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**ADVANCING PEACE, SECURITY AND HUMAN RIGHTS**  
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**Military Force, Criminal Justice and Diplomacy:  
Rebalancing Counter-terrorism Strategies**

March 18, 2013, 3:15 - 4:45 pm

*Please note that these notes have not been reviewed  
by the speakers or organizers of this session*

**Speakers:**

- **Harold Koh**, Professor of International Law, Yale School of Law; former Legal Advisor to the U.S. Department of State
- **Elisa Massimino**, President and CEO, Human Rights First

**Facilitator:**

- **Wendy Patten**, Senior Policy Analyst, Open Society Foundations

This session explored opportunities and challenges in U.S. counterterrorism policies as the U.S. moves on from the post-9/11 era. Harold Koh opened by explaining the complex nature of what the U.S. faces. The U.S. is on a set timetable to end the war in Afghanistan, and is seeking to end the war against Al Qaeda worldwide as well. That will involve military involvement and the continued use of drones as there are real and significant threats to the security of the U.S. How can human rights and peace and security advocates acknowledge the reality of these threats and bring the use of drones and the military into a legal and transparent frame?

Koh expressed that while the Obama Administration started well, it has been disappointing on Guantanamo, the use of military trials instead of civilian trials, and the lack of a policy on the use of drones. There is need for greater transparency around the Administration's positions and actions on these issues. Obama should use this time to end the U.S.'s third war - the war against Al Qaeda, the Taliban and associated groups. The challenge is that there will continue to be threats from terrorist groups – how can the U.S. utilize legal and transparent security measures? It is important not to extend the Al Qaeda label to groups that are not Al Qaeda.

President Obama has also been poor at articulating his standards and processes and has not sufficiently consulted with members of Congress. He has failed to consult with a number of his allies.

What to do:

- 1) Confirm John Brennan. He has a strong moral character and the fact that he is at the CIA is the best thing that could happen.
- 2) Make White House standards and processes available for review.

- 3) Promote greater transparency. Administration needs a spokesperson on these issues and the President needs to explain his plan and processes.
- 4) Support international norm setting and clarify how U.S. standards fit with other countries.
- 5) Obama should enforce his plan for promoting civilian trials and closing Guantanamo.
- 6) Support the national security left having a voice.

What not to do:

- 1) Do not try to pass new legislation in this Congress, it is not helpful.
- 2) Courts are an incomplete solution to this problem. Call for the executive branch to give a public accounting of the process.

Do not seek a new Authorization for Use of Military Force agreement or seek to repeal the existing one because of the risk that Congress would expand the war to include “anyone who hates” the United States.

Elisa Massimino believes that the challenge the U.S. faces is ending the war on terror, or at least clearly and transparently explaining the perimeters of that war. No one in the government has an incentive to be clear on this. Targeted killing is a good thing in war time; indiscriminate killing is a war crime. The problem with drones is that there is not enough transparency about what the rules are and their legality.

There is no bureaucratic incentive to close Guantanamo; it can only be done with political will. When the war ends, people need to be released. Massimino is very concerned about the trajectory of military commissions. Will the U.S. execute people on the basis of an unfair trial that lacks legitimacy? Interrogation standards and torture are also an unfinished business.

The U.S. needs to focus on how to end the war against Al Qaeda. Part of that challenge is that there are conflicting signals from senior people in the Administration about the level of the current threat. No one is willing to articulate what the end of the war looks like as there are not many political incentives to do that.

President Obama has staked his reputation on ending the two wars in Afghanistan and Iraq. If he leaves Americans with an on-going third war against terrorism, a perpetual state of war becomes a new norm. This damages the capacity for advancing human rights and could be the most significant blow to work in that area.

A challenge for advocates is how to build the argument for an effective post war counterterrorism strategy. This does not mean that the U.S. should never use military force. Sometimes military force is lawful and appropriate to combat imminent threat. There needs to be clarity on what this means.

### **Question & Answer**

Q: What is the interplay between the Administration and the Hill on these issues? How can civil society be of support?

A: Koh stated that while he loves the idea of Congress, but that the lack of positive accomplishments by the current Congress makes him cautious about engaging with them at all on these issues. It is also important to remember that this Administration does not give high priority to scaling back national

security. Its priorities are budget balancing and deficit reduction, healthcare, immigration, and gun control.

The key is to strengthen the national security left and use funding to reposition them to focus on the core issues. One challenge is that the use of force is critical to promote human rights at times. There needs to be policing of these lines and transparency moving forward. The challenge for the next six months is to get thoughtful democrats into positions of leverage.

A: It is easy to beat up on Congress. However, we should remember that Congressional leaders on these issues were prepared to take on many of these fights and then they were abandoned by the White House. In the Obama Administration, the President hoarded his political capital for issues like healthcare, not Guantanamo.

Q: How can funders and NGOs empower voices within the Administration that would change the course of action?

A: Funders and NGOs should be willing to articulate a robust framework for combating terrorism that does not depend on being at war. It is a political non starter to talk about ending the war and depriving the Administration of tools to combat dangerous people. However, there are officials at high level in the military that believe that the perception the U.S. is a nation perpetually at war undermines everything else the U.S. is trying to accomplish. They should be the spokespeople.

A: the military surge in Afghanistan did little to stabilize the country. President Karzai is unreliable and has said that the U.S. is as much of a problem as the Taliban. The key point is that the U.S. cannot simply declare victory in the war against Al Qaeda when Al Qaeda is plotting things every day. It would not be responsible for Obama to say that the U.S. has defeated Al Qaeda when they haven't. There is need to strengthen diplomatic and civilian actions; it is dangerous if military commissions become routine.

In Afghanistan, there is need for more high level diplomatic engagement and collaboration with allies. How can the U.S. sustain the necessary long term commitment to complete the work if Americans are sick of being there? Funders need to help President Obama garner the support to do that.

Q: I am a big fan of your book which explores the dangers of an unrestrained executive branch, but I am hearing a very different Koh here. In the past after periods of U.S. foreign policy characterized by illegal and extreme policies, the U.S. has had extensive Congressional hearings and has then come back with reforms. It doesn't seem like this has happened in the past ten years. You seem to be saying we need more executive power, not less, which will just increase the problem.

A: In 1990 there were some bipartisan talks and some hearings, but Congress and the courts have not improved since 1990. Right now most checks and balances are happening within the executive branch, which wasn't the case back then.

The U.S. government is now extraordinarily militarized. The State Department has 190 lawyers and the Department of Defense has 1700 lawyers. The Judicial branch has been missing in action entirely. Where is the Attorney General; what is his agenda? Where are the rule of law people? They need to be empowered.

Q: What is the plan if there is another attack? What is the plan in Afghanistan if the Taliban takes over again?

A: There is a decent chance of another attack. However, this Administration has demonstrated that you can successfully prevent attacks without torture. The same is possible without Guantanamo or military commissions, without violating human rights and the rule of law. In Afghanistan, civil society and women are now more empowered, they will moderate the Taliban. The U.S. may need to settle for “Afghanistan good enough.”

Differences from the Bush Administration: This administration doesn’t use “global war on terror”, doesn’t engage in torture, doesn’t talk about unlimited executive power, doesn’t call the Geneva conventions quaint, and doesn’t label people enemy combatants without facts.

Q: Implications of successes and failures in the U.S. have massive implications around the globe. E.g. The Financial Action Task Force, tighter spaces for civil society. How to address this?

A: Push for formal institutionalization of executive rules, transparency, and international norm setting. President Obama disproved the notion that the left cannot protect the U.S. The country can be protected while still protecting these values. Establish what those standards are and explain exactly how and why certain strategies are being used instead of hiding them (e.g. drones). If an attack were to happen today, there are strong national security voices on the left to push back against the pro-torture lobby.

Q: You both talk about how to end this war, but you lump terrorists together. Isn’t that expansion? How will there ever be an end?

A: The biggest issue right now is who will be the leader of Afghanistan. It is important not to call terrorists Al Qaeda when they are not. People on the right want to authorize the executive to go to war with anyone engaged in terrorism. The current status is: part of Al Qaeda is imprisoned, part is underground, and there is a need to negotiate with the Taliban (the U.S. has been fighting with these 3,000 people for 13 years). Military, diplomatic, and civilian surges are all necessary. There is a lot of motivation to prevent attacks against Americans, end the war in Iraq, and end the war in Afghanistan. There is not the same motivation to end the war against Al Qaeda.

Q: The Treasury Guidelines were a deliberate attempt to put a stop to diplomacy. How do we challenge it?

A: The Humanitarian Law Project decision at the Supreme Court was a mistake. Where is the Justice Department on this? The Court should have given guidelines about when Track Two money and supplies would not be classified as material support and should have called on rule of law officials to speak for the rule of law. NGO coalitions kept coming to State when they should have gone to Justice.

## **Wrap up/Reflections**

- How to get voices to challenge the Treasury Guidelines?
- It would be helpful for funders to discuss due process and where they stand.
- Funders should think about their role in Afghanistan as the U.S. military withdraws.

- Running theme: Congress cannot play a positive role at this time.
- Need to build unlikely partnerships/coalitions that can speak to more centrist politicians.
- Be innovative.
- With the low amount of money in the room, it is necessary to be really smart, razor focused, and strategic. This conversation should be brought to the Council on Foundations, where there is more of money.
- An example to follow is that of a diminutive hockey player in the 1980s. He was the best scorer because he skated to where the puck was going to be. Funders can do such scenario building to invest in the future and use modest resources in creative, effective ways.
- Strategies utilized within the LGBT movement are instructive and worthy of scrutiny. Civil society groups have opened the space and a strong movement has pushed these issues toward the Supreme Court.
- President Obama is not the answer, but is part of the solution. This group can help him find space to pursue shared values.
- Messaging is critical. Funders can support the Administration in making more compelling cases about why these issues matter to the American public.
- Be learning organizations. Learn from the past and repeat what works.