Pre-hearing Questions Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Richard Lugar (#1)
Senate Foreign Relations Committee

Question:

The United States has historically taken the position that the International Covenant on Civil and Political Rights does not apply to U.S. actions outside the territory of the United States, including extraterritorial actions undertaken during the course of armed conflict. If confirmed as Legal Adviser, do you intend to recommend any change in this position? If so, please explain the changes you intend to propose and the reasons for them.

Answer:

I recognize that the question of the extraterritorial scope of the International Covenant on Civil and Political Rights has received particular attention during the last several years. But it would be premature for me to suggest what interpretation I would recommend until I have had the opportunity to review fully the U.S. Government's rationale of its position and to engage in full discussions of this issue with all relevant U.S. Government legal offices. If confirmed, I would look forward to doing so, as well as to consulting further with members of this Committee and other interested members of Congress on this important issue.

Pre-hearing Questions Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Richard Lugar (#2)
Senate Foreign Relations Committee

Question:

In a 2007 article in the Journal of International Economic Law, you criticized positions taken by the Bush Administration in litigation under the Alien Tort Statute and stated, inter alia, that "there has been no change in the wording of either the Alien Tort Statute (ATS) or the Torture Victim Protection Act (TVPA), and thus, no apparent legal reason why the United States should suddenly depart from the positions of the Carter and Clinton Administrations supporting the use of US courts for Filartiga-type recovery under these two statutes."

Under what circumstances do you believe the Executive Branch may appropriately change its interpretation of treaties or statutes from those taken under prior Administrations?

Answer:

I firmly believe in the value of continuity in legal interpretation of treaties and other legal obligations. Our legal system is based on a deep respect for legal precedent, although it does allow for evolution of the law to address new issues and challenges. My view is that the Executive Branch should seek to offer consistent interpretations of treaties and statutes and, to promote this continuity, should give significant weight to the legal judgments and precedents of prior administrations. This is particularly true of statutes such as the Alien Tort Claims Act and the Torture Victims Protection Act, where Congress assigned a task not to the executive, but to the courts. In all cases, I would apply a presumption that an

existing interpretation of the Executive Branch should stand, unless a considered reexamination of the text, structure, legislative or negotiating history, purpose and practice under the treaty or statute firmly convinced me that a change to the prior interpretation was warranted.

Pre-hearing Questions Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Richard Lugar (#3)
Senate Foreign Relations Committee

Question:

If confirmed as Legal Adviser, to what extent will you consider yourself bound in providing advice to the Department of State on questions of statutory or treaty interpretation by prior Executive Branch interpretations of the statute or treaty in question?

Answer:

If confirmed as Legal Adviser, on statutory and treaty matters, as with all legal standards, I would begin by undertaking a full and careful review of the views of previous administrations. I would give significant weight to legal judgments and precedents of prior administrations. I would look first to prior judicial and Executive Branch interpretations of the treaty or statute in question, with the presumption that the existing Executive Branch interpretation should stand, unless a considered reexamination of the text, structure, legislative or negotiating history, purpose and practice under the treaty or statute firmly convinced me that a change to the prior interpretation was warranted.

Pre-hearing Questions Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Richard Lugar (#4)
Senate Foreign Relations Committee

Question:

In a 1994 article in the Yale Law Journal discussing the U.S. Supreme Court's decision in Sale v. Haitian Centers Council you wrote that "Haitian Centers Council takes its place atop a line of recent Supreme Court precedent misconstruing international treaties. In the past few years, the Court has sanctioned the emasculation of a range of treaties governing service of process, taking of evidence, bilateral extradition, and now nonrefoulement."

Under what circumstances, if any, do you believe the Executive Branch may adopt a different interpretation of the legal effect of a treaty than that adopted by the U.S. Supreme Court in a case interpreting the treaty?

Answer:

Under our Constitution, the Supreme Court has the final duty to interpret a particular treaty and to say what it requires as a matter of domestic law. Where the Supreme Court has spoken definitively on the legal effect of a treaty, its rulings are obviously controlling. Where the Court has not spoken definitively, the Executive Branch should provide its best interpretation of the legal effect of the treaty by looking to the Court's and lower courts' rulings and prior Executive Branch interpretations of the treaty in question, as well as to the text, structure, negotiating history, object and purpose, and practice under the treaty, as well as any

reservations, understandings and declarations that accompany the advice and consent of the Senate.

Pre-hearing Questions Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Richard Lugar (#5)
Senate Foreign Relations Committee

Question:

If confirmed as Legal Adviser, to what extent will you consider yourself bound in providing advice to the Department of State on questions of treaty interpretation by interpretations of the treaty in question adopted by the U.S. Supreme Court?

Answer:

As my writings reflect, my long-held view is that a Supreme Court ruling on a matter of treaty interpretation is authoritative as U. S. law and binds the political branches of the federal government, lower courts, and the states. If confirmed, when advising the Department of State on questions of treaty interpretation, I would defer to the Supreme Court's interpretation whenever the Court has spoken definitively on the particular question of treaty interpretation at issue.

Pre-hearing Questions Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Richard Lugar (#6)
Senate Foreign Relations Committee

Question:

In testimony before this Committee in 2002 on the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) you stated that "The United States can and should accept virtually all of CEDAW's obligations and undertakings without qualification… Although past Administrations have proposed that ratification be accompanied by certain reservations, declarations, and understandings, only one of those understandings, relating to limitations of free speech, expression and association, seems to me advisable to protect the integrity of our national law."

Under what circumstances, if any, do you believe the Executive Branch may adopt a different interpretation or application of a treaty's provisions than those reflected in reservations, understandings, and declarations accompanying the Senate's advice and consent to the treaty?

Answer:

My long-held view is that the Executive Branch is bound to comply with the reservations, understandings and declarations that accompany the Senate's advice and consent to ratification of a treaty. As I have noted in my writings, it is clear that the Senate may give its consent to treaty ratification subject to conditions ranging from reservations to declarations to understandings of what particular treaty terms mean. If the President and our treaty partner choose to make a treaty by exchanging instruments of ratification, they can only make the treaty to which the Senate has advised and consented. Accordingly, under U.S. law, the President

is bound, not only at the time of ratification but after, to honor the conditions on which the Senate has based its consent.

Pre-hearing Questions Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Richard Lugar (#7)
Senate Foreign Relations Committee

Question:

If confirmed as Legal Adviser, to what extent will you consider yourself bound in providing advice to the Department of State on questions of treaty interpretation and application by reservations, understandings, and declarations accompanying the Senate's advice and consent to the treaty in question?

Answer:

Should I be confirmed as Legal Adviser, I would consider myself bound to honor the reservations, understandings and declarations that accompany the Senate's advice and consent to a treaty. I have expressed in my writings my belief that the President is bound to honor the conditions upon which the Senate has based its consent. Under such circumstances, it follows that the President's subordinates, including the Legal Adviser to the Secretary of State, would be bound to honor those conditions as well.

Pre-hearing Questions Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Richard Lugar (#8)
Senate Foreign Relations Committee

Question:

You have been Counsel of Record in amicus briefs filed in the U.S. Supreme Court urging the Court to consider the law and practice of foreign jurisdictions when interpreting rights-bearing provisions of the U.S. Constitution. If confirmed as Legal Adviser, what role, if any, do you expect to have in the Obama Administration's decisions on the interpretation of rights-bearing provisions of the U.S. Constitution, and on positions the Obama Administration takes on such issues in litigation?

Answer:

Since the President nominated me, much has been said about my views on this question. If confirmed, I would be taking the oath to support and defend the Constitution of the United States. My family settled here in part to escape from oppressive foreign law, and it was America's law and commitment to human rights that drew us here and have given me every privilege in my life that I enjoy. My life's work represents the lessons learned from that experience. Throughout my career, both in and out of government, I have argued that the U.S. Constitution is the ultimate controlling law in the United States and that the Constitution directs whether and to what extent international law should guide courts and policymakers.

Within the Executive Branch, the Department of Justice has been assigned the primary responsibility for interpreting the rights-bearing provisions of the U.S. Constitution. It is my understanding that the Department of Justice consults with the Department of State on the interpretation of a rights-bearing provision of the U.S. Constitution in cases where that interpretation implicates the foreign relations of the United States. If confirmed, I would expect, as prior Legal Advisers have done, to participate in such discussions with the Department of Justice and other relevant agencies in the U.S. Government when those cases arise.

Pre-hearing Questions Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Richard Lugar (#9)
Senate Foreign Relations Committee

Question:

A December 12, 2008 Memorandum of Understanding between the William J. Clinton Foundation and the Obama Presidential Transition Foundation governs certain fundraising activities of the Clinton Foundation during the period of Hillary Rodham Clinton's service as Secretary of State. The Memorandum of Understanding provides, *inter alia*, for the State Department's designated agency ethics official to review and advise on ethics issues potentially raised by certain proposed contributions to the Clinton Foundation.

The State Department's designated agency ethics official is employed within the Department's Bureau of Legal Affairs, over which you will have management responsibility if confirmed as Legal Adviser. If confirmed, what role, if any, do you expect to play with respect to the functions performed and the advice provided by the designated ethics official on issues addressed by the Memorandum of Understanding?

Answer:

Under the December 12, 2008 Memorandum of Understanding between the William J. Clinton Foundation and the Obama Presidential Transition Foundation, the Department of State's Designated Ethics Official, who also serves as a Deputy Legal Adviser in the Office of the Legal Adviser, has been given specified ethics duties with respect to reviewing and advising on certain foreign government contributions. I believe that this official as well as other career government attorneys must be allowed to provide their considered, independent judgments on

ethics matters to senior Department officials. If confirmed as Legal Adviser, I would take all necessary steps to support that goal.

Pre-hearing Questions Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Richard Lugar (#10)
Senate Foreign Relations Committee

Question:

In a number of law review articles, you have developed a theory of "transnational legal process" in which you seek to explain ways in which states comply with rules of international law through the internalization of such rules into domestic law and processes. In a 2004 law article in the Berkeley Journal of International Law addressing this theory you wrote: "Some have asked me, 'Is your notion of transnational legal process an academic theory? Is it an activist strategy? Or is it a blueprint for policy makers?' Over time, my answer has become, 'It is all three.'"

In what sense do you consider your theory of transnational legal process a blueprint for policy makers?

Answer:

U.S. policymakers frequently use transnational legal process as a tool to urge other nations to obey international law. As I explain in the 2004 article, "transnational legal process" is a shorthand description for how state and nonstate actors interact in a variety of domestic and international fora to encourage nations to obey international norms as a matter of domestic law. For example, U.S. policymakers encouraged China to join the World Trade Organization and then to modify Chinese domestic law to conform with international rules on intellectual property, an objective that is important to U.S. economic and other interests. When designing legal rules, U.S. policymakers may take into account all available

enforcement mechanisms, with an eye toward furthering U.S. foreign policy objectives.

Pre-hearing Questions Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Richard Lugar (#11)
Senate Foreign Relations Committee

Question:

What aspects of your theory of transnational legal process do you believe are relevant to the role of the Legal Adviser to the Department of State and, if confirmed, what guidance do you expect to draw from this theory in performing the functions of the Legal Adviser?

Answer:

My approach to transnational legal process assumes that U.S. Government officials, including those in the State Department, must first and foremost uphold the Constitution and laws of the United States of America. When U.S. foreign policy decisions are supported by the law, they enjoy the legitimacy that comes from compliance with the law and reflect America's commitment to the rule of law as a guiding value. Government lawyers enable policymakers to achieve policy objectives within the confines of the law and urge policymakers to re-examine any policy objective that cannot be achieved lawfully. Thus, when the Legal Adviser helps to negotiate a treaty, for example, he helps to guide policy choices by both our government and its treaty partner into a lawful channel that promotes the rule of law.

Pre-hearing Questions Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Richard Lugar (#12)
Senate Foreign Relations Committee

Question:

In a 2007 Comment in Michael Doyle's book Striking First, you wrote "[I]f you look at some of the yielding lawyers with whom the current president has surrounded himself, at the White House counsel's office, as attorney general, and as general counsel of the Defense Department, you quickly conclude that, sadly, these are not the kind of strong-willed, independent-minded attorneys who, in a unilateral situation, are likely to impose restraints upon the president's will, based on the rule of law."

In the context of these comments, please discuss the general approach you would intend to take, if confirmed, in providing legal advice to the Secretary of State and other Department officials, and the role you believe the Legal Adviser should play in assisting policymakers to achieve desired policy objectives.

Answer:

If confirmed as Legal Adviser, my highest priority would be to provide the best possible legal advice to the Secretary of State and other State Department officials that is consistent with the Constitution and laws of the United States. Legal Advisers should give policymakers honest and accurate advice about what obligations and opportunities the United States faces under international law, what room exists for good faith interpretation of legal terms, and what consequences the United States might expect from taking positions that are inconsistent with its international obligations. If confirmed, I would work to help client officials

achieve desired policy objectives, but only so long as those objectives are consistent with the Constitution and our laws.

During nearly thirty years of working alongside government lawyers—including my own time working in the Reagan Administration as an Attorney-Adviser at the Office of Legal Counsel and in the Clinton Administration as Assistant Secretary of State for Democracy, Human Rights and Labor—I have found that the best government legal counsel do not either "just say yes" or "just say no." The first approach too easily lends itself to lawyers bending the law to allow the administration to do whatever what it wants to do; the second approach, without more, too easily lends itself to lawyers who do not present policymakers with all available lawful options. A third approach, which I favor, involves the legal counsel working closely with policymakers throughout the policy process to develop alternative, lawful means of obtaining smart, sensible policy objectives. In all cases, though, a government lawyer must be prepared to hold policymakers to their oaths to support and defend the Constitution of the United States. If confirmed, that is what I would intend to do.

Pre-hearing Questions Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Richard Lugar (#13)
Senate Foreign Relations Committee

Question:

In a 2004 law article in the Berkeley Journal of International Law you wrote the following:

"Turning to the United States, the final member of the 'axis of disobedience,' our greatest surprise should be how quickly after September 11th we turned the story from the non-compliance of others with international law, to our own non-compliance. Examples abound: first and most obviously, the U.S. unsigning of the International Criminal Court Treaty; second, the U.S. attitude towards the Geneva Conventions - including its actions in Abu Ghraib, its decision to create zones in Guantanamo in which people are being held without Geneva Convention rights as well as to designate certain U.S. citizens within the United States as enemy combatants; and third, the death penalty, which has become a growing irritant in the relationship between the United States and the European Union, even in the war against terrorism."

Please explain in what sense you believe the so-called "unsigning" of the Rome Statute of the International Criminal Court amounts to non-compliance with international law. Do you believe that international law requires states to become parties to particular treaties or precludes states from expressing an intention not to become parties to treaties they have previously signed but not ratified?

Answer:

Unfortunately, aspects of the article cited have been misunderstood by some commentators. I do not believe that international law precludes states from expressing an intention not to become parties to treaties they have previously signed but not ratified. However, I do believe that America's reputation for respect

for international law, and its capacity to secure the compliance of other nations, can be harmed by actions that withdraw from or undermine international legal obligations that have been previously undertaken. The specific point I was making in the article is that when we are perceived by the world to be noncompliant with international norms and obligations, we may encourage other countries to do the same.

Pre-hearing Questions Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Richard Lugar (#14)
Senate Foreign Relations Committee

Question:

In a 2004 law article in the Berkeley Journal of International Law you wrote the following:

"Turning to the United States, the final member of the 'axis of disobedience,' our greatest surprise should be how quickly after September 11th we turned the story from the non-compliance of others with international law, to our own non-compliance. Examples abound: first and most obviously, the U.S. unsigning of the International Criminal Court Treaty; second, the U.S. attitude towards the Geneva Conventions - including its actions in Abu Ghraib, its decision to create zones in Guantanamo in which people are being held without Geneva Convention rights as well as to designate certain U.S. citizens within the United States as enemy combatants; and third, the death penalty, which has become a growing irritant in the relationship between the United States and the European Union, even in the war against terrorism."

Please explain in what sense you believe that U.S. practice with respect to the death penalty amounts to non-compliance with international law.

Answer:

The specific point I was making in the article was that the continuing U.S. use of the death penalty can pose an obstacle to international cooperation to achieve compelling national objectives, for example, to the extent that the possibility of the death penalty may complicate the extradition of terrorist suspects from the European Union. The Supreme Court has also recently found that

particular U.S. death penalty practices do not comply with constitutional standards, invalidating the practice of executing offenders with mental retardation and offenders below the age of 18. *Atkins v. Virginia*, 536 U.S. 304, 316–17 n.21 (2002); *Roper v. Simmons*, 543 U.S. 551, 577 (2005). In neither case did the Court apply international law directly. But in both cases, the majority did find that the challenged practice violated the "cruel and unusual punishments" clause of the Eighth Amendment of the United States Constitution, first by looking to the practice of domestic legislatures and juries, and then confirming the “unusual” nature of the practice by examining whether those practices had also become "unusual" internationally, contrary to the “evolving standards of [human] decency” long applied to construe the Eighth Amendment. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

Pre-hearing Questions Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Richard Lugar (#15)
Senate Foreign Relations Committee

Question:

In November 2001 you delivered the Edward L. Barrett, Jr. Lecture on Constitutional Law at the University of California, Davis School of Law. In that lecture, you discussed your tenure as Assistant Secretary of State for Democracy, Labor and Human Rights between 1998 and 2001, and stated "While I recognized that the United States stood increasingly among the minority of nations in its adherence to the practice [of capital punishment], I did not believe that a customary norm of international law had yet formed condemning the practice."

Do you believe that a customary norm of international law currently exists condemning the practice of capital punishment? If so, what consequences do you believe flow from the existence of such a norm? If confirmed as Legal Adviser, what steps would you recommend that the United States take in light of any such norm?

Answer:

While I recognize that the United States stands increasingly among the minority of nations in its adherence to the practice of capital punishment, I do not believe that a customary norm of international law has formed prohibiting the general practice of capital punishment.

Pre-hearing Questions Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Richard Lugar (#16)
Senate Foreign Relations Committee

Question:

In the same lecture, you stated that prior to accepting the position as Assistant Secretary for Democracy, Labor, and Human Rights "I wondered whether I could publicly defend the legality of the death penalty. My initial view was that, whatever my moral beliefs, as an official sworn to uphold the Constitution and laws of the United States, I could defend the legality of the death penalty, so long as it was in fact administered as Gregg and Furman required according to exacting constitutional procedures." Later in the same lecture, you stated that "One day during my time in government, while being challenged on the death penalty, I could no longer find it in my heart to defend the practice. I found myself morally convinced that its continuing use is not only utterly wrong, but also unconstitutional."

In recent years, Legal Advisers to the State Department have been called upon to address and defend aspects of U.S. practice with respect to the death penalty, including in litigation before the International Court of Justice and in connection with periodic reports of the United States to human rights treaty bodies monitoring the implementation of the International Covenant on Civil and Political Rights and the Convention on the Elimination of Racial Discrimination.

In light of the development you have described in your views on capital punishment as practiced in the United States, do you believe you will be able to represent the United States on issues related to capital punishment if you are confirmed as Legal Adviser? Please explain the approach you would intend to take on such issues.

Answer:

If confirmed as Legal Adviser, I would take an oath to support and defend the Constitution of the United States. In carrying out my governmental duties, I

would stand in much the same position as a judge in a state that administers the death penalty who personally opposes the death penalty, but still must administer that penalty because it is the law of his or her state and because he or she has taken an oath to uphold that law. Because I acknowledge that no norm of customary international law has formed condemning the general practice of capital punishment, I would have no difficulty making such an assertion to an international body.

Pre-hearing Questions Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Richard Lugar (#17)
Senate Foreign Relations Committee

Question:

In testimony before the Senate Judiciary Committee in September 2008, you stated that the next U.S. Administration "should reengage diplomatically with the Contracting Parties to the International Criminal Court to seek resolution of outstanding U.S. concerns and pave the way for eventual U.S. ratification of the Rome Treaty."

Please indicate what specific concerns you believe would need to be addressed before it would be advisable for the United States to consider becoming a party to the Rome Statute.

Answer:

The recent bipartisan American Society of International Law Task Force on the International Criminal Court—which was co-chaired by former Legal Adviser William H. Taft IV and Judge Patricia Wald and included former Supreme Court Justice Sandra Day O'Connor—recommended that the United States could announce a policy of "positive engagement" with the International Criminal Court. Such a policy would allow the United States to help shape the development of the Court and could facilitate future consideration of whether the United States should join the Court. See American Society of International Law Task Force, *U.S. Policy Toward the International Criminal Court: Furthering Positive Engagement* iii (2009), http://www.asil.org/files/ASIL-08-DiscPaper2.pdf.

In considering such a recommendation, among the many questions would be: whether to announce a new policy toward the Court; whether and how to respond to the 2002 "unsigning" of the Rome Statute; whether and how to support the ICC's Prosecutor in particular cases; whether to participate in some capacity in the 2010 conference that will address the definition of the crime of aggression; whether to propose amendment or waiver of particular provisions of the American Servicemembers' Protection Act; and whether ultimately to seek ratification of the Rome Treaty, a step that would require the Senate's advice and consent. All of these issues would require extensive interagency discussions, in which I would hope to participate if confirmed.

In particular, the U. S. Government has long expressed concern about the authority of the ICC Prosecutor to initiate investigations of U.S. soldiers and government officials stationed around the world. Particularly because the United States has the largest foreign military presence in the world, this is an important issue on which we would need further discussion and clarification within the government. If confirmed, I would also wish to consult extensively with military commanders and other experts, and members of this Committee, before I would deem it advisable to recommend to the Secretary of State and the President that the United States take any steps with regard to the Rome Statute.

Pre-hearing Questions Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Richard Lugar (#18)
Senate Foreign Relations Committee

Question:

In the same testimony, you urged that "at the earliest opportunity, the new Secretary of State should withdraw the Bush Administration's May 2002 letter to the United Nations 'unsigning' the U.S. signature on the Rome Treaty creating the ICC, restoring the status quo ante that existed at the end of the Clinton Administration."

What do you believe the legal effect of such an action would be? What obligations, if any, would the United States incur in relation to the Rome Statute if it took this step?

Answer:

As a matter of international law, the May 2002 letter did not actually result in the United States "unsigning" the Rome Statute, as the United States' signature remains on the operative legal instruments. The stated intent of the May 2002 letter was instead to relieve the United States of any current obligation to refrain from acts that would defeat the Rome Statute's object and purpose. A withdrawal of the May 2002 letter would neither bind the United States to become a party to the Rome Statute, nor increase the risk of prosecution posed to U.S. citizens, such as soldiers stationed abroad. If confirmed, in considering whether to make any recommendations to the Secretary of State and the President with regard to the

Rome Statute, I would consult fully within the Executive Branch, including with the military, as well as with members of this Committee.

Pre-hearing Questions Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Richard Lugar (#19)
Senate Foreign Relations Committee

Question:

The Bush Administration's May 2002 letter stated, in pertinent part, that "the United States does not intend to become a party" to the Rome Statute. Is it the position of the Obama Administration that the United States does intend to become a party to the Rome Statute?

Answer:

With respect to the position of the Obama Administration, I would refer you to the answer that Secretary Clinton provided to this Committee during her confirmation hearing in response to a written question concerning the Administration's position on becoming a party to the Rome Statute. If confirmed, I would hope to participate in discussions with the Secretary of State, other officials within the State Department and other agencies, and members of the Senate Foreign Relations Committee and other interested members of Congress on this important issue.

Pre-hearing Questions Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Richard Lugar (#20)
Senate Foreign Relations Committee

Question:

The Assembly of States Parties to the Rome Statute is in the process of considering whether to adopt a definition of a crime of aggression over which the International Criminal Court would exercise jurisdiction. What interests do you believe the United States has with respect to whether, and in what form, the Assembly of States Parties adopts a crime of aggression? What steps do you believe the United States should take to advance and protect its interests in connection with this process?

Answer:

The crime of aggression was included, but not defined, as a potentially prosecutable offense in the 1998 International Criminal Court negotiations. A review conference will be held next year at which parties to the Rome Statute and observers are expected to discuss both the definition, and the circumstances under which the crime of aggression could be investigated and prosecuted. The United States has substantial interests in whether, and in what form, the Assembly of States Parties adopts a definition of the crime of aggression as part of the Rome Statute. In particular, the United States has a strong interest in avoiding baseless charges of aggression against its own officials, soldiers, or allies. This concern would need to be addressed before I would recommend that the United States become a party to the Rome Statute. If confirmed, I would be interested in

participating in deliberations both within the Executive Branch and with members of this Committee and other interested members of Congress about how the United States could participate in discussions, without becoming a party, to advance and protect U.S. interests in this process.

Pre-hearing Questions Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Richard Lugar (#21)
Senate Foreign Relations Committee

Question:

On March 29, the *New York Times* reported that a Spanish court was considering opening a criminal investigation into actions of former U.S. officials involved in decisions about detention and interrogation policy during the Bush Administration. What U.S. interests do you believe are implicated by efforts of foreign courts to assert criminal jurisdiction over sitting or former U.S. officials for acts undertaken in the course of their official duties? What do you believe is the appropriate role of the U.S. Government in responding to such cases?

Answer:

There can be no doubt that very important U.S. interests are implicated by efforts of foreign courts to assert criminal jurisdiction over sitting or former U.S. officials for acts undertaken in the course of their official duties. The appropriate role of the U.S. Government in responding to such cases should be first to understand the procedural posture of the case, precisely how it arose, the nature of the allegations raised against the former U.S. Government officials, the shared aspects, if any, between the foreign prosecution and any other investigations or inquiries that may be pending or forthcoming in the United States, and the nature of any defenses that might be available in such proceedings. If confirmed, I would intend to follow such cases closely in coordination with the Department of Justice and other U.S. Government agencies, and to work actively with our foreign

counterparts through legal and diplomatic channels, as appropriate to the particular case. In so doing, I would seek the advice of members of this Committee and other interested members of Congress and keep them fully informed.

Pre-hearing Questions Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Richard Lugar (#22)
Senate Foreign Relations Committee

Question:

Successive U.S. Administrations have from time to time filed briefs in cases in U.S. courts under the Alien Tort Statute in which the United States itself was not a party. Under what circumstances do you believe it is appropriate for the United States to submit views in such cases? What principles do you believe should govern any positions to be taken by the United States in such cases?

Answer:

It is appropriate for the United States to submit its views in Alien Tort Claims Act cases when a court asks it to do so. The United States might also proactively file such a brief when it deems it necessary, for example, to ensure consistency with the views of the United States on the content of international law; to guarantee respect for the separation of powers, including the authority of Congress and the courts; and to protect important foreign policy interests of the United States. Key decisions about when to file and what position to take in any such amicus filings will depend upon multiple factors, including the facts and circumstances of each case, the importance of the legal principles at stake and the likelihood that they will be furthered by such a filing, and the U.S. Government's assessment of whether adjudication of the Alien Tort claims at issue at that time

would or would not prejudice or impede the conduct of U.S. foreign policy interests.

Pre-hearing Questions Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Richard Lugar (#23)
Senate Foreign Relations Committee

Question:

In a 2005 article in the *Indiana Law Journal*, discussing the Alien Tort Statute, you wrote that "Under U.S. law, the President may not, on his own, violate a *jus cogens* norm such [as] those against torture or slavery or genocide. In the event that the President does, he as well as his subordinates may be sued under the [Alien Tort Claims Act]."

Is it the position of the Obama Administration that the Alien Tort Statute provides for civil damage remedies against individual U.S. officials, including the President, in connection with actions taken in the course of their official duties?

Answer:

My understanding is that the Obama administration has continued to argue in court that, in cases asserting claims for civil damages under the Alien Tort Claims Act against U.S. officials in connection with actions taken in the course of their official duties, the United States should be substituted for the officials pursuant to the Westfall Act, 28 U.S.C. § 2679, and the case against the United States should then be governed by the Federal Tort Claims Act. In the article referred to, I was only pointing out that the Supreme Court has decided that the Alien Tort Claims Act is potentially available as a basis for federal jurisdiction in certain cases dealing with torture allegations. *See Sosa v. Alvarez-Machain*, 542

U.S. 692, 725 (2004). In so saying, I did not address many of the other questions raised by such an action, including the application of the Westfall Act, domestic law immunities (including presidential immunity), or other defenses that might be available to the official defendants.

Pre-hearing Questions Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Richard Lugar (#24)
Senate Foreign Relations Committee

On February 28, 2005, President Bush determined that the United States would comply with the judgment of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals* (Mexico v. United States). To achieve such compliance, President Bush issued a memorandum directing state courts to review and reconsider the convictions and sentences of the Mexican nationals at issue in the case, who were not advised in a timely fashion of their rights under the Vienna Convention on Consular Relations to have Mexican consular officials notified of their arrests in the United States on state criminal charges. In March, 2008 the U.S. Supreme Court held in *Medellin v. Texas* that President Bush lacked the authority to compel the states to take such actions.

Question:

What further actions, if any, do you believe the federal and/or state governments should take to give effect to the ICJ's *Avena* judgment? If confirmed as Legal Adviser, what steps would you recommend that the United States take with respect to this issue?

Answer:

If confirmed as Legal Adviser, I would strive to ensure that the United States lives up to its international obligation to comply with decisions of the International Court of Justice (ICJ). With respect to the Court's decision in *Avena*, I know that the State Department is committed to training federal, state and local officials on our consular notification and access obligations under the Vienna Convention on Consular Relations. I understand that the Department's efforts have been well

received by these officials and that the United States is now doing a substantially better job of complying with these obligations than in the past. If confirmed, I would intend to review thoroughly what additional efforts can and should be taken to comply with the ICJ's judgment.

Pre-hearing Questions Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Richard Lugar (#25)
Senate Foreign Relations Committee

Question:

Last term in *Medellin* v. *Texas*, the Supreme Court held that the President could not direct state officials to give effect to treaty obligations of the United States at issue in the case because the relevant treaties were not self-executing and the President did not have other sources of authority on which he could rely to direct such actions.

In light of this decision, what further steps, if any, do you believe the Executive Branch and Congress should take in order to ensure that the United States will be able to fulfill its obligations under treaties to which it is currently party?

Answer:

Upon close analysis, I would not expect the ruling to create broader problems for overall U.S. treaty compliance with existing treaties. The Court emphasized that it was not suggesting that other "treaties can never afford binding domestic effect to international tribunal judgments." *Medellín v. Texas*, 128 S.Ct. 1346, 1365 (2008). To the extent that the Court's judgment applies more broadly to ratified treaty provisions outside of the context of international dispute resolution, the Court was careful to mention with approval the direct enforcement of a number of self-executing treaties. While the Executive Branch does rely in certain contexts on direct judicial enforceability of treaty provisions to ensure U.S. compliance, more frequently, the Executive Branch seeks implementing legislation

or relies upon existing legislation or Executive Branch action or restraint to ensure that U.S. treaty obligations are fulfilled.

While, for these reasons, I do not believe that the Court's decision in *Medellin* poses a serious broader threat to future U.S. treaty compliance, I do think that there is room for improvement during the treaty ratification process, including, among other things, the need to provide greater clarity regarding the domestic legal effect of treaty provisions, as the Senate has recently been doing. Should I be confirmed as Legal Adviser, I would of course welcome further dialogue on this issue with this Committee and other interested members of Congress, in search of ways to continue improvement of that process.

Pre-hearing Questions Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Richard Lugar (#26)
Senate Foreign Relations Committee

Question:

Last term in *Medellin* v. *Texas*, the Supreme Court held that the President could not direct state officials to give effect to treaty obligations of the United States at issue in the case because the relevant treaties were not self-executing and the President did not have other sources of authority on which he could rely to direct such actions.

What steps do you believe the Executive Branch and Congress should take during the process of considering future treaties to which the United States may become party to ensure that the United States will be able to fulfill obligations it would undertake under such treaties?

Answer:

Should I be confirmed as Legal Adviser, I would support the recent practice of this Committee to include, where appropriate, in resolutions of advice and consent a joint Executive and Senate view regarding the self-executing nature of specific provisions of new treaties, which will undoubtedly give helpful guidance to U.S. courts that are considering the direct enforceability of a particular treaty provision. As I noted in my answer to Question 7, I have long maintained that the President is bound, under U.S. law, to honor the conditions upon which the Senate has based its consent. I would also take steps to promote clarity in appropriate documents regarding the proposed domestic implementation of a treaty, including

its domestic legal status, both before and during the process of seeking advice and consent.

Pre-hearing Questions Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Richard Lugar (#27)
Senate Foreign Relations Committee

During the last Congress, the Bush Administration submitted to the Senate for advice and consent treaties on defense cooperation with the United Kingdom and with Australia. Without any prior consultation with the Senate, the Bush Administration took the extraordinary step of specifying in the text of each of these treaties that their provisions would be self-executing in the United States.

Question:

Do you believe the Senate has a co-equal role with the Executive Branch in deciding whether treaties to which the United States may become party will be treated as self-executing for the purposes of U.S. law?

Answer:

The Senate has played an important historical role in the determination of the domestic legal effect of treaties, and if confirmed, I would expect to respect that role by consulting with the Senate on this and other aspects of proposed treaties. In my writings, I have long argued that Article II of the Constitution mandates that the Senate and President act as partners in the treaty process. I believe the Executive Branch should respect the long historical tradition of prior Executive Branch consultation with the Senate regarding treaties, a tradition that also enables the Senate more effectively to fulfill its own constitutional function of advice and consent.

Pre-hearing Questions Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Richard Lugar (#28)
Senate Foreign Relations Committee

Question:

If confirmed, will you consult with the Senate on arrangements for implementing obligations the United States would assume under treaties submitted to the Senate for its advice and consent?

Answer:

Yes. As my writings make clear, I believe the Senate has an essential role to play in the implementation of treaties. If confirmed, I would consult fully with the Senate on arrangements for implementing obligations the United States would assume under treaties submitted to the Senate for its advice and consent. I would also urge other agencies with the lead on particular implementing legislation to do the same.

Pre-hearing Questions Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Richard Lugar (#29)
Senate Foreign Relations Committee

Question:

What legal instruments and rules do you believe govern the detention of individuals captured in connection with U.S. military operations in Iraq and Afghanistan?

Answer:

As a general matter, the Obama Administration is currently conducting an ongoing policy review of its detention authorities. I have not participated in that review, and therefore am not in a position to comment on what recommendations, if any, are being developed by the detention policy task force that may affect the bases for and scope of U.S. detentions in armed conflicts and counterterrorism operations.

Detentions of individuals captured in connection with U.S. military operations in Iraq and Afghanistan are governed by the law of armed conflict and in some cases by rules of local law, although the specific international law rules applicable to a particular detainee will depend upon both the nature of the conflict at a particular point in time, and the status of the individual within the context of that conflict. The legal framework governing the treatment of all detainees in U.S. custody in Iraq and Afghanistan includes, among other provisions of law, the

baseline treatment rules found in Common Article 3 of the 1949 Geneva Conventions; the Detainee Treatment Act of 2005 and the Federal Torture Statute; Executive Order 13,491; and various Department of Defense rules and regulations (including the Army Field Manual).

In Iraq, additional rules applicable to detainees as a matter of law have changed as the legal framework governing the U.S. presence in Iraq has changed. U.S. forces currently operate in Iraq pursuant to the *Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq* ("Security Agreement"). Article 22 of the Security Agreement addresses both the disposition of the security detention population in U.S. custody as of the entry into force of the Agreement, and new detainees whom U.S. forces may arrest or capture in the course of their ongoing mission in Iraq

In Afghanistan, U.S. forces taking part in the International Security Assistance Force ("ISAF") are operating in Afghanistan under (most recently) UN Security Council Resolution 1833 (2008), a Chapter VII resolution that authorizes Member States participating in ISAF to "take all necessary measures to fulfil its mandate," which includes detention. The United States also continues to lead the coalition called "Operation Enduring Freedom," and to detain individuals under legal authorities that include the Authorization for Use of Military Force of

September 18, 2001 (Public Law 107-40), as confirmed by the Supreme Court's decision in *Hamdi v. Rumsfeld*. 542 U.S. 507, 517-18 (2004). In addition to the legal requirements noted above, the Department of Defense periodically reviews the status of the detainees it holds in its custody in Afghanistan. Questions relating to whether certain detainees at the Bagram Air Field enjoy constitutionally-protected *habeas corpus* rights are the subject of ongoing litigation.

Pre-hearing Questions Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Richard Lugar (#30)
Senate Foreign Relations Committee

Question:

What legal instruments and rules do you believe govern the detention of members of al Qaida captured by the United States outside Iraq and Afghanistan in operations undertaken pursuant to authorization for the use of military force contained in S.J. Res. 23 of September 18, 2001?

Answer:

As a general matter, the Obama Administration is currently conducting an ongoing policy review of its detention authorities. I have not participated in that review, and therefore am not in a position to comment on what recommendations, if any, are being developed by the detention policy task force that may affect the bases for and scope of U.S. detentions in armed conflicts and counterterrorism operations.

With regard to detentions undertaken pursuant to the Authorization for Use of Military Force of September 18, 2001 (Public Law 107-40), the Supreme Court held in *Hamdan v. Rumsfeld* that Common Article 3 of the 1949 Geneva Conventions governs the treatment of Al Qaeda detainees. 548 U.S. 557, 629-31 (2006). In addition to baseline treatment rules found in Common Article 3, the legal framework governing the treatment of Al Qaeda detainees in U.S. custody

includes, among other provisions of law, the Detainee Treatment Act of 2005 and the Federal Torture Statute; Executive Order 13,491; and various Department of Defense rules and regulations (including the Army Field Manual).

With regard to detainees held at the Guantánamo Bay Detention Camp, Executive Order 13,492 created a review process whereby participating agencies are required to consolidate information pertaining to Guantánamo detainees and, through a case-by-case status review, to determine whether they can be released or transferred, whether they can be prosecuted, or whether to select another lawful option with respect to their disposition. Executive Order 13,492 additionally ordered the Secretary of Defense to undertake a 30-day review of the conditions of confinement at Guantánamo Bay Detention Camp to ensure their compliance with all applicable laws, including Common Article 3 of the 1949 Geneva Conventions, and the Department of Defense has completed that review and made it public. Beyond these processes, the Supreme Court has confirmed in *Boumediene v. Bush* that Guantánamo detainees have a constitutionally-protected right to seek the writ of *habeas corpus* in U.S. courts. Detainees held at the Bagram Air Field are currently being governed by the legal framework described in my response to Question 29. Questions relating to whether certain detainees at Bagram Air Field enjoy constitutionally-protected *habeas corpus* rights are the subject of ongoing litigation.

Pre-hearing Questions Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Richard Lugar (#31)
Senate Foreign Relations Committee

Question:

In a 2007 article in the Cornell International Law Journal, you urged the United States to renounce the practice of extraordinary rendition. Under what circumstances, if any, do you believe the United States has the authority to transfer an individual to the custody of foreign law enforcement authorities in the absence of an extradition treaty?

Answer:

Under certain circumstances, as some senior administration officials have said, transfers of individuals outside extradition channels may be appropriate and lawful – such as when an individual is subject to deportation proceedings, with any necessary diplomatic assurances, or is transferred with the consent of the sending state to face legal process in the receiving state.

In the article cited, when referring to the practice of "extraordinary rendition," I was referring in particular to rendition of suspects to conditions of torture. I do not believe that rendition is lawful or permissible where the goal of the rendition is to transfer an individual to a foreign government so that he can be tortured. President Obama's Executive Order 13,491 on "Ensuring Lawful Interrogations" created a Task Force specifically to examine the U.S. practice of transferring individuals to foreign nations. One goal of this Task Force is to ensure

that such practices comply with the domestic laws, international obligations, and policies of the United States and do not result in the transfer of individuals to other nations to face torture. I understand that the State Department and its attorneys are playing an important role in that Task Force.

Pre-hearing Questions Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Richard Lugar (#32)
Senate Foreign Relations Committee

Question:

In a 2007 Comment in Michael Doyle's book *Striking First*, you discuss international law rules governing the use of force. You propose "that we move to a *per se* ban on unilateral anticipatory war making, with any post hoc justification of such anticipatory actions being asserted as a defense and not in the form of prior permission."

Under what circumstances, if any, do you believe a state may legitimately use force in response to threats that have not resulted in an attack on the state?

Answer:

I agree with the longstanding U. S. Government view that a state may use military force to defend itself if an armed attack occurs, or in the event that such an attack is imminent. Any action taken in response to such an imminent threat must be necessary and proportional; as Daniel Webster said in 1837 in his famous statement in the Caroline case, "the act justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it." Determining whether the traditional tests of imminence, necessity and proportionality are satisfied in any particular case can present exceedingly difficult questions that would need to be evaluated in the context of the particular circumstances existing at the time and the precise nature of the threat being faced. In the Comment quoted, I was observing

the dangers of a doctrine that would reach well beyond these established principles of self-defense to provide advance authority to an individual state such as North Korea to engage in "unilateral anticipatory war making” based on its own subjective balancing of four factors (lethality, likelihood, legitimacy and legality).

Pre-hearing Questions Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Richard Lugar (#33)
Senate Foreign Relations Committee

Question:

A 2004 report by a high level panel convened by then-UN Secretary General Kofi Annan stated that "a threatened State, according to long established international law, can take military action as long as the threatened attack is imminent, no other means would deflect it and the action is proportionate." Do you agree with this statement?

Answer:

Yes. As noted above, the quoted statement follows "long established international law."

Pre-hearing Questions Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Richard Lugar (#34 - #35)
Senate Foreign Relations Committee

Questions:

34. In 2005, the United Nations World Summit endorsed the concept of a responsibility of states to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. The concept as endorsed by the United Nations provides that where states manifestly fail to protect their populations from such atrocities, the international community, acting through the UN Security Council, is prepared to take collective action in a timely and effective manner to provide such protection. Some commentators have asserted that this doctrine provides a basis on which states, individually or collectively, may use force to protect populations in other states from atrocities.

Do you believe that international law recognizes a right of individual states to use force without UN Security Council authorization to protect populations from atrocities?

35. If you believe in such a right, what principles govern such interventions? What impact would such a doctrine have on the general prohibition in international law against the use of force between states except in cases of self-defense?

Answer:

As in any case where the use of force is being contemplated, this situation presents some of the most difficult and fact-specific questions with which international law has had to deal. As UN Secretary General Kofi Annan said in 1999:

> "To those for whom the greatest threat to the future of international order is the use of force in the absence of a Security Council mandate, one might ask . . . in the context of Rwanda: If, in those dark days and

> hours leading up to the genocide, a coalition of States had been prepared to act in defen[s]e of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold?"

Address to General Assembly, Sept. 20, 1999, http://www.un.org/News/ossg /sg/stories/statments_search_full.asp?statID=28.

In any such case, I believe it would be important for the Legal Adviser to examine the case presented with extreme care and thoroughness, taking into account all relevant factors and circumstances, before advising the Secretary of State and the President on how to proceed. In addition to international legal considerations, it would also be important to build as broad support as possible among the American people and the Congress for any decision to use force in such circumstances, including working as closely as possible with the members of this Committee.

Pre-hearing Questions Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Richard Lugar (#36 - #37)
Senate Foreign Relations Committee

On January 26, U.S. Permanent Representative to the United Nations Susan Rice stated that the Administration remains "very deeply concerned about the ongoing genocide in Darfur." Similarly on March 23, acting State Department Spokesman Robert Wood stated "certainly what's going on in Darfur is genocide." Other observers have declined to characterize past and present events in Darfur as constituting genocide.

Questions:

36. Do you believe that events currently taking place in Darfur meet the legal definition of genocide contained in Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide? Please indicate the reasons for your conclusion.

37. When then-Secretary of State Colin Powell announced the Bush Administration's position in September 2004 that events then occurring in Darfur met the legal definition of genocide, he based his conclusion on a contemporaneous study conducted by the State Department documenting atrocities in Darfur, including field interviews with over 1,100 Darfur refugees. Has the Obama Administration conducted a similar study of events currently taking place in Darfur? If not, does the Administration intend to conduct such a study to inform future judgments it may make about the legal character of events in Darfur?

Answer:

As reflected in Secretary of State Colin Powell's September 9, 2004 statement before the Senate Foreign Relations Committee, the Department of State's comprehensive review of the situation in Darfur provided the basis for the conclusion that the events on the ground met the requirements for genocide under the Convention on the Prevention and Punishment of the Crime of Genocide. That

statement appeared to me to be well-reasoned, as Secretary Powell pointed to, among other things, a consistent and widespread pattern of killings, rapes, burning of villages and other acts that indicated the specific intent to destroy in whole or in part non-Arab groups in Darfur. I am not aware of what recent information may be available within the U.S. Government on this subject or what the Department's plans might be for conducting a study on the subject. However, if confirmed, I would work closely with Secretary Clinton, others at the State Department, and the members of this Committee to determine how best to address the situation in Darfur.

Pre-hearing Questions Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Richard Lugar (#38)
Senate Foreign Relations Committee

Some have criticized the UN Security Council's targeted sanctions regime for failing to provide sufficient due process rights for individuals who are targeted for sanctions. In September, the European Court of Justice in the *Kadi* case invalidated European Community regulations implementing UNSC sanctions against Al-Qaeda and the Taliban as applied to two individuals on the ground that the process for adopting the sanctions failed to respect the individuals' fundamental due process rights.

Question:

Do you believe the UN Security Council's existing sanctions regimes fail to provide adequate protections for the due process rights of targeted individuals?

Answer:

Targeted sanctions are an important and effective tool for the Security Council. They are a valuable alternative to the use of force and to comprehensive economic sanctions that affect entire populations. At the same time, I understand why concerns have been raised that targeted sanctions operate unfairly and can be imposed on the wrong people. It is important that the sanctions process not only work, but also be perceived to work in a way that is fundamentally fair. With the support of the United States, the Security Council has taken recent steps to enhance fairness and transparency in the implementation of targeted sanctions. Additional steps to address due process concerns may well be necessary, and if confirmed I

would devote considerable attention to working with our partner states to identify and implement those steps.

Pre-hearing Questions Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Richard Lugar (#39)
Senate Foreign Relations Committee

Question:

If confirmed as Legal Adviser, what steps would you recommend the United States take to respond to such challenges and to ensure that the Security Council retains the authority to implement effective targeted sanctions regimes?

Answer:

The United States has a strong interest in ensuring that targeted sanctions, which can be effective foreign policy tools, are imposed and implemented by the Security Council in a manner that is as fair and transparent as possible. For this reason, and because of our own fundamental sense of fairness and due process, I believe that the United States should continue to work with partner states to identify further improvements that could be made to United Nations targeted sanctions regimes.

Pre-hearing Questions Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Richard Lugar (#40)
Senate Foreign Relations Committee

Question:

In 2007, the UN General Assembly failed to elect a U.S. national to the International Law Commission for the first time since the ILC's inception. The next elections to the ILC occur in 2011. What priority do you attach to electing a U.S. national to the ILC in these elections? If confirmed as Legal Adviser, what steps would you plan to take to ensure the election of a U.S. national to the ILC?

Answer:

Since its inception in 1947 until the last election in 2007, the International Law Commission (ILC) had always had a U.S. member. Although the members of the ILC serve in their personal capacities, not as representatives of their countries of nationality, I believe that the presence of a U.S. member is good both for the United States, in helping to ensure that U.S. perspectives are taken into account as the ILC undertakes its work, and for the Commission itself, which benefits from the perspective that a U.S. member can bring to bear. I was disappointed that the U.S. candidate in the last ILC election, Professor Michael Matheson, who had served with distinction on the Commission for several years, was not elected. I believe that electing a U.S. national to the ILC in 2011 should be an important priority for the United States.

If confirmed as Legal Adviser, I would seek to identify the strongest possible U.S. candidate, and would welcome counsel from interested members of this Committee and other U.S. communities knowledgeable about international law. I would then work within the State Department to make sure that efforts to support the election of the U.S. candidate are treated as a high priority. I think it could be particularly useful to work within the Western European and Others Group (WEOG), including in the early stages, to assure support within the group for the U.S. candidate, and to impress upon others the benefits to all concerned of once again having a U.S. member of the Commission.