions that have important legal dimensions in a room where most of the people are lawyers and, as Harold well knows, are not shy about actually trying to interpret whatever text they’re working, which really was interesting because Harold then is the official lawyer. He’s the person who is there to frame the issues and offer the set of solutions, and I’m going to let him talk about that, but what I took away from it was the constant awareness on the part of pretty much everybody who mattered at that table, that our space for decision was defined by the law, and then it became a question of whose interpretation is going to prevail. As the client—and this isn’t going to surprise anybody—we’re, of course, looking for interpretations that allow us to do the things that diplomatically we would seek to do, and that’s no different than if we were a corporation turning to a private international lawyer and saying, “This is what I want to do. How do I do this?” So we’re looking for the way to solve problems, but just imagine that your client was a group of top lawyers who all had their own opinions about the various texts. That means that “L” operates in a unique decisionmaking environment. So let me start with that proposition.

### **DONALD FRANCIS DONOVAN**

Harold, your perspective?

### **HAROLD HONGJU KOH**

So let me say first it’s great to be here and to be with Anne-Marie again. At our 8:45 meeting with Secretary Clinton, the American Society of International Law was very present in the room because I would have the coffee mug from the ASIL with all of the presidents’ names listed, including Anne-Marie’s, and when she would say something, I would say, “Anne-Marie Slaughter? This Anne-Marie?” and point to the mug.

So Anne-Marie has pointed to one issue, which is that when you do international law for the Obama administration, you have many clients who are lawyers who have their own opinions. The good news on the side of the lawyers for the State Department is that you have a law firm—I think the best international law firm in the world—which is the Legal Adviser’s Office (“L”), and that office has a variety of strengths, not just the particular individual lawyers and the relationships that they have with their clients, but most fundamentally that they are operating within a system of institutional precedent. That becomes very important because on any particular issue, I notice in academia people always want to ask, “What’s the most original thing you could say?” In the government, the question is usually, “What’s the most traditional thing you can say, and is there a precedent for it?” And it came as a great shock to some people when I finally told them, “You know, if an issue comes up, the most relevant source of precedent is not an article I wrote when I came up for tenure when I was 30 years old, it’s the precedents of the office and the opinions of that

office which go back to 1848. So the real institutional question is usually, how do you apply those office precedents to the situation that now exists before you?"

I think there are two big challenges within the department and one big challenge outside. The challenge within the department is that as the policy clients, many of whom are lawyers, are trying to formulate policy options, you, the Legal Adviser, are simultaneously, with your law firm, trying to determine which of those options are legally available. If you conclude that an option toward which the clients are headed as a policy matter is not legally available, you tell them, "It would be nice if we could do that; it's just not an option that is legally available to you." In the same way, the Legislative Affairs person sometimes says, "You might want to try that. But that's not *politically* available to you because Congress would never agree to it." So the various advisers in the room try to narrow the policymakers' options to the zone of the available and possible.

The second challenge, though, is after you decide an option is legally available. That doesn't mean they should pick it. Sometimes we say to them, "It's lawful, but it's awful." Which is to say, "It is legally available to you; I just don't think it's a good idea for you to do it." You explain the reasons why you don't think it's a good idea, but then at the end of the day, the policy client ends up making the choice from among the legally available options, and you have to be ready to defend it.

And then the third challenge is outside of the building: there is the so-called interagency legal process convened by usually, on our issues, the National Security Council Legal Adviser, who is currently Avril Haines. Present are the Legal Advisers for the State Department, Defense, the Office of Legal Counsel at Justice, sometimes somebody from the National Security Division at Justice, the Legal Counsel of the CIA, of the Director of National Intelligence, of the Chairman of the Joint Chiefs of Staff, and sometimes Homeland Security, Commerce, or Treasury, depending on what the issue is. The net result is that you have to come up in this process with what are the agreed-upon legal issues, carve them out, and then reach an agreed-upon interagency analysis before you return it to the policy process.

So there would be meetings that Anne-Marie would go to, which would be the policy discussions, in which if a legal issue would come up, they would say, "Well, let's leave that one for the lawyers." For the lawyers, we often went to meetings where an issue that was a policy choice among the policy clients would come up, and we would say, "Well, let's leave that for the policy people," who might be lawyers, but who are not there to assess the legality of the option. Then at the end of the day, we'll put these two things together at the end of the process in reaching a decision.

## **ANNE-MARIE SLAUGHTER**

I just want to add one comment on the interagency process because Harold is describing it at the White House, but we also saw it within State, the smaller State constellation of issues. And, Harold, I know you'll remember the question, for instance, of giving food aid in Somalia, a very important issue. I won't divulge any secrets, but this was a complicated issue where, if you could imagine, if you are the Africa desk, you've got people who are suffering. You want to get food to them. You have Congress that says obviously we can't help terrorist groups, and you have Al Shabaab there. You have the Legal Adviser's Office, but you also have USAID's legal adviser. So even there you have different views around the table, not at the White House but just within State, and, of course, USAID has its view, and the administrator then has his view, and we had our view. And so there was a lot of

back-and-forth that I didn't necessarily expect on an issue like that. I would have said, well, surely State prevails, but it was hard.

### **HAROLD HONGJU KOH**

I should just add that "the clearance process," if you have not heard about it, is right up there with the "root canal process" as a pleasant way of doing business. So you usually end up making a document that has been cleared by dozens and dozens of people, all of them putting their edits in. So the next time somebody says at an ASIL meeting, "There is a U.S. Government position on this, but the analysis stopped at the exact point where it got interesting," there's a simple reason for that: that was the point at which the participants in the interagency process stopped agreeing, and so there was no legal consensus. So they didn't get to the more difficult questions because there was a multiplicity of views; they therefore agreed only on the least-common denominator among the interagency participants, and that's what comes out of the mix.

So you have to understand that there is a two-level game going on, with respect to any issue you face. First, what does our office think is the correct legal position? And second, how much of our legal position can we get cleared by the interagency? For example, when I gave a speech here at the ASIL in 2010, we were taking clearances while I was being introduced. And I remember at one point somebody said, "At the point where you started talking about certain issues, you suddenly became riveted to the text, and I thought at that point you were 'going to the dark side.'" My answer was, "No, at that point I was reading all the scraps of paper that were being handed to me," which formed pieces of our cleared position, which was the only thing I was authorized to say in that circumstance on behalf of the entire U.S. government.

### **DONALD FRANCIS DONOVAN**

So in this dialogue between policymakers and lawyers, is there a meaningful difference between "whether" and "how"? You used the phrase at one point, "How can I do this?" and we also talked about, "What can you do?" And at what point do those two decisions, those two analyses, back up against one another? At what point is there a clash between, on the one hand, the question, "Okay, this is what we need to do. How do I do it? How do I make it legal? How do I act in a legal fashion? Do I get it done?" and, on the other, "Okay, here are your options, pick among them"? Does a true conflict ever arise, or do the analyses meld organically so that it's one discussion?

### **ANNE-MARIE SLAUGHTER**

Well, I did not see this, and again I think part of this is because Secretary Clinton herself is a lawyer, because this has been an administration very committed to multilateral processes, and I never saw a case in which the principal said, "Find me a way to do it, find a way to do it," which at that point, if you don't think there is a way, you can resign, or, as Harold says, I think much more likely, you can come back and say, "Well, here's a way to do it. It's lawful, but it's awful." But I never actually saw that in my two years in the conversations I was part of.

**HAROLD HONGJU KOH**

I think the 8:45 meeting that we discussed is a morning meeting among a subset of senior officials at the Assistant Secretary level or higher, and a lot of what goes on there is a flagging of possible positions, and that's where people start to develop positions. Toni Chayes and Sarah Chayes are here, and my former teacher, Legal Adviser Abe Chayes is here in my memory. When I studied the Cuban Missile Crisis with him, one of the things that struck me—and I should add that Anne-Marie is very much a “daughter-in-law” of Abe Chayes—was that, the first set of options that came out to respond to Soviet missiles in Cuba were three unacceptable policy options: first, do nothing; second, launch a ground invasion, which was precluded by the reality of the Bay of Pigs; or third, authorize a unilateral aerial strike, which would have triggered, everybody thought, mutual assured destruction. And the job of the lawyers was to say, “Are those really the only three available options? Isn't there a way to do a fourth option, namely what they ended up calling a ‘quarantine’”? There's a back-and-forth between the lawyers and the policymakers. The lawyers ask, “Isn't that really a blockade? Is that illegal under the UN Charter? Is there a way to understand that policy option that would make it legal? For example, do you do it with OAS approval? Do you do it with Track II diplomacy?” And then you come up with a fourth option—namely, setting up a quarantine approved by an OAS resolution, and supported by a “Track II deal” that says if the Russians remove their missiles from Cuba, the U.S. will in due course remove their Jupiter missiles from Turkey. The fourth option turns out to be superior to the three that were on the table, in no small part because it emerged from an interactive dialogue between the lawyers and the policymakers.

And when you consider that example, there are two key questions. First, how did the lawyers work together to make the fourth option of quarantine legally available. Second, how did they then announce that option, sufficiently cabined with limiting principles, so that it wouldn't open the door to other kinds of blockade or quarantine-type activities that you wouldn't want other nations to claim were authorized by that precedent?

**DONALD FRANCIS DONOVAN**

So give me an example concretely of where this dialogue occurred. When we talked before this event you mentioned Honduras, and a few moments ago you mentioned food aid to Somalia. Give us a sense concretely of the dialogue and how the options were identified.

**ANNE-MARIE SLAUGHTER**

So when we were talking about this beforehand, the example that immediately came to mind for me was the—I'm going to put quotes around it—the “coup” in Honduras. So this is June of 2009; we had been in office not even six months; and if you'll recall, Manuel Zelaya, who was the President of Honduras was removed from office by the Honduran army acting on instructions from the Honduran Supreme Court. He actually left the house, as I recall, in his pajamas—which suggests it wasn't voluntary—and the army installed a politician from the other party, who was a legislator named Micheletti. Now, I thought, this is not a very big country, and it's a situation in which the U.S. and the Brazilians and many other countries actually all agreed that President Zelaya should be restored, but then elections should take place. We spent seven months trying to make that happen, but it never did. So

this was a case where the United States supposedly had lots of power and leverage over a situation in a small country but we could not actually change the situation on the ground.

So for me it was an instructive early example of the limits of U.S. power, and probably a good one. But the reason I choose it as an example is that I remember very vividly how much turned on the definition of whether a coup had occurred, because if a coup had occurred, then U.S. law imposed all sorts of constraints on the State Department's diplomatic freedom of action. What I remember very clearly was Harold and the entire Legal Adviser's Office working extremely hard trying to figure out how to interpret what was a matter of domestic law but informed by international law in ways that would be faithful to the law, with Congress, of course, having its own views, but that would also allow our diplomats enough space to work with other countries in the region. So that was an example where I thought a great deal—it's like a quarantine—a great deal turns on how we interpret this word and how you interpret it in a way that will allow the diplomats room while also being faithful to domestic law.

**DONALD FRANCIS DONOVAN**

Harold, what was your equivalent to the Cuban Missile Crisis analysis?

**HAROLD HONGJU KOH**

Well, just on that, the key statutory phrase was actually "military coup."

**ANNE-MARIE SLAUGHTER**

"Military coup," okay.

**HAROLD HONGJU KOH**

The statutory language on its face requires that (1) a duly elected leader (2) be deposed (3) by a coup that was actually done by the military, not just an interruption of democracy where one leader came in for another without military involvement. And it turned out that when we looked back at the facts of the Honduran case and the many executive branch precedents interpreting the statute in analogous situations, we found that the military had not undertaken the kind of measures that appeared to be required by the statute when a true military coup has occurred. When we saw that there was a long series of precedents, we asked the harder question, which is: Was there truly a "military coup," or was there a transition of power that was not in fact accomplished by the military?

For me, the most memorable case involved Chen Guangcheng, the blind Chinese activist who came into our embassy in Beijing last May. Unlike most cases, there was not much of an interagency legal process, because I was in China, and the only people I was really talking to were people from my own office. And the background is interesting, which was that when Chen first contacted us, I happened to be in China at a meeting of the P-5 (permanent five UN Security Council members) Legal Advisers in Beijing. I was on my way to go with the rest of the P-5 up the Yangtze River to the Three Gorges Dam, which to this day I have never seen, because at 3:00 in the afternoon somebody came in and said that Cheryl Mills, the Chief of Staff, is on the phone. I got on with her, and she said, "Can you go to a secure phone?" and it dawned on me that if it's 3:00 in the afternoon in China, it's 3:00 in the

morning in the United States. So I said, “Have you talked to Mary McLeod, my principal deputy?” and she said, “She’s also in the office.” So I knew that Mary was in the office at 3:00 a.m. So I called Mary, and, you know, you’re not supposed to talk about these things on an open line. But one of the great things about having a close relationship with people in your office is that you have a shared language that allows you to understand what was going on without being too explicit about it.

So I said, “Hi, Mary, how are you doing? What’s happening?” And she says, “Well, it’s kind of like February.” (It was May at the time.) And I said, “Like February in Egypt or February in Chengdu?” Because, as you may recall, that February Wang Lijun had come into our consulate in Chengdu, where at about the same time, a group of NGO workers had come into our embassy in Cairo. And she said, “Kind of both.” Which I took to mean that somebody wanted to come into our embassy in Beijing. So then I asked, “Is it like that famous case?” by which I meant Fang Lizhi, the Chinese physicist who came into our Beijing embassy after Tiananmen Square in 1989. And Mary said, “It is, but he has different physical characteristics.” So then I knew it was Chen Guangcheng, whom I had heard of from doing human rights work. This was good because I had 2½ hours then to get from where I was in Chongjing to a secure phone at our consulate in Chengdu to figure out what was going on.

And while we were going to the secure phone, which is on this train going to Chengdu, it was occurring to me that this set of facts raised a very broad precedential question. You know, Cardinal Josef Mindszenty had gone into the U.S. embassy in Hungary and stayed there for some 17 years. Fang Lizhi, I know, had been at the U.S. embassy in Beijing for more than a year and a half. And the real question, which continues to be raised by persons like Julian Assange going into the Ecuadorean embassy in London is: When, if ever, does the individual have a right to diplomatic asylum in a foreign embassy?

Now I knew that our office had researched this and had concluded that while some nations thought there was a right of diplomatic asylum, we, the United States, had never endorsed this legal concept. So when we got to Chengdu, I asked our consulate for a report, and it was that Chen had escaped from Shandong, that he had broken his foot escaping and had severe medical needs that needed to be addressed. So the question that I sent back over a secure phone was, “What if we styled this not as the right of the person in question to seek asylum but as the right of the United States, a country from whom he requests temporary refuge for medical purposes, to give him that temporary refuge?” In other words, we would not be invoking his legal rights, but a right of the requested state. Would we really say that a nation-state couldn’t give a foreign national, who specifically requests it from an embassy, temporary and short-term medical care for the purpose of addressing his medical needs? And it was on that basis that we gave our views. That opinion I think frankly was correct, didn’t violate any reading of the Vienna Conventions on Diplomatic or Consular Relations, was pretty much limited to that set of facts, but didn’t open the door for other kinds of unanticipated situations. To be sure, it was something that we did at 4:00 in the morning U.S. time, but it held up and I think made possible what I think proved to be a good human rights result.

#### **DONALD FRANCIS DONOVAN**

So you both having just left (in Harold’s case very recently and in Anne-Marie’s relatively recently), can you characterize an Obama-Clinton approach to international law? Is it possible to generalize about how the administration treated international law during its first term?

**ANNE-MARIE SLAUGHTER**

So my view of this is more the administration's attitude overall to the international order, which is not quite the same thing, but I think this is an administration led very much from the President, who thinks that being a great power involves responsibility for upholding the international order, and it's really the opposite of an image of America as policeman. It is the view that says, "This is what it means to have the status of being one of the major players at the international table," whether that's the Security Council, the G-20, or whatever the leading group is in any international institution.

So when people talk about leading from behind, I don't see that at all. What I see is an administration that says that if there is a problem, and you want to be considered a great power, then you are responsible for helping to come up with the solution. We saw this posture very clearly in the Libya case, but also in many other cases in which the White House adopts a posture of: "We can't want it more than you do if you want there to be a solution," speaking to France or speaking to Britain or speaking to Qatar or to Egypt or whichever the countries are who are saying, "Look, here is the problem" (Mali is another good example). "We will help you, but we will not be the principal enforcers of the international order. We will be a huge part of it, we will be the preeminent nation perhaps in many cases, but we expect you to take responsibility." And you see that particularly now with North Korea and Asia where it was not so long ago that Bob Zoellick was talking about China being the responsible stakeholder. Well, certainly this administration thinks China needs to play a very important role, it needs to play an important role in upholding international norms on territorial disputes in the East China or South China Sea, but it also needs to play that role with respect to North Korea. The difference between this administration and the Bush administration is that this administration does not single out China as a responsible stakeholder, but instead insists that all great powers have to be responsible stakeholders, and what that means is taking responsibility for upholding our common norms.

The other thing I will say, which isn't an approach exactly, but it complicates the way the U.S. looks at international law, is that this is an administration that takes development very seriously. I've been up here before, and I've said that the thing I am proudest of, having worked with Secretary Clinton for two years, is that we did everything we could to elevate development alongside diplomacy as a core part of what American foreign policy is. She talked about the three Ds—defense, diplomacy, development. On the civilian side we focused on diplomacy and development. That poses a real challenge for those of us who are international lawyers, who are driven to international law or attracted to international law because we want to combine law with foreign policy. We know what the international law is governing diplomacy, right? We know that; that's what we do. But what is the international law governing development? If I go back to my law school teaching days, the courses were always called law and development, not the law of development.

So what is the international law of development? Is there a single body of law governing development? There are certainly different places that you can pull it together, but what are the international constraints on how we practice development as a country? This goes beyond foreign aid. This is really thinking about how our interests in the world are deeply intertwined with the life conditions of people around the world—whether that's health, whether that's poverty, whether that's education, whether that's climate. Those are all development issues, and for me, as an international lawyer, it seems to me to open a new chapter and a very

interesting one in what it means to be an international lawyer thinking about law and foreign policy.

**DONALD FRANCIS DONOVAN**

And at the time that you were thinking about those issues, did it become clear to you what impact law might have on development as opposed to the traditional sphere of diplomacy?

**ANNE-MARIE SLAUGHTER**

No. In other words, we were so busy—I mean, and again, Harold is probably in a better place to answer this because certainly that was something that ‘L’ looked at in specific cases, but what I kept seeing was the split between the traditional national security diplomatic world, which is well represented by lawyers in this room, and the community in Washington that works on development issues who are much less well represented in the sort of high corridors of foreign policy. I think there are fewer lawyers thinking about development as an international law issue. So that’s a challenge to all of you. I think that is very much what’s coming. This is an area where frankly we have plenty to learn from developing countries, who have been thinking about development as a collective issue for a very long time. In terms of the international law governing development, I think the United States has done so much less.

**DONALD FRANCIS DONOVAN**

So, Harold, we’ve been talking about the role of international lawyers in policymaking. Is it possible to characterize the approach of the Obama-Clinton State Department to international law itself, the role of international law in foreign policy?

**HAROLD HONGJU KOH**

Yes. I think, simply put, the Obama-Clinton doctrine is that “international law is an element of smart power.” What that means is very simple—that one way to view international law is as an annoying constraint or as “quaint,” and therefore irrelevant to modern situations. Another way to view international law is as an asset in terms of trying to exercise smart power, namely global leadership using a range of tools, which include international law, development, private-public partnerships, military power, but also diplomacy, et cetera.

This administration came in recognizing that an overreliance on hard power had led to two kinds of problems: first, the kind of imperial overstretch that Paul Kennedy talks about in his book, *The Decline and Fall of the Great Powers*; and second, a diminution of our perceived respect for international law and institutions from Kyoto to the ICC to the Human Rights Council, et cetera. The lack of smart power resources and the overreliance on hard power resources was leading us to a situation in which we were less often leading and more often being criticized for overreliance on the military tool.

So this administration took a simple three-pronged approach—engage, translate, and leverage. That means that across the board we reengage with all of these international institutions the last administration had boycotted—the ICC, the Human Rights Council, and the like. We appointed or nominated experts to all of these leading bodies, for example, appointing Sean Murphy to the International Law Commission. It’s a way of showing our commitment on these issues, that we think that these institutions are important.

The second prong is to translate. If I were to point to a single issue that separates this administration's approach from its predecessor's, it's that when you have a new situation which is not anticipated by existing law, you face two possible approaches. One is to say it's not anticipated, so it's a black hole and we can do whatever we want—this is the Tina Turner approach, “What's law got to do with it?” “What's law but a sweet old-fashioned notion?”

The other approach is to say, as Montesquieu would, that we are going to apply “the spirit of the laws.” For example, the Geneva Conventions did not anticipate cyber conflict, but we set forth stated principles of cyber conflict, which are an effort to translate the laws of war to that novel situation. They did not anticipate a non-international armed conflict with a nonstate actor, but we, in the context of a conflict with Al Qaeda, have tried to translate those principles to this new type of conflict.

And then finally, leverage. When you've engaged around certain principles, you try to discuss these with your allies, you try to build public-private partnerships—to build what Anne-Marie's colleagues at Woodrow Wilson would call regimes of global governance to address these issues.

So let me give you an example. As Secretary of State, Hillary Clinton has a choice. Does she take up the issue of LGBT rights? She could have stayed away from that issue. She could have not touched it. Instead, she goes to Geneva on December 2010, Human Rights Day, gives a speech in which she says, as a matter of pure translation, LGBT rights are human rights, and human rights are LGBT rights. In other words, she translates LGBT rights into the traditional framework of human rights and says they should be protected by the human rights apparatus like the rights of other minorities. Then she leveraged the issue: she worked together with other institutions and bodies on this issue, by diplomacy, by seeking same-sex benefits for our own foreign service officers, to work on domestic issues eliminating the policy of “Don't ask, don't tell” in the U.S. military, supporting same-sex marriage, to try to leverage this into a new moment in the equality movement involving human rights.

Similarly, I could say that the smart power paradigm of engage-translate-leverage explains the Libya intervention or Burma, or cyberspace, or many other things. But mainly, this is an overarching theme. International law is an element of smart power: engage, translate, and leverage.

## **DONALD FRANCIS DONOVAN**

Thinking about the mission of this Society to provide a forum in which to debate, disseminate, and develop international law, let me leap ahead for a second. The U.S. Constitution, on its face, seems a very international-law-friendly document, and in the early days of the Republic, international law, in the form of the rights of neutrals, played an enormous role in our foreign policy. Yet we have a sense these days that at least the political classes see international law largely as a constraint on policy choices, as opposed to, as you've just described it, a component of smart power, a way to increase the United States' impact in a positive way. So thinking about constituencies in the United States, what's the most effective way to convey the message that international law can be a very effective tool to advance U.S. interests as opposed to simply a constraint on what we want to do?

**HAROLD HONGJU KOH**

Well, I think not ratifying the Law of the Sea Treaty effectively concedes a huge amount of turf to the Russians in the Arctic and the Chinese in the South China Sea. An outmoded theory of sovereignty that keeps us out of a treaty that would give us tools to counteract many of the political forces that these same people find the most threatening shows how deeply counterproductive it is. Again, Abe Chayes and Toni Chayes, in *The New Sovereignty*, described sovereignty as a means to assert authority and influence externally through devices like international law and smart power, not just to shield ourselves like a tortoise in the name of protecting zones of sovereignty.

In our own country, the exchange rate is set by a massive set of external forces that are working in global markets, and nevertheless we're afraid that the sudden permeation of foreign law is going to corrupt us? If we're looking to determine whether other countries have had experience with gays in the military, shouldn't we look to other countries to see what their experience has been or to do what Justice Breyer calls deriving "empirical lessons" from other countries' jurisprudence? So I think this perception that somehow in a day and age in which every single part of American life is so deeply infused with the international that we can somehow shut down, protect ourselves, protect our sovereignty, as opposed to exercising it through engagement around these common values is just massively outdated.

**ANNE-MARIE SLAUGHTER**

I agree with that, but what I hear repeatedly now when I talk to audiences on the political side is much more a question of, well, why do we want to be out there in the first place? So, in other words, thinking about international law as a constraint assumes that the desire is to be out there doing all sorts of things in the world that you want to do and that you think are a good idea, and international law stops you. My sense right now is that actually those of us who think the United States should be engaged in the world and within the international system, engaged positively in ways that address global problems, our biggest issue politically is convincing those people who can't see why we're spending our hard-earned dollars anywhere but within this country. And, you know, Secretary Clinton repeatedly would be making the case for foreign assistance, but she would say to us, and rightly, that we have to have a justification for our foreign aid budget that explains to the person in Detroit why we are spending our money on other countries rather than fixing our problems at home. As President Obama says, we should be nation-building at home. And when you look at it that way, the sort of constraint idea just isn't even an issue, because they don't want to do anything.

**HAROLD HONGJU KOH**

But I think, Donald, the law school that Anne-Marie and I attended talks about laws as "those wise constraints that make us free." You know, never is there a clearer example than now. You wake up in the morning, and you look at your iPhone, and you download a file from Korea of someone dancing "Gangnam Style," and you get on a plane, you fly across the Atlantic protected by the Warsaw Convention, you pass through immigration with a Schengen Visa, you go to an ATM machine and draw money out of your own account because of SWIFT and CHIPS and other international legal rules. International law has massively *freed* us to do things that were never possible before because of precisely these

kinds of international laws. During my confirmation process, one of the senators asked me, “How can you possibly think that American law schools should allow the study of Sharia law?” to which my answer was, “Senator, if the general counsel of a Fortune 500 corporation in your state didn’t know this, he would be committing malpractice. Yet you think the general counsel of the State Department is free not to know this body of law in this day and age?” This is the world we live in, and it’s a global world. Our children recognize this, and we should recognize it, too.

**DONALD FRANCIS DONOVAN**

As I said at the outset, we intend this roundtable to include the entire room. So those who might have questions to put to Harold and Anne-Marie, please start thinking about them, and feel free to line up at the mikes, because I’m going to start looking for questions from the floor in a moment.

But in the meantime, Anne-Marie and Harold, I would like to move to specific issues that you had to deal with. Let’s start with drones. What was the mix of foreign policy objective and law in the administration’s deliberations about the use of drones? Harold, we pick up, of course, from your visit a couple of years ago to this very body in which you came to this meeting and forthrightly explained the administration’s position on that issue.

**HAROLD HONGJU KOH**

So let me ask everybody a question. Suppose it was September 18th, 2001, and Congress has passed the authorization for use of military force against Al Qaeda. Let’s imagine that the winner of the popular vote, Al Gore, is President. He goes on TV, and he says: “My fellow Americans: A dangerous nonstate actor has just killed 3,000 civilians on U.S. soil, and we have declared war on them under both U.S. and international law. So I’m going to tell you what we’re not going to do and what we are going to do. We’re not going to invade Iraq, we’re not going to torture anybody, we’re not going to open Guantanamo, we’re not going to use military commissions, but what we are going to do is to reach out for the hearts and minds of people in the Middle East, the Muslim world, and to persuade them that they have a better future than hating us and killing us. But with regard to those people who are directly responsible for this, Al Qaeda, the Taliban, and associated forces, we are going to have to incapacitate them, whether by detention under the laws of war or by direct action, and we will use all available technological methods, we will do this transparently, and we will do it multilaterally. We want this war to end, but it’s not one that we can let go by us, and we need everybody’s support for the long term because it’s going to be difficult. I am going to adopt a program that I believe to be legal but necessary.”

If this had been done, I think the world would have been behind us. Second, what it demonstrates is that a lot of the lost momentum behind this effort has been because so much time and energy were wasted on misdirection and failed policies. I do think that this administration should be more transparent, and I think it should move more fully to the development of international standards. When I gave the speech here in 2010, I thought it was the beginning of a process that would be further along at this point in time.

**DONALD FRANCIS DONOVAN**

In terms of transparency?

**HAROLD HONGJU KOH**

Yes, in terms of both transparency and agreed-upon international standards. And I do think that it's important for this administration to step forward, as we did a couple of years ago, and say that if we want to end three wars—Iraq, Afghanistan, and the one against Al Qaeda, the Taliban, and associated forces—the only way we're going to end the third one is by having a long-term strategy which involves smart power. Our goal should be to change the feeling of the region and the individuals who have this desire to participate in their own self-government, along with a short-term program which will recognize that there are certain small sets of bellicose individuals who wake up every morning trying to commit havoc and death on U.S. soil.

So some people said to me, "How can you be opposed to torture and defend the legality of drones?" The answer is sad but simple: torture is always illegal, no matter how or where it's done. Sadly, while all killing is tragic, there is a line between lawful and unlawful killing, and it's the job of lawyers to police that line. We call that line the laws of war. If we're engaging in a new kind of war, we should translate the principles of that war to the new situation, and in that, drones are a tool, they are not a strategy.

One of the things I'm very struck by is how obsessed people are with the technology of drones, even though tomorrow there will be a new technology. Fifteen years from now, they're not going to make the same kind of use of drones, they'll take out drones with cyber signals. The key is that the tools themselves are neither per se lawful or unlawful—all tools that are used in whatever sense should be used consistently with the laws of war. And there is a potential there with these weapons—this is the point I made in 2010—they have a capacity, if correctly deployed, to be much more discriminating than inherently indiscriminate weapons like nuclear weapons, chemical weapons, and the like. So I think that there should be some stepping back from the current furor over this issue. To go back to the key question: Is the core of the drone program properly done, transparent, multilateralized, legal, and necessary to end this third war? If the answer to that question is yes, then let's work on that challenge together.

**DONALD FRANCIS DONOVAN**

Harold, you've just commented that you were hoping that the development of these standards would be further along, and, of course, the observation that's easily made is that it's not long going to be that we're the only ones with these weapons. So it's important that we lead not simply with respect to the use of them as a tool, but in the principled use of them. What do we do to develop acceptable standards? How do we push that?

**HAROLD HONGJU KOH**

Well, if you believe what you read in the press, there has been a lot of work on the standards already. The question is how to make them more transparent and how to take them into norm-setting discussions with like-minded countries. Some colleagues here from other foreign ministries know that we've had precisely that kind of conversation. The Government Attorneys Interest Program was just discussing ways in which there is a discussion about these standards. Former British Legal Adviser Sir Daniel Bethlehem just published an article in the *American Journal of International Law* on self-defense principles, which is describing

ways to think about self-defense principles in a modern situation, and I know that his article was looked at by many, many international lawyers of different nationalities.

So I think that's why we need this kind of transparency, this kind of debate and discussion, and I think that the administration should embrace that. Transparency helps because it makes the case for how to end the war with Al Qaeda. Just think about this: If you really do want this third war, which has been going on since 2001, to end, you do have to figure out how to reconcile with the Taliban, limit the expansion of associated forces, and defeat the core of Al Qaeda. That will take certain measures that require the hearts and minds of people to be behind it, and that will require this administration to explain not only why this is the best approach, but also why it's lawful and ethical. I think that the President should do that, I hope he does do that.

### **DONALD FRANCIS DONOVAN**

Anne-Marie, your thoughts?

### **ANNE-MARIE SLAUGHTER**

I think in many ways we agree about the need for international standards. I mean, for me, the idea that this President—as a former law professor, this President would leave office having dramatically expanded the use of drones, including against American citizens, although that isn't to me the key issue, without any public standards and no checks and balances domestically. I mean, I absolutely believe in the good faith of our colleagues who will apply those standards, but that's not the principle on which this government is based. So the idea that you make these decisions, and they are life-and-death decisions, and you don't know with what standards, and there are no checks, and there is no international agreement. I would find that to be both terrible and ultimately will undermine a great deal else that this President will have done for good. I cannot believe that that's really what he wants as his legacy.

More and more and more countries are going to have drones, and I, for one, don't want to live in a world where another country can decide that I'm opposed to their government by something I've said or something I've done. In many cases where we decide to mount a drone attack, we have some evidence demonstrating the culpability of the target, but the public doesn't know what that evidence is or what standards are being applied. I don't want those standards interpreted by other governments against us. That's not a world I want to live in as an American or indeed as a member of any country. So I think I agree with the need for international standards, and I wish we would be leading it.

There are two other dimensions to this, though. I have not studied the primary documents here, but I have read a lot on the people who are focusing on this question. It is not at all clear to me that what the President is doing is legal—domestically using drones beyond Pakistan, Afghanistan, geographically, or against Al Qaeda in terms of the target. If you look at the authorization of the Use of Military Force Act, it basically says we can use force against Al Qaeda and we can use force in Afghanistan and Pakistan, a theater of war where clearly we were defending ourselves after 9/11. When you push that out to Somalia or Yemen or Mali, it is obviously not Afghanistan and Pakistan, but it's also often not Al Qaeda, it's maybe some loosely connected terrorist group. If the only way to make these attacks legal is to say that all these terrorist groups are Al Qaeda, that there is no limit to what's Al Qaeda, then even as a matter of domestic constitutional law, I am deeply uncomfortable

with the idea that we've got a blank check for the use of clandestine weapons. I think that in many ways those weapons are better than missiles or ground troops, but I still think that we are killing people in ways that are not subject to law.

But the last thing I'll say is that this is a case that is going to require a lot of political courage. When I was here in October at a small group of Democrats with a couple of Senators and other people from think tanks, I voiced these concerns and said, "I really am very, very worried about the precedents we're setting." The response I got was, "Boy, that's politically brave," which scared me. If you can't say, as a lawyer, that this is violating constitutional law and we don't have international law standards, then we are not translating and engaging international law in the way Harold described it. The fact is that 70–90% of the American people think the use of drones is fine. I've had many discussions on this score even within my own family. This is a case where lawyers have to stand up and raise these issues even when it's politically very uncomfortable to do so, and it's particularly uncomfortable with an administration that has recaptured the national security edge that Republicans have traditionally had. The administration is very proud of having done that and does not want to have this conversation in many ways. So, in my view, those of us who support the administration have a particular duty to raise this issue—many of us waited until after the election—but to raise it and to keep raising it because this is not the legacy this administration wants to leave, and this is not, however politically expedient right now, it's not the world the American people actually are going to want to live in.

### **HAROLD HONGJU KOH**

There are a couple things in this environment that we have to acknowledge. One is the collapse of the legislative process. However much you want to put the standards into intelligence legislation negotiated with intelligent people, we have not had a good national security legislation process for the last 10 years. We don't have a FISA process that involves people like Ed Levi or Ted Kennedy; the effort to get the standards into some kind of legislative package is a much more delicate issue.

Second, as we all know, we also don't have a treaty process in which anything is going to be approved, so taking things out for international discussion doesn't ensure that it will emerge in a sensible frame. So in the cyber conflict area, one of the great searches of this administration has been for a forum in which these rules could be discussed, for example, the group of governmental experts up at the UN.

I think the key, though, is that the administration has to articulate a strategy for addressing a set of issues that frankly weren't anticipated in 2001, the main one of which was Arab Spring. Nobody predicted that these autocratic governments would collapse, that there would be releases of weapons, that those weapons would go to all kinds of people, some of whom were friendly and some of whom were hostile, the same kind of people who might do a Benghazi or get arms to the Tuaregs, et cetera. And then the new question is, How to address this evolving complex geopolitical situation with the legal resources we have? In part, that means determining when the war that started on September 11, 2001, is over, and when there is a framework discussion about a new set of principles.

Now, I completely agree with Anne-Marie, that the administration is hurting itself by a lack of transparency—it really is. When John Podesta, the former head of the Obama transition team, calls on the President to be more transparent, that means that even his closest political supporters are wondering what is to be gained by failing to produce this kind of information. And I think our allies very much want to understand the justification and how this particular

tool is used according to certain standards and how those standards fit within a broader strategy for bringing a better outcome to a region of the world. I think that's entirely appropriate and necessary. But can we be less obsessed about the tool or the technology and more focused on the grand strategy that we're trying to accomplish with the help of international law? I do agree with Anne-Marie, that this is also an area where international law can be a tool of smart power. They should bring it to bear in the same kind of way. I'm not sure why a speech wouldn't be given by the Secretary of State on this subject or by the President himself.

**DONALD FRANCIS DONOVAN**

You've been very patient at the microphone. So if you could first introduce yourself and then ask your question.

**AUDIENCE MEMBER**

Mark Wojcik. I'm a professor at the John Marshall Law School in Chicago. I came here to be informed and inspired, and instead I'm depressed because neither of you is in the administration anymore, and I miss the input and knowing that there are people like you in there. So why did you leave? And why not just go to something else if you were bored in the jobs you had?

But the question I still have to ask is early on in the Obama administration, the President received the Nobel Peace Prize—not for peace, as such, but for reengaging the United States in global institutions and international institutions. And I'm wondering, did that award help recognize a way for us to categorize his first four years of the Obama foreign policy?

**HAROLD HONGJU KOH**

Let me speak to that. I think that that Nobel Peace Prize speech deserves very careful study, first of all, because I think President Obama wrote the speech himself, not with the help of a speechwriter, and second, because it paints a very poignant story. Here is a person who has just been elected President; he just got this unexpected stunning award; he's not sure he deserves it; but, most ironically, he's just been given an award for peace at the exact moment that he has become the Commander-in-Chief of the most powerful military force that happens to be engaged in three wars. And then the question that he's asking—and he puts it very explicitly in his speech—is, How can he reconcile his commitments as a man of peace with his official duties as the Commander-in-Chief? And his explanation is, "I will follow the laws of war." He endorses the notion of humanitarian intervention—and then most fundamentally he says, "I believe that our values make us stronger and safer, so I'm going to conduct the warfare that I'm authorized to conduct consistently with the laws of war as I understand them."

Now, that was in December of 2009. The speech I gave here at the ASIL in March 2010 was simply a legal translation of that exact same principle. I consider myself a professor and a man of peace, I do human rights, and for four years my job was, among other things, to ensure the legality of U.S. policies, help protect the country, and minimize the human rights violations that occur on both sides—because when 3,000 people are killed in New York, that's a human rights violation. You want to prevent that from happening again, and the question is how do you do it. So there is a great sense of relief when those four years are up that somebody else has to worry about it.

One of the great baseball managers said, “Some people get paid for saying stuff, but I get paid for doing stuff,” and that’s how you feel when you’re in the government. These decisions have enormous import, you can make a mistake either way, human lives are at stake whichever way you go, and you know that there is no perfect or clean solution. And so you want to make sure you do all the work necessary so you’re making the absolute best decisions possible, and you know that whatever happens, people aren’t going to be happy. Wherever a line gets drawn, somebody will get criticized. All you can do is to ask, “Did I give it my absolute best judgment? Did I learn as much as I could about the facts? Did I work as hard as I can? Would I apologize to anybody for those decisions later on?” If your answer is “I have a clean conscience,” then you’re fine.

#### **AUDIENCE MEMBER**

Hi. Andrea Prasow, Human Rights Watch. One of the areas where the U.S. government has failed to comply with international law, yet has advocated compliance for other nations, is accountability for crimes such as torture and war crimes. To what extent do you see that as problematic in the U.S.’s attempt to continue to support international accountability mechanisms, domestic accountability mechanisms, for conduct which is similar to what did take place by U.S. personnel but has not been prosecuted? And, indeed, a sort of current stark example we have right now is that the acting head of the National Clandestine Service is reportedly under consideration to be made the permanent head. She reportedly headed a CIA black site, the existence of which itself was illegal, and certainly the things that took place there were illegal and possibly war crimes. So what kind of impact do you see that failure to hold people accountable here inside the U.S. and the U.S.’s ability to promote international accountability and criminal accountability abroad?

#### **HAROLD HONGJU KOH**

Well, there are two kinds of accountability decisions. The one you are talking about is whether people don’t get jobs because of things they did in the past. That has to be reviewed by the people who are making those appointments. I worked closely with John Brennan, now the CIA director. I don’t know him well, but I thought he was a person of extraordinary moral fortitude and courage—much more courage, frankly, than many who were known as human rights activists who were sometimes in the same meetings. So I’m sure if these allegations are being made, he’s taking them with the utmost seriousness, and I would have confidence that he will do the right thing.

On other kinds of accountability decisions, which are decisions to prosecute or not prosecute, those are matters which the Justice Department and the Attorney General address, and I’ll be honest, I would have expected to see more such cases brought. From the State Department, you do not tell other parts of the government what cases to bring or not, and you just deal with the outcomes that the rest of the government produces.

On the other hand, I think we should also ask: What are the standards going to be, going forward, and have those standards been made clear? The leadership at the CIA sent memos to their staff telling them, “Don’t believe that *Zero Dark Thirty* means we tolerate any of the kind of abusive interrogation of the kind that’s being depicted in that movie.” There has been a change of standards that’s being reflected in future-looking conduct. I think obviously outside groups should continue to push, and those of us who are inside should push as well. Sometimes you don’t get everything that you would have hoped for. I think there is a

tendency to think that that results from some sort of cynicism or lack of commitment, as opposed to the product of often a very powerful internal bureaucratic discussion that comes out one way or the other. Very often that discussion didn't come out the way that I wanted, but it's still a process that I respect.

**DONALD FRANCIS DONOVAN**

Anne-Marie?

**ANNE-MARIE SLAUGHTER**

I'll just add one thing, which is that one of the reasons those prosecutions aren't happening is because we are not actually prepared to pursue them all the way up the chain. So politically what's happening here is the sense that you would be prosecuting people for things that they did that are illegal, but that were authorized. If we were looking at another nation, you know full well we would insist that accountability go all the way up to the top, and we are not going to do that. And because we are not going to do that, that adds a dimension to this discussion that makes people very, very uncomfortable.

I think we've painted ourselves into a terrible corner because—you are right—we are asking other nations to do things that we're not willing to do in this setting. We spent eight years actively violating norms of international law, rules of international law, that we have tried to uphold around the world. Many, many people have told us that the consequences of what we did were so much worse in their countries, because their government could point to us and say, "Look, the Americans say this is okay."

I don't see a solution in terms of prosecutions. If we at least recognize that we don't have the courage to do this, it doesn't mean that we should stop asking and pushing for prosecutions around the world, but I do think it has to inform our posture and our attitude when we are working with other governments. I think otherwise we compound this inability—which I understand politically quite well—with hypocrisy, and that doesn't serve us well internationally.

**AUDIENCE MEMBER**

Joe DiMento, from UC Irvine. I came here with low expectations, and I was inspired. My question goes to the issue of international standards with regard to targeted killings. There seem to be two evolving ideas about standards. One would be to have judicial review within some specialized court, and another would be to have some group within the executive branch addressing this. I think my personal view is that moving this to the judiciary would be a serious mistake, but I wonder if you have views as to whether either of them make sense, or are there other alternatives for reviewing the decisions?

**DONALD FRANCIS DONOVAN**

Harold? Anne-Marie?

**HAROLD HONGJU KOH**

I think the question is whether you see this as occurring in the context of an armed conflict or not. If you have an armed conflict with a particular group, the targeting decisions

traditionally have not been subject to *ex ante* judicial review. I mean, George Washington did not go to a court to ask the court whether he could target leaders of the British Army in the Revolutionary War. The American generals in World War II did not go to courts before they made targeting decisions with regard to Japanese generals who were responsible for Pearl Harbor. So there is a requirement under the laws of war that commanders should know with confidence that the person you are targeting is in fact an enemy combatant leader but that does not necessarily entail the use of a judicial process. Now, those who would discuss a judicial process have to describe exactly how that would work. Many of the people who are the biggest fans of judicial process also point out that the FISA court has largely ratified executive decisions 95% of the time. So it's not that having a court by itself is a necessary panacea. Our own courts—and I have been reviewing this during this term while I've been teaching these classes—tends to treat many of these issues as nonjusticiable anyway.

So there is a complicated question as to what constitutes due process of law in this particular setting, which has elements of armed conflict, elements of self-defense, and often has a law enforcement alternative. That's the kind of challenge that members of this Society are very well suited to do, namely to think about what process is due in this situation? Reasonable minds can differ, I think, on that.

#### **ANNE-MARIE SLAUGHTER**

I understand all the reasons why you might not think it's a good idea, but I came of age, political age, during Watergate, and so I just don't trust the Executive alone pretty much ever, in the sense that I think there needs to be some check. The question for me comes down to that remaining 5% of decisions. The court may decide it's not justiciable, the court may well agree with the Executive 95% of the time, but at least you have the possibility that in that other 5% of cases somebody outside the Executive—somebody not infected by the groupthink that we know so well—says enough! and sets up a check that then allows the public to have its say. So my instincts are at least to design some kind of court in a way that allows another branch to intervene.

#### **DONALD FRANCIS DONOVAN**

We have time for one or two more questions.

#### **AUDIENCE MEMBER**

Karima Bennoune, UC Davis Law School, and perhaps more relevant for this question, I sit on the board of an NGO called the Network of Women Living Under Muslim Laws. I really enjoyed both of your presentations, both of your comments, but I just have a specific question and maybe a bit of a challenge to something that Harold Koh said. And I have to say for me, as a person who has worked a lot on women's human rights in Muslim-majority countries, to hear you say that the way to win the conflict with Al Qaeda is to reconcile with the Taliban gives me chills. I'm writing a book about Muslim opponents of fundamentalism, and I went to Afghanistan and did a lot of interviews, and one of the things that women's human rights defenders there are most afraid is precisely a U.S. "reconciliation with the Taliban," which remains committed to systematic gender apartheid and has not changed that position.

So to my mind, a much better strategy would be to do more than we have done to empower the internal opponents of these kinds of extreme forces. We haven't really tried that, and I

wondered for you, do you see limits in international law on what a reconciliation, quote/unquote, with the Taliban could look like based on their own substantive commitments and their track record of human rights abuses?

### **HAROLD HONGJU KOH**

So, Karima, I think you know that Secretary Clinton gave a speech at the Asia Society stating three preconditions for negotiations with the Taliban. They were, in particular, a commitment to renounce violence, abandon their alliance with Al Qaeda, and abide by the constitution of Afghanistan. She said this out of a recognition that the Taliban may have elements which are willing now to accept certain realities. Among those realities are, first, that in the last 10 years millions of women have come to enjoy their freedom in Afghanistan and Pakistan where there are Taliban societies, and they are not likely to return; second, that there are millions of cell phones, educational opportunities, and other kinds of Internet access now available in a more open society; third, that the process of engaging in Afghanistan has involved not just a military effort but an enhanced diplomatic effort, a continued civilian effort, and a continued development effort, which are going to continue, and that the discussion, which involves how to bring about an end to all of this, involves being ready to come to the table and to discuss many kinds of conditions. That's how wars end.

Now, when you say it gives you chills, surely it gives people chills when you end a war on unacceptable terms. But what Richard Holbrooke, who was the person who was running the AfPak program when Anne-Marie and I were first there, suggested was that it was all about how to come to the table with the correct preconditions. And those three preconditions were exactly what went into Hillary Clinton's Asia Society speech. Even Mitt Romney, at the presidential debate, recognized that we're not going to kill everybody; if we're going to end this, we have to figure out a way in which parts of this can be done through diplomatic discussions. And we're also having a whole set of discussions with Afghanistan and the government of Afghanistan on how to move past 2014 with continued civilian engagement.

So this is not fast, and it's not easy, but it's also not simplistic either. It's a matter of trying to figure out which pieces of this can be addressed through diplomacy consistent with our values and which pieces of this can be addressed through development, which pieces of this can be addressed through a civilian surge and which pieces of this still require the use of hard power. And I think that there is a tendency to seize upon one issue out of many as opposed to looking at the broader strategy. If the broader strategy is capable of success and should lead to a better outcome, then you look at the different pieces of it, and ask: Are each of those pieces lawful and consistent with the overall policy, and can it be brought home by a sustained effort in which everything is not politicized?

We're now in an environment where virtually everything is politicized, which makes it very difficult to have a rational discussion about anything. I think that some people could disagree about whether there are any moderate Taliban at all, and I think that remains a predictive question: whether the Taliban, if they resumed control of certain areas, would simply impose the same set of rules or have to abide by a more reasonable set of rules. Answering that question is going to be the longer-term discussion, which I know is occupying our decisionmakers on this issue right now.

### **DONALD FRANCIS DONOVAN**

Why don't we have one last question, and then I will ask a wrap-up question.

**AUDIENCE MEMBER**

Christine Bustany, with Suffolk University Law School. It's been 10 years and approximately 10 days since the beginning of the Iraq War, and I just would note that the ASIL failed to have any panel that was specific to the Iraq War, so the Iraq War is always sort of an aside, and it seems to somewhat be marginalized, if not purposely forgotten. So I'm happy that the question was raised in terms of the accountability. It seems like you both were critical of the fact that there was lack of accountability in terms of the violations of international law, and I wondered if you could give a grade as to how the Obama administration failed in making sure, in fact, that those responsible for various violations of international law would have been brought to justice. So my question is, How do you think that the Obama administration should have handled it?

**HAROLD HONGJU KOH**

You know, when you're a professor, you assign grades because you're evaluating something that is happening somewhere else. When you're in the government, you are part of what's happening, and you try to make it better. The Iraq invasion I opposed. I made public statements that it was illegal. I spoke at rallies. And when I came to the government, the United States was in Iraq and a lot of people were working very hard to try to make what was a badly conceived thing come out in a reasonable way. Lawyers in my office put their lives on the line and went to Baghdad to try to improve the situation there. Every single day that I worked at the State Department, which was nearly four years, we worked to try to create a situation where we could disengage from Iraq militarily, sustain a diplomatic presence, be true to a certain set of commitments, and try to achieve the best possible outcomes. Much of this occurred at the end of the last calendar year as we disengaged.

Now, other people can give grades to what we did. I think we took a bad situation and emerged from it in a way that was the best that could happen, given where we started in 2009. And I think that's all I'll say about it, that we're all Americans—at least those of us who are Americans—and, you know, governments change, but we want our country to do the right thing. When we're in the government, we push the government hard from the inside, and when we're outside of the government, we push the government hard from the outside. At the end of the day, the real question is not what grade you give it, but what effort did you personally expend to make the situation the best that you could make it, given where we started?

**DONALD FRANCIS DONOVAN**

Anne-Marie, anything to add?

**ANNE-MARIE SLAUGHTER**

I would just add a comment about the intersection of law and politics. The Obama administration was an administration elected on a platform of trying to bring the two sides, the two political parties, closer together. No President has ever turned around and prosecuted a prior President for decisions taken in office, but here, in addition to what Harold said, it's inconceivable to me that President Obama would have tried to hold people accountable for the kind of decisions you're talking about. He came to power saying torture was completely

illegal, a lot of what we did was illegal, but no one was prepared to prosecute responsibility for what we did up the chain, and I think that colored people's decisions about whether to prosecute at all. But my larger point is that when we study and practice international law, we think about rules and political interests intertwined, and that's what we have to accept unless we're going to do international law purely academically—and I never went through a single day in government where the word “academic” wasn't used as a synonym for “irrelevant,” not one, even with me sitting in the room. So even accepting the premise of your question, I agree the Iraq War was illegal absolutely, but I can't imagine actually advising President Obama when he came into power, as he came into power, and supporting him, to actually try to prosecute people, the people before him, for decisions to go to war, even accepting that they are illegal, because of the intertwining of law and politics.

### **DONALD FRANCIS DONOVAN**

So let's wrap up. Harold, final thoughts?

### **HAROLD HONGJU KOH**

Donald, one thing I would say is I'm proud of being an academic. It's my lifelong profession, and I will always return to being an academic. There are two differences in what I see when you're a government lawyer and an academic, which is what I call interconnectedness and proportion. Interconnectedness means seeing how issues connect to other issues. So when you're in the government, you tend to see the full chain of events, which makes it harder to do something at Stage 1 because of the implications it might have at Stage 5, or where Stage 5 cannot be controlled by going back and redoing things at Stage 1.

Then the other thing you see differently is the general proportion of a particular legal issue in a grand discussion. So, for example, in Libya, there is a big discussion about the War Powers; I was personally involved in the discussion. At the end of the day, I think thousands of people's lives were saved. The War Powers Resolution remains, and we have an interpretation of it that I think I would defend based on the facts of what we put forward in a future case, whichever President did it.

And I think that President Obama understands that presidencies are lived in eight-year cycles, and he will be judged probably by three big things: he got health care, will he get the economy to a reasonable state? and will he get to the point where he can bring about the end of three wars that existed at the time that he took office? Certain things are not going to go perfectly in that; things will fall through the cracks. There are things that he will not have the capacity to get done. He wants to do immigration, he wants to do gun control, et cetera. Every day there is a new issue—the sequester or other things like that. He's in a toxic political environment.

I wish him well. I would like him to succeed. But I do think that in the grand scheme of things, he will be measured by his commitment to a lawfulness of our policies, a commitment to transparency, a commitment to working closely with our allies, as was the original vision of the Constitution. If he can set forth a frame in which this can continue over a very long period of time, and not get sucked up into this kind of partisan fighting that has been such a tragic feature over the last decade, I think that will be a measure of the success of this presidency.

**DONALD FRANCIS DONOVAN**

Anne-Marie, final comments?

**ANNE-MARIE SLAUGHTER**

So, Harold, I think that's right. I guess I want to end with what I was trying to say about drones. I think many of us want this President to succeed very much, and many of us believe in what he is trying to do very much, but we have a tendency to pull our punches when it's a President that we care about and we support. When I say "we," I'm not suggesting everybody in this audience is a Democrat—I well know that we are a nonpartisan Society. But I do say to everybody here who *is* a Democrat, that it would be a terrible thing to have this President—a President of whom I was so proud when he was elected for what he stands for in terms of the ability of Americans actually to live up to what we say we believe in, not only electing the first African-American President, but also the first President who was a constitutional law professor—leave a legacy of the expansion of executive power over life and death and indefinite detention. It would be awful for people to be able to say that this was the President under whom the ability to decide people's lives and liberty was greatly expanded with the normal checks afforded by the rule of law. I think we have an obligation, as the American Society of International Law—but also as lawyers, as people who believe in the rule of law—to stand up even when we might not want to make waves in our party. It's politically very unpopular to say, you know, you really have to look down the road and look at the precedents that you're setting, and they're very bad ones when it comes to things like drones and indefinite detention. We need rules. We need rules we can agree with, even when they constrain us in ways that are extremely uncomfortable. And I hope very much that two or three years hence we will not be having this same conversation, but instead will be looking back at this President and saying he actually pursued the rule of law all the way through, even in areas where it tied his own hands.

**DONALD FRANCIS DONOVAN**

So as is frequently the case in these situations, there is a long series of issues we didn't get to. I apologize to those who wished to ask questions but for whom we didn't have time. I do want to enthusiastically thank Anne-Marie and Harold for coming here and talking so frankly and so thoroughly about the issues we did have the time to address. So thank you both for doing that. These are true friends, true members of the Society, and it's great to have this forthright discussion.