

Intervention 2 (Part I)

National Security Issues

Harold Hongju Koh

I am Harold Hongju Koh, Legal Adviser of the State Department. Previously, I served as Assistant Secretary of State for Democracy, Human Rights and Labor in the Clinton Administration, and as Dean of the Yale Law School, from which I am on leave as a professor of international law. I will address the relationship between protecting human rights and national security.

The United States is committed to establishing national security policies that respect the rule of law. In President Obama's words, "living our values doesn't make us weaker, it makes us safer and it makes us stronger." **This Administration has devoted much energy over the past two years to ensuring that our armed conflict operations comply fully with all applicable domestic and international law.** Let me explain steps we have taken to accomplish this goal in three areas: humane treatment of detainees, legality of detention, and the use of force.

First, this Administration began by turning the page and unequivocally ensuring the humane treatment of all individuals in U.S. custody in armed conflict. On his second full day in office, President Obama categorically affirmed the United States' commitment to abiding by the ban on torture and inhumane treatment, ordered CIA "black sites" closed, and instructed that any interrogations must be conducted consistent with U.S. treaty obligations, including Common Article 3 of the Geneva Conventions, the Convention Against Torture, and the revised Army Field Manual. The President also ordered a review to ensure that the detention center at Guantanamo Bay fully complies with Common Article 3, and established a special interagency task force to review U.S. interrogation and transfer policies. That task force issued recommendations to help ensure that all U.S. transfer practices comply with U.S. law, policy and international obligations and do not result in the transfer of any individual to torture.

Second, we have worked to ensure that all individuals held in armed conflict are detained lawfully, under a legal framework that is authorized by Congress under domestic law and informed by the laws of war under international law. Guantanamo detainees have robust access to habeas review by our federal courts, which have upheld the legal authority under which our law of war detainees are held.

The UK and other countries have asked about our progress in closing Guantanamo. Let there be no doubt: **President Obama has ordered and remains committed to the closure of the Guantanamo detention facility.** While that commitment has not wavered, the task has proven enormously complex. President Obama cannot close Guantanamo alone; that also involves our allies, the courts and our Congress (which has legislated restrictions on transfers from Guantanamo). Nevertheless, through diligent efforts, only 174 individuals remain at the facility, down from 242 who were held there when the Administration took office. Our intensive efforts to close the facility continue every day. We are very grateful to those countries that have helped by accepting detainees for resettlement.

Third, with respect to use of force and targeting, like detentions, the United States is committed to ensuring that all of our actions fully comply with the rule of law. "Where force is necessary," President Obama said, "we have a moral and strategic interest in binding ourselves to certain rules of conduct. And even as we confront a vicious adversary that abides by no rules, ... the United States of America must remain a standard bearer in the conduct of war."

It is the considered view of this Administration that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including international humanitarian law. This Administration has carefully reviewed the rules governing targeting operations to ensure that these operations are conducted consistently with law of war principles - including the principles of distinction and proportionality that are designed to ensure the protection of civilians. It has long been considered lawful to target, for example, a particular enemy leader in an armed conflict. We know of no legal principle that bans the use of advanced weapons systems in armed conflict for these purposes. The United States has put robust safeguards in place to ensure that

force is directed against only lawful targets. These uses of force are lawful and constitute neither extrajudicial killing nor political assassination. And these safeguards are implemented rigorously throughout the planning and execution of operations to ensure their lawfulness.

We have been asked whether and to what extent human rights law may apply when a nation engages in armed conflict or acts in self-defense. Let me **note three points. First, international human rights law and international humanitarian law are in many respects complementary and mutually reinforcing.** Both bodies of law are animated by humanitarian principles that are designed to protect innocent life; in many cases, the rules of each body of law are co-extensive – for example, in their absolute prohibition on torture. **Second, the applicable rules for the protection of individuals and conduct of hostilities in armed conflict outside a nation's territory are typically found in international humanitarian law.** Unlike some aspects of human rights law, humanitarian law rules apply not only to government actors, but to all parties to a conflict, including non-state actors. Even in wartime, a country must respect and ensure applicable human rights, for example, the right to a fair trial or to be free from torture or cruel, inhuman, or degrading treatment or punishment. **Third, determining which international law rules apply to any particular government action during an armed conflict is highly fact-specific and made even more difficult by the changing nature of warfare.** But rest assured: the United States takes every available step to ensure that our actions are fully lawful. Because the United States is fundamentally committed to the rule of law, we believe there can be no substitute for such compliance.

Finally, questions have recently been raised regarding whether the U.S. government has taken appropriate steps to investigate reports of detainee abuse. To be clear: no one polices its own military forces more vigorously than the United States. The Department of Defense has well-established procedures for reporting detainee abuse and investigates all credible allegations of abuse by U.S. forces. Between Iraq, Afghanistan, and Guantanamo, we have conducted hundreds of investigations regarding detainee abuse allegations which have led to hundreds of disciplinary actions. In reviewing several hundred cases where investigators found probable cause of abuse, over 70% received some form of discipline and in more

than one-third of the cases—well over 100 instances—those charged have been court-martialed, often receiving a federal conviction or federal imprisonment.

Notwithstanding recent public allegations, to our knowledge, all credible allegations of detainee abuse by U.S. forces already have been thoroughly investigated and appropriate corrective action has been taken. If, however, the Defense Department should become aware of credible new information concerning a past instance of abuse, its standard rigorous reporting and investigatory procedures will apply.

With respect to transfer, we are committed to ensuring that the United States does not transfer individuals to torture in Iraq and elsewhere. We have worked hard to train Iraqi forces in human rights protection, and our Rules of Engagement require all U.S. forces to report any credible allegations of violations of the law of armed conflict. We take our humanitarian commitments with utmost seriousness, and we continue to work to ensure that transfer safeguards meet relevant needs and challenges.

With that, let me turn the floor over to Assistant Secretary Echo Hawk to address issues related to indigenous peoples in the United States.