

## A Conversation with Professor Harold Hongju Koh

by

Lesley Dingle<sup>1</sup> and Daniel Bates<sup>2</sup>

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*This is the thirteenth interview for the Eminent Scholars Archive with an Arthur Goodhart Visiting Professor of Legal Science.*

*This interview was held in Professor Koh's rooms in Christ's College.*

*Questions in the interviews are sequentially numbered for use in a database of citations to personalities mentioned across the Eminent Scholars Archive.*

Interviewer: Lesley Dingle, her questions are in **bold type**.

Professor Koh's answers are in normal type.

Comments added by LD, [*in italics*]. Footnotes added by LD.

**1. Harold, you are the thirteenth Arthur Goodhart Visiting Professor of Legal Science to be interviewed for the Eminent Scholars Archive. You're currently the Sterling Professor of International Law at Yale Law School, a position that you've held since 2013. You've been a Goodhart Professor for the academic year 2018 to 2019, and we are very grateful for your agreeing to share some reminiscences of your life in Korea, and your experiences here in Cambridge over this period. I hope you can also give us some thoughts on legal topics in international law. So, could we start with your early life? You were born in Boston on December the 8<sup>th</sup> 1954, and this was 16 months after the end of the Korean War. Your father was originally from what is North Korea, but he escaped to the United States. Can you tell us a little about your parents, how they came to The States and re-established themselves there?**

Yes, so actually it was my mother who lived from time to time in North Korea. My parents are the inspiration of my life<sup>3</sup>. My father was an international law professor, which explains why I'm an international law professor. His name was Kwang Lim Koh and he was from a very small island off the south coast of South Korea - as south as you could get - it's called Cheju Island. It's a fishing village and he was an incredibly hard-working student and was the first student from the island ever to go to Seoul which was astonishing - it would be like someone from the Isle of Wight coming to London.

At the time, the Seoul National University was controlled by the Japanese colonial forces and so, what he attended was called Keijo Imperial University<sup>4</sup>, where he was the only Korean with one other fellow, and they were very heavily discriminated against. But my father took this as a challenge and he was number one in the class, even though he was one of the only two Koreans; this created this incredible drive for achievement, really so he could prove that Koreans could not be looked down upon. My dad passed away in 1989. He did not escape to America, he came as a student. In fact, we've just found the materials - he got a scholarship from an educational establishment in Princeton, New Jersey, which he

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<sup>1</sup> Foreign & International Law Librarian, Squire Law Library, Cambridge University

<sup>2</sup> Freshfields Legal IT Teaching and Development Officer, Faculty of Law, Cambridge University

<sup>3</sup> <http://sites.bu.edu/koreandiaspora/individuals/boston-in-1950s/dr-kwang-lim-koh-dr-hesung-chun-koh-and-the-koh-family/> <https://www.immigrantheritage.org/new-blog/2018/9/11/the-koh-family>

<sup>4</sup> [https://en.wikipedia.org/wiki/Keij%C5%8D\\_Imperial\\_University](https://en.wikipedia.org/wiki/Keij%C5%8D_Imperial_University)



misunderstood in 1949 to mean that he was being admitted to Princeton University to study law. Princeton doesn't have a law school, so he came all way to America, went to Princeton, and they said, 'We don't have a law school', so instead, he enrolled in a PhD programme at nearby Rutgers University, New Jersey; he got a PhD in political science. He then went to Harvard Law School, got a Masters or LLM, and then got an SJD. And then, finally, just to establish that he could practice law in America, he got a JD degree from Boston College Law School. His specialty was Law of the Sea and particularly the study of fisheries and the outer continental shelf.

Next week I'm arguing at the International Court of Justice about, among other things, Russia's theft of fisheries from Ukraine. So his life is coming full circle in some way. And, finally, I realised that my father had a vision that was just very far-reaching.

Now my mother, Hesung Chun Koh<sup>5</sup>, is from a very different walk of life; she's from a very well-to-do family in Seoul. She is still alive. When I get back from Cambridge, we'll have her 90<sup>th</sup> birthday. She had six children. She has her own PhD. She is the head of East Rock Institute, a research institute on Koreans and Korean Americans, and she's a sociologist. And my parents were the first Asians ever to teach law at Yale Law School, which they did in 1961, and my sister Jean and I are now chaired professors at Yale Law School, many years later. But what happened was that my mother's family had a summer home in North Korea, which is a very cool, mountainous part of the country. And when the country was divided after the end of World War II, they happened to be up there, herself and her two siblings, and were actually trapped inside North Korea for three or four months, while the Russians were in control. And she was recounting to me just very recently that, when the Russians came marching down, the Koreans didn't know what to do. You're supposed to welcome them but she didn't like the Russians, so she put up a sign that said, 'Welcome Allied Forces'.

She was advised that, she was 17 years' old, that the Russian forces were molesting young Korean women so, after several months, she dressed up as a boy, and she and her two brothers hiked to the border and my grandfather, who I never met, her father, sent a car to meet them. When they got to the border, there was no car, and then they just waited there for ten hours or so, and suddenly a car appeared and took her south. Not long after, she went to America on a scholarship to Dickinson College in Carlisle, Pennsylvania, as a freshman.

The war started, the Korean war started [*LD- June 1950*], and Dickinson College is very close to the US Army War College, which sent out a distress signal, asking, 'Does anyone speak Korean, because our generals need to know how to speak Korean?'. So, my mother went over there as a freshman, who was only 18 years' old, and starting teaching them Korean language. And then, a few weeks later, she said, 'You can't learn Korean language without learning Korean history, and you can't learn Korean history without learning Korean culture. So, I want to teach these courses and you can't do any of it without knowing Korean geography'. So, she taught all of these courses as a fresher.

So, she is a remarkable person, as you can tell. And so, in the early '50s, my parents were among the only two Koreans in the East Coast of the United States under the Korean Normalization Act. I think there were less than one thousand in the mainland of America, as opposed to Hawaii. And then by incredible coincidence, my father's dissertation adviser at Rutgers went to Dickinson, where my mother was a student, to give a speech and my mother was his tour guide. And so, he went back and told my father, 'There's this remarkable Korean woman not so far from here'. So, my father began writing her letters and proposing marriage and things like this, sight unseen, and eventually she agreed to a meeting and they

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<sup>5</sup> [https://www.dickinson.edu/info/20391/library/2761/east\\_asian\\_studies\\_room/2](https://www.dickinson.edu/info/20391/library/2761/east_asian_studies_room/2)



got married. I'm the fourth child of six from their marriage.

## 2. What an incredible trajectory.

Well I think there are a couple of things you can get from that. One is I'm an optimistic person, I think because of my history. It's a miraculous story really. In fact, I'll tell a little bit more if it's not too much.

The pivotal moment of my father's career came when he was at Harvard Law School, and Syngman Rhee's<sup>6</sup> Government, which was being propped up by the Americans, collapsed and my father's friend, John Chang,<sup>7</sup> who was the ambassador from Korea to Washington, decided to run for Prime Minister. My father was so popular in the south of Korea that Chang asked my father to go back and campaign for him. My father didn't have any money but he had just joined the Methodist church that is right next to Harvard Law School, and so the minister of the church said to my parents, 'Okay on Sunday, we'll tell you to leave the church and just take your family and walk out'. So, we did and a few minutes later he came out and gave us several thousand dollars. He had just called for the congregation to donate money so that this young patriot could go back to help Korea.

So, my father goes back, they win the election, and he suddenly was offered every position; he was sort of the young star of the government. He then agreed to be the first ambassador to the UN, but he was only 40 years' old. South Korea was an observer nation. So, then they said, 'We would like you to be the number two diplomat in Washington, the Chargé d'Affaires'. And this was the ideal position for my father. The year was 1960, John Kennedy<sup>8</sup> had just been elected, and my father was constantly over at the White House, and everybody at the White House was somebody he knew from Harvard; he was having the time of his life, and we were living in Washington D.C.

One day my mother gets a call from my father, who is at Dulles Airport and he says to her, 'What I was worried about is happening, I'm going back to Korea'. And it turned out he had been warned that the Korean government would be overthrown by a military dictatorship. And so, he flew back and warned Chang, his mentor and boss, who said, 'No, no, General Park' - Park Chung-hee<sup>9</sup> - 'will prevent this from happening'. A few days later, General Park himself committed the coup and they were all thrown out of office.

By this point, my father was back in America and he convened a meeting of everybody at the embassy and he said, 'Everyone must take a pledge, we will never serve a dictatorship. We will only serve a democracy that's governed by the rule of law', and everybody signed the pledge. But within a year, everybody broke the pledge except for my father. He was exiled and he never served in the government again. But he told me the story countless times and his main point was that many people profess to care about the rule of law, but they're weak willed and when push comes to shove, they don't live their commitments.

But another amazing thing happened: my father heard that Chang, his boss, would be executed and was under house arrest. So, he went to the White House to see the Deputy National Security Advisor, who was a man named Walt W Rostow<sup>10</sup>, a famous economist,

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<sup>6</sup> Syngman Rhee (1875-1965). First President of South Korea (1948-60).

<sup>7</sup> John Chang Myon, (1899-1966). South Korean statesman, educator, diplomat, journalist and social activist as well as a Roman Catholic youth activist. Last Vice President (1956-60) and the Prime Minister (1950-52) of the Second Republic.

<sup>8</sup> John Fitzgerald "Jack" Kennedy 1917-1963. Democratic 35<sup>th</sup> US President (1961-63).

<sup>9</sup> Park Chung-hee, (1917-1979), Military dictator (1961-63), President of South Korea (1963-79).

<sup>10</sup> Walt Whitman Rostow, (1916-2003). American economist and political theorist, Special Assistant, National Security Affairs to Pres Lyndon B. Johnson (1966-69). Rhodes Scholar Balliol College, where became friends with Edward Heath and Roy Jenkins. Pitt Professor of American History and Institutions, Cambridge University (1949-50).



and Rostow said to him, ‘We know where Mr Chang is, he will not be harmed’. And my father was just staggered by the reach of American power, that this guy sitting in Washington could protect someone imprisoned on the other side of the world. And I think he was stunned by what he felt was the goodness of American power. Obviously, America’s power has many faces, but this gave my father a deep love of America, which I think everybody in my family shares. There’s a good America and a not-so-good America, but we have to keep calling America to its better angels.

At the very end of the conversation, t proving this, Walt Rostow says to my father, ‘What are you doing now?’, and my father says, ‘I’m exiled and I’m unemployed and I have six children’. And Rostow asks, ‘Don’t you teach law?’, and my father says, ‘Yes’, and he says, ‘Well you know my brother’s Dean of Yale Law School, Eugene Rostow<sup>11</sup>, let me call him’. So, he picks up the phone and they have a very short conversation. According to my father, the conversation lasted maybe 10 seconds; he couldn’t hear what he’d said. And my father just assumed that nothing had happened so he was getting ready to leave and then Rostow said, ‘Where are you going?’, and my father said, ‘I guess it didn’t work out?’. He said, ‘No, no, no’. He said, ‘My brother said, can you get here in a week?’, and a week later we moved to New Haven and 40 years later I was Dean of Yale Law School.

From these strands come a couple of things. First, I think this belief that we have to fight for human rights. Second, that we have to be committed to the rule of law. Third, that we American citizens, have to call America to its better angels. And, finally, that there’s a generous approach to life and a less generous approach to life and if you’re lucky enough to be the beneficiary of the generous approach, then you have to take that generous approach to others. So, I’ve tried to live by those ideals, not perfectly, but that’s about the case.

Now there’s a very interesting connection to Cambridge: both Rostow brothers were later Pitt Professor here. And there’s a connection to the Goodhart chair, which is when I was growing up in New Haven, Connecticut, my dad wanted my brother to get into a local boys’ school, and it turned out the only way you could get in was to be recommended by someone who had gone to that school. And there was a young professor, Guido Calabresi<sup>12</sup>, and my father went to him and asked him, ‘Would you recommend my son’, this is my brother, ‘to the school?’, which he did. And then he recommended each of us and that’s how we went. Years later, I was Guido’s colleague and then succeeded him (once removed) as the Dean of the Law School, but it was Guido who said to me, ‘The best year I ever had was my year at Cambridge as the Goodhart Professor at St. John’s’, and that’s when it came into my mind, ‘Gee, I’d like to be the Goodhart Professor someday’. Another colleague, John Langbein<sup>13</sup> also had a similar experience at Trinity Hall (*LD - where he did his PhD*). So, anyway, that’s how I got here.

### **3. Thank you very much. You mentioned that in the ‘60s your family was in Washington and I had somehow assumed that you grew up in New Haven so you would have undertaken your schooling, your early schooling, presumably, in Washington?**

No, it was only a year. We were in Boston. Two interesting things about my

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<sup>11</sup> Eugene Victor Debs Rostow, (1913-2002), Dean of Yale Law School (1955-65), Under Secretary of State for Political Affairs to Pres Lyndon B. Johnson (1966-69). Pitt Professor of American History and Institutions, Cambridge (1959-60).

<sup>12</sup> Guido Calabresi (b.1932 ). U.S. Court of Appeals Second Circuit (1994), Dean of Yale Law School (1985–1994) Sterling Professor Emeritus of Law, Yale (1959-1978), Goodhart Professor (1980-81), Rhodes Scholar, Magdalen College, Oxford BA 1955.

<sup>13</sup> John Harriss Langbein, (b.1941), Chicago Law School (1971-90). Sterling Professor of Law and Legal History Yale Law School (2001), PhD Trinity Hall Cambridge (1971), Goodhart Professor (1997-98), Trinity.



childhood, well, three interesting things. One, I had all of these brothers and sisters who are tremendously capable, who protected me and pushed me along. My older sister, Carolyn, was Dean of the Chung-Ang University<sup>14</sup>, she has a PhD in chemistry. My brother, Howard, became Assistant Secretary of Health and Human Services under Obama and Commissioner of Public Health at Massachusetts and he is a professor of Harvard School of Public Health.<sup>15</sup> And then my brother, Edward, has an MD PhD in neuroscience and became an anaesthesiologist.<sup>16</sup> My younger brother Richard is an illustrator who wrote a book about the rehabilitative ideal.<sup>17</sup> My younger sister, Jean Koh Peters<sup>18</sup>, became the Goldman Professor of Law at Yale Law School. So, in the history of Yale University, of more than 300 years, we were the first brother and sister to hold chairs at the same time, which was very touching because our parents had taught there. We have a picture of ourselves and my parents in 1965 standing in the Yale Law School faculty picture and then us in 2005 in the same faculty picture.

My father was very determined that we forge ahead, so we all skipped many grades and so I went to school when I was four years old and I learned to read very early. I also had polio; my brothers and I all got the polio fever the last year before the vaccine was developed, and so they were older and had more immunities but I got the disease and had a series of painful operations as a young boy. I was much younger as a student and physically had more difficulty getting around. It hasn't been an inhibition in my life really, but it ended up that I went to school very early and I graduated from college at the age of 20.

And that's part of what led me to want to come to England for a couple of years. I thought, I've spent my whole life being two years younger than everyone around me and maybe I should get a little bit of maturing. And at that time when I was graduating from college, I had gone to Korea many times but I'd never been to Europe, and I understood that I had absorbed an Anglo-Saxon way of thinking but I didn't actually understand what the origins of this were, the philosophical assumptions, and so I applied for a scholarship. I won the Marshall Scholarship from the British Government<sup>19</sup> and I came to Oxford and read Philosophy, Politics and Economics at Magdalen College, Oxford, and that's become a second home to me now.

#### **4. You graduated BA from Harvard in 1975 at the age of 20 and you chose Harvard, presumably, because of your father's association?**

Yes, my father loved Harvard, mainly because he had heard of Harvard even on the island of Cheju-do. In Korea it's so big and famous that it was the only place he'd really heard of. But at one time - I'm almost embarrassed to say this on tape - he said, 'There are four great universities in the world - Harvard, Yale, Oxford and Cambridge. You should

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<sup>14</sup> Carolyn Kyongshin Koh (b. 1946), Dean of Chung-Ang University, which was first in South Korea to offer courses in Pharmacy, Business Management, Public Administration, Mass Communication, Advertising & Public Relations, Urban Planning and Real Estate, Energy System Engineering, Sociology, Psychology on the Seoul campus.

<sup>15</sup> Howard Kyongju Koh (b. 1952), Harvey V. Fineberg Professor of the Practice of Public Health Leadership, Harvard School of Public Health.

<sup>16</sup> Edward Tongju Koh (b. 1953), clinical anesthesiologist and pain specialist.

<sup>17</sup> Richard Jongju Koh (b. 1960).

<sup>18</sup> Jean Koh Peters (b. 1958) Sol Goldman Clinical Professor of Law at Yale Law School (2009-)

<sup>19</sup> <http://www.marshallscholarship.org/> The Marshall Scholarship is a postgraduate scholarship for "intellectually distinguished young Americans [and] their country's future leaders" to study at any university in the United Kingdom. Created by the Parliament of the United Kingdom in 1953 as a living gift to the United States in recognition of the generosity of Secretary of State George C. Marshall and the Marshall Plan in the wake of World War II.



attend all of them' As you know, I was educated at Harvard, I taught at Yale, I went to graduate school at Oxford, but I'd never really been to Cambridge, so that was another reason I came to the Goodhart Professorship. Now, happily, I feel that this dark spot has been illuminated.

**5. You acted as a law clerk for Justice Harry A. Blackmun<sup>20</sup> of the U.S. Supreme Court and Judge Malcolm Richard Wilkey<sup>21</sup> and this was about 1976. What were the circumstances of your obtaining these positions?**

Now I graduated from Harvard College in Government in 1975, I was originally a physics major, but I wasn't very good at physics so I switched to Government, Political Science, but I had a incomplete liberal arts education in my own view. So then from '75 to '77, I read PPE at Magdalen, Oxford. So, I went back to Harvard Law School in 1977 to 1980 and, originally, I wanted to do International Law but they didn't have much in the way of International Law at Harvard at the time. The one person whose work I focused on a little bit there was Abram Chayes<sup>22</sup> who was writing about international legal process and that became a focal point for my later work on transnational legal process.

Judge Wilkey just interviewed me; he was the General Counsel of Kennecott Copper Corporation and he had had a very varied career in international law, international business and in the Government. There was a moment in college that really hit home which is about US foreign policy. They had a class and somebody started talking about Henry Kissinger<sup>23</sup> as the exemplar of a 'scholar-diplomat,' and I remember raising my hand and saying, 'What does that mean?' They said, 'Well there are some people who are professors, and they have tenure, but they're also diplomats and so they go back and forth and they get benefits from both in that when they're in the real world they can gain practical experience and when they're in the academy they can think bigger thoughts'. And I said, 'Who are such people?', and they said, 'Henry Kissinger, John Kenneth Galbraith<sup>24</sup>, Daniel Patrick Moynihan<sup>25</sup>, Lincoln Gordon<sup>26</sup>, Robert Strausz-Hupé<sup>27</sup>'.

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<sup>20</sup> Harry Andrew Blackmun, (1908-1999), lawyer and jurist, Associate Justice US Supreme Court (1970-94).

<sup>21</sup> Malcolm Richard Wilkey, (1918-2009), US Assistant Attorney General of Office of Legal Counsel US Department of Justice (1958-59), General Counsel of Kennecott Copper Corporation (1963-70), Circuit Judge US Court of Appeals for District of Columbia Circuit (1970-85), US Ambassador to Uruguay (1985-90), Visiting Fellow Wolfson College (1990).

<sup>22</sup> Abram Joseph Chayes, (1922-2000), Felix Frankfurter Professor of Law Harvard (1976-93), Legal Adviser to the State Department under Pres John F. Kennedy. Practiced law with Covington & Burling in Washington, D.C. (1952-55). Appeared before the International Court of Justice twice: 1999 as lead counsel for *Namibia v Botswana* over the status of Kasikii/Sedudu Island, & 1984-89 for Nicaragua in *Nicaragua v United States*.

<sup>23</sup> Henry Alfred Wolfgang Kissinger, (b. 1923), German-born American political scientist, diplomat, and recipient of the Nobel Peace Prize. National Security Advisor and Secretary of State for Richard Nixon and Gerald Ford.

<sup>24</sup> John Kenneth Galbraith, (1908-2006), Canadian-born economist, public official, and diplomat, and a leading proponent of 20th-century American liberalism. Paul M. Warburg Professor of Economics Harvard (1948-74).

<sup>25</sup> Daniel Patrick Moynihan, (1927-2003) US Senator for New York (1977-2001), Assistant Secretary of Labor for Kennedy and Lyndon B. Johnson (1963-65). Advisor to Richard Nixon (1969-70). US Ambassador to UN (1975-76). Fulbright Fellow LSE (1950-53).

<sup>26</sup> Abraham Lincoln Gordon, (1913-2009), Professor of International Economic Relations Harvard (1950s), President Johns Hopkins University (1967-71), US Ambassador to Brazil (1961-66), BA Harvard 1933, DPhil Rhodes Scholar Oxford 1936. Director, US Marshall Plan Mission and Minister for Economic Affairs, US embassy London (1952-55).

<sup>27</sup> Robert Strausz-Hupé, (1903-2002). Austrian-born US diplomat. Foreign policy advisor to Barry Goldwater when Republican Party's candidate for President (1964), and Richard Nixon (1968). US Ambassador to Sri Lanka and Maldives Islands, Belgium (1972-74), Sweden (1974-76), NATO (1976-77), and Turkey (1981-89).



So I decided to write a paper about this. I interviewed a bunch of these people for it, and it wasn't a very good paper but it actually made me think, 'Gee, this is a great idea if I could be a scholar-diplomat too', and that idea stuck with me. And Judge Wilkey had had a similar kind of career. He had been a practising lawyer at the Justice Department, but then he had become an international lawyer for a major global corporation. So, he assigned me to every international law matter that came before him and he had cases on extra-territoriality and immunities.

That was my first real exposure to international law, but it was international law in domestic courts, and that's what made me think the divide between domestic and international is very artificial; we actually live in a transnational legal process.

Justice Blackmun was a very internationally-minded person also, and also thought very deeply about international law. And he also said, 'If you want to work on the international cases, we don't have that many of them, but you are welcome to work on all of them'. So those two years were almost like a postgraduate study, deepening my understanding of how international law was actually penetrating domestic law through the domestic courts. And that just permanently affected the way I thought about law and practice.

My father had a saying, 'Theory without practice is as lifeless as practice without theory is thoughtless', and he felt you should do both theory and practice, each as kind of a reality check on each other. So almost from the very beginning, I did that. And I started at a law firm called Covington & Burling<sup>28</sup> which is a very well-known Washington firm that has a big international practice. It was coming off of the Iran hostages crisis, which I think now was a pivotal moment in international law, and triggered a whole series of matters, including the Iran-US Claims Tribunal, etc. So, I ended up working on all these things. I represented the Iranian hostages on a pro bono matter. In the middle of it all, someone comes to me and says, 'How would you like to teach a course at night at George Washington Law School?'<sup>29</sup>, and it turned out that another lawyer at the firm had been teaching this course with his friend, and then the friend had gone on maternity leave. And I was sort of petrified and they said, 'You can use her lecture notes, they're all written out', and they were stunningly complete. So, during the time I was at the law firm, I taught the course with him. He then went on leave and she came back and I then taught the course with her, and then the third year I taught it by myself. And the book we used was called Steiner<sup>30</sup> and Vagts<sup>31</sup> *Transnational Legal Problems*<sup>32</sup>. And then someone asked me, 'Do you want to write a book review of *Transnational Legal Problems*?', and I did. And then Professor Detlev Vagts, who I had not known at Harvard Law School, contacts me and says, 'How would you like to update the book?'. So, I became a co-author of the book and viewing each new challenge as a Transnational Legal Problem became the way that I looked at the world.

## **6. So, your academic career has been primarily at Yale, interspersed with periods of government service for Democratic administrations, and this is an arrangement which**

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<sup>28</sup> <https://www.cov.com/>

<sup>29</sup> At George Washington University, Washington DC.

<sup>30</sup> Henry J. Steiner, Emeritus Jeremiah Smith, Jr. Professor of Law & Founder of the Human Rights Program (HRP) at Harvard Law School.

<sup>31</sup> Detlev Frederick Vagts, (1929-2013), Eli Goldston Professor of Law (1980-84) & Emeritus Bemis Professor of International Law Harvard (1984-2005)

<sup>32</sup> <https://today.law.harvard.edu/tribute-emeritus/>. 1986, Third Edition, The Foundation Press, Mineola, NY, 1128pp.



would be unusual in the UK.

Oh, my first job was with Reagan<sup>33</sup>. I worked for the Reagan administration at the General Counsel's office, the Office of Legal Counsel of the Justice Department from 1983 to '85, and I worked on such matters as ratification of the Genocide Convention, the suit by Nicaragua against the United States at the International Court of Justice, the follow-on to the resolution of the Iran hostage crisis. But I didn't vote for Reagan and often disagreed with his policies; by the end of that period I said to myself, 'I'm not going to work anymore for someone I didn't vote for'.

### **7. Right, it's far more helpful if you are actually attached to the political cause in terms of focusing your legal notions? It's quite helpful I would think?**

Oh, very much so. Well in fact it was very ironic. What happened was in 1989 fall, I got tenure and my father passed away; this all happened very suddenly in the space of a few weeks. And then in the spring my son was born, and I was teaching international business transactions at the time—a course which I liked but whose substance I didn't care much about; it wasn't something that touched my heart. And then the students asked me, 'Would you form a human rights clinic because we should be able to sue human rights violators?', and I decided to do it with a public interest lawyer called Michael Ratner<sup>34</sup>, who I didn't know before, but we started the Allard Lowenstein International Human Rights Clinic in the fall of 1990. And then we got involved with a suit on behalf of Haitian refugees in Florida, which was lost to the U.S. government very quickly. Then the students said to me, because I'd been saying to them, 'The case should have been brought somewhere else. We'd have a better chance if it was brought in New York', and then they said to me, 'Would you bring the case in New York?'. And I said, 'You know suing the U.S. Government's a serious business, not to be taken lightly'. But soon thereafter, I went to my father's grave and I'm standing there and I thought, 'You know, I have all of the job security that he never had', but he told me to stand up for my principles. You know, if I'm an immigrant with tenure at an Ivy League University, if I'm not going to do this, who else is going to do this? So, I said, 'Go ahead', and we just worked on this like crazy for two years and sued the Bush administration.<sup>35</sup>

I had never been in a court, I'd been in a court, but I'd never argued on a motion even, and I argued 26 times in the next year and a half, including I argued on a motion standing at a speakerphone at a maître d' station in a hotel lobby at Grand Central Station. And the case went to the Supreme Court and I argued to the Supreme Court. It was the first case about Guantanamo. I went to Guantanamo; I went to Haiti. And I was, at the time, supporting Bill Clinton<sup>36</sup> who was running for President, but when he got elected, he reversed his own position and he sustained George H.W. Bush's<sup>37</sup> policy, which was a bitter disappointment to me. I was told at the time, 'You have a good chance to be the Legal Adviser of the State Department', and a couple of people said to me, my colleagues, 'Why do you not argue the case and go into the government? You've been doing work in the government'. And I said, invoking my dad, 'I'm not going to serve a government that can't take a position consistent with the rule of law'. I mean these guys changed their view and I said, 'If I never serve in the

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<sup>33</sup> Ronald Wilson Reagan, (1911-2004) 40th US President (1981-89).

<sup>34</sup> Michael Ratner, (1943-2016), President of the Center for Constitutional Rights (CCR), President of the European Center for Constitutional and Human Rights (ECCHR)

<sup>35</sup> The Haitian refugee litigation is detailed in Brandt Goldstein, *Storming the Court: How a Band of Law Students Fought the President and Won* (Scribner 2005).

<sup>36</sup> William Jefferson "Bill" Clinton, (b. 1946). 42nd US President (1993-2001)

<sup>37</sup> George Herbert Walker Bush, (1924-2018), 41st US President (1989-93)



government that's okay'.

Anyway, we lost on the law, but we sort of won in the court of public opinion eventually, and that showed me that the relationship between law and politics, you know, that you can lose in court and the transnational legal process can play on.

I then brought a suit on behalf of Cubans, Cuban Americans, on Guantanamo in Florida, and people said to me, 'Nobody who represents the Haitians represents Cubans', because one group is to the left and the other is to the right. and I said, 'I don't represent ethnic groups, I represent people who take particular legal positions, it's the same legal position'.<sup>38</sup>

## 8. The Clintons

I spent really four years suing the US Government and the Administration I had voted for – of Bill Clinton. In the middle of it all, I met Hillary Clinton<sup>39</sup> who was at the time the First Lady. This was before Clinton adopted Bush's legal position, and I was very impressed by her. I thought she was very sympathetic to our view. It turned out she was and that she was pushing Bill Clinton to change the policy in the direction that we favoured and, eventually, he did. And then in 1996, when all of this litigation ended, I was exhausted, and so we decided that we would come to England for a year, and I went back to Oxford, at All Souls College as a visiting professor. My family came over with me and my children made close friends here in the UK – in fact such good friends that we're still friends with these people now – we've just attended the wedding of a young guy who was just three years old when we first met him and he's now a graduate student at Cambridge. And I'm going to give him my printer when I leave.

And then I went back and it was 1997, and suddenly I got a call from Madeleine Albright's<sup>40</sup> right-hand man, who had been my student – a fellow named Jim O'Brien<sup>41</sup> - and he said, 'You know we'd like you to be Assistant Secretary for Human Rights', and I was kind of dumfounded and I said, you know, 'I spent the whole last four years suing Clinton', and he said, 'Yeah, that's fine, Madeleine wants you because everybody knows that if you defend us you're not just doing it because it's in your political interests; it's because you believe it. You're not a 'Yes' man'.

Anyway, I went in and I did that job and then through that I met a lot of people around Bill and Hillary Clinton, particularly Hillary Clinton herself. I worked with her on a number of issues. It turned out later that Hillary Clinton was the person who cast the deciding vote for me to get the job as Assistant Secretary for Human Rights and I stayed in touch with her. And then I came back to Yale Law School and became the Dean from 2004 to 2009. And then, you know, Obama got elected and I'd actually supported Hillary in the primaries. But then suddenly Hillary became Secretary of State and so they asked me to be the Legal Adviser of the State Department. So that's what happened.

In 2013, after I had served for four years, I thought, 'Well Hillary will be President so I think I'll leave now and come back in later'. And so in 2016, I worked for her campaign

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<sup>38</sup> The Cuban refugee litigation and subsequent Guantanamo cases are described in Harold Hongju Koh, *Enduring Legacies of the Haitian Refugee Litigation*, 61 N.Y.L. Sch. L. Rev. 31 (2016–2017).

<sup>39</sup> Hillary Rodham Clinton, (née Rodham) (b. 1947). American politician. US First Lady (1993-2001), 67th US Secretary of State (2009-13).

<sup>40</sup> Madeleine Jana Korbel Albright, (b. 1937). First female US Secretary of State (1997-2001) under President Bill Clinton.

<sup>41</sup> James (Jim) C. O'Brien, Vice Chair at Albright Stonebridge Group (ASG), In Clinton administration was senior advisor to US Secretary of State Madeleine Albright and Deputy Director of Policy Planning, In Obama administration was Special Presidential Envoy in the U.S. Department of State.



and in the middle of it all, James Crawford<sup>42</sup> and Eli Lauterpacht<sup>43</sup> said ‘How would you like to be the Goodhart Professor?’ I thought, ‘I’d love to be the Goodhart Professor but I’ll probably be in the government, or I hope to be in the government’, which is one reason why I didn’t end up coming here for immediately.

And then, suddenly, in 2016, she lost, and Trump became President and then I thought, ‘Well it’s a good time to go back over to England’. I had started talking about the relationship between Trump and international law, and then I thought, I should really write this as a book. So last spring when I was at Trinity College, I finished my classes at Yale, I flew over here. I landed, it was raining, nobody knew who I was, and for six weeks I just worked from morning till night; it was great. I mean this is what the College is equipped to do. I had one hour for lunch, another for dinner, and I had no interruptions and the book got finished. And then in September, it got published and in the middle of it all, people were emailing me to ask, ‘Can you come and speak?’ I said, ‘I’m writing this book, can I come in a year?’, because I knew I would be back. So, this spring—my second as Goodhart Professor—I’ve been to Sheffield, Nottingham, Leicester, Swansea, Dublin yesterday (Trinity College), Oxford, Cambridge, and London, talking about the book. I didn’t set it up that way but I’m glad that it worked out that way; it’s been very rewarding.

**9. And you mentioned on the Lauterpacht Centre profile page that you would be working on this forthcoming book, which is now being published, and it seems that you are very happy with it and its reception. You also said that in the second part of your Fellowship would focus on issues surrounding law and globalisation for another book. Have you been able to make some progress on that?**

Yes, so in 2014 I gave the Clarendon Law Lectures [*LD - at Oxford*] which are called ‘On Law and Globalization’<sup>44</sup>. It’s a very simple idea: that there are three faces of law: law as globalization: the globalisation of law is a feature of globalisation: law in globalisation, that law promotes globalisation by connecting parts of the world. And then, third, law of globalisation is emerging as its own distinctive subject, so we have global criminal law, global property law, intellectual property. So, it’s a way of understanding how globalisation and law intersect. I’ve written most of it but some of it I took out of that book and put it into the Trump book. I’ve just been having a conversation with some presses about how to update the National Security Constitution book in light of 9/11 and the Mueller Report<sup>45</sup>, and I think I’m going to do that first. The book is called the National Security Constitution so I’m going to do a version called ‘The 21<sup>st</sup> Century National Security Constitution’ because I think that this is the logical follow-on. I think I’ll do the Law and Globalization book as a much shorter book based on the original three lectures.

I’m also supposed to write a book on human rights. I gave lectures at the European University Institute<sup>46</sup> a few years ago which is my take on human rights. It’s supposed to be published as part of a human rights series. Now, those tapes are all there and transcribed and I would like to have my take on this published before I’m done. But, you know, I’m more interested right now in writing about the issues that are the most current because the attack by

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<sup>42</sup> James Crawford, (1948-) Whewell Professor of International Law (1992-2015), Judge ICJ (2015-).

<sup>43</sup> Sir Elihu Lauterpacht, (1928-2017), Hon. Professor of International Law (1994-2017), Director, Research Centre for International Law (1983-95). Judge *ad hoc*, ICJ (*Bosnia v Yugoslavia*).

<sup>44</sup> <https://www.law.ox.ac.uk/clarendon-law-lecture-series/past-events?page=1>

<sup>45</sup> Officially titled *Report on the Investigation into Russian Interference in the 2016 Presidential Election*, documents the findings and conclusions of Special Counsel Robert Mueller’s investigation into Russian efforts to interfere in the 2016 United States presidential election. Submitted to Attorney General March 22, 2019

<sup>46</sup> Florence



Trump on international law is so savage. That leads me to write an optimistic book about law and globalisation; it's really about law as a defence to humane globalisation.

Globalisation can occur in two ways, simplistically put. It can impoverish the middle class and enhance inequality—that's Trump's position, that globalisation has hurt the common man and that, therefore, the answer is to end globalisation and to become more nationalist. This is also the spirit of Brexit, blame immigrants, Fortress America, the way to 'make America great again' is to stop being global. And my view is that this is profoundly ignorant and wrong-headed, partly because there are so many global problems that have to be addressed collectively – you're not going to solve climate change by yourself. Globalisation can be managed in a humane way so it has a human face – or it can just evolve in such a way that the rich get richer. And a *laissez-faire* approach tends to lead to increasing inequality, which is what we've seen. So, all of these topics are connected one to the other. I will get to them all in time but I prioritise working on the thing that I think is the most timely.

What I'm working on at the moment most directly, and I wrote an article about this, is Trump's belief is that he can withdraw from treaties at will by himself. Now because Trump is so weak politically, he likes to do things that he thinks he can do on his own, and that includes to pardon people, take away security clearances, deny people press passes. These are bad but they're not destructive of the system, but the most destructive has been his claim that he can, by himself, withdraw from any treaty he wants. And so, he's withdrawn from the Paris Agreement, or trying to at least, the Iran nuclear deal, the two treaties with Iran, the Intermediate Nuclear Forces Treaty with Russia, etc. And an obvious question is, could Trump tomorrow tweet, 'I withdraw from every treaty to which the United States is a party'? That would bring down the structure of international law. Now, when you had the exact same issue over here in the UK, can the UK withdraw from the EU without parliamentary participation, the answer was "no". So, I think that same issue is coming to a head in the US. So, I wrote a long article about that last summer as a follow-on to the book.

## 10. Where was that published?

The Yale Law Journal Forum; it's called 'Presidential Power to Terminate International Agreements'<sup>47</sup>.

It's challenging this claim that the President has this cross-cutting unilateral power of agreement termination. I think Brexit is a good example. It's funny because the way that this notion got currency in academia was the thought that the United States, or the President, might have to suddenly get out of some entangling alliance and that the danger would be that we would be stuck in some agreement that would be threatening to our national interests.

What I think we've seen from Brexit is the greater danger is you try to get out without thinking through the consequences. You know, our connections, international and domestic, are so deeply intertwined that to cut the fabric of our legal connections is like trying to pull all of the red threads out of a tapestry and thinking you're not going to destroy the tapestry.

Yesterday, I was in Ireland in Dublin and I was talking to someone and we were eating sandwiches, and my friend said, 'It's a little hard to just get out of the EU if everything in your sandwich has been back and forth across the border 15 times'. That's what you're experiencing: that international and domestic are so deeply intertwined, the idea that you can just, Nigel Farage-style,<sup>48</sup> say 'We want to be independent', is a naïve myth.

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<sup>47</sup> *Yale Law Journal*, 2018-19, vol. 128. <https://www.yalelawjournal.org/forum/presidential-power-to-terminate-international-agreements>

<sup>48</sup> Nigel Paul Farage, (b.1964), Leader of the Brexit Party since 2019, Member of the European Parliament (MEP) for South East England since 1999.



**11. Now moving on to your published work. In this regard you are a very obviously prolific writer and thinker on issues in international law and your [Yale] faculty website lists 11 books and monographs and I've seen that you've done more or less 150 journal articles. Obviously, I've been unable to read these. I've just skimmed them but I've benefitted greatly from reviews and I've selected four of your books that we can briefly touch on. Your *National Security Constitution*<sup>49</sup>, your recent book - *The Trump Administration and International Law*<sup>50</sup>, and then I've selected two in between – the *2005 Foundations of International Law and Politics*<sup>51</sup> and your *2008 Transnational Litigation in the United States Courts*<sup>52</sup>.**

**It seems to me that issues of transnationalism in international law are a dominant theme during your research career. And in the Acknowledgements in your first book, *National Security Constitution*, you said that your interest in constitutional law and foreign affairs started in the 1980s when you were a clerk to Justice Harry Blackmun. So, it seems to me he was your initial inspiration and you actually wrote a tribute to him in 1994. So, is it possible to summarise perhaps the legacy of your association with Justice Blackmun, which has possibly influenced the original developments of your notions of transnationalism?**

Yes, Justice Blackmun is, apart from my father, the person with whom I have the strongest emotional connection. He was a very modest man but incredibly hard-working. He travelled a lot and he was very modest about America versus other countries and one point he made to me quite a bit was that when the United States was a young nation, at the beginning, it was very respectful of international law; this is what young nations do. They declare fidelity to international law as a way of being accepted on the world stage. So, some people talk about originalism; originalism means we're globalist, you know, we're inherently global. So, someone like Brett Kavanaugh<sup>53</sup>, the new Justice, who was my student claims, to be an originalist and he's also an anti-globalist; that's not possible. If you're an originalist, you're a globalist. And early on, the Supreme Court said unanimously international law is part of our law and shall be applied as often as courts of appropriate jurisdiction shall apply it. And that means that we have a permeable system, the international norms enter our system and become domestic law, and these norms come both from international law – such as the 12-mile limit in the law of sea – and they come from human rights law.

When we were discussing whether you could execute a child. I pointed out to Justice Blackmun that this was barred by the Convention on the Rights of the Child, to which the United States was not a party, but barred everywhere in the world. He pointed out to me that the US has an Eighth Amendment clause that prevents 'cruel and unusual punishment.' And if nobody else does it, it's unusual. When we were talking about equality, he said to me, 'Equality is not American property', you know the French had 'égalité, fraternité, liberté'. The United States Bill of Rights came at the same time as the French Declaration on the Rights and Duties of Man. So, universally, human rights is not something that the United States somehow owns and can, therefore, just ignore at will. So, what Justice Blackmun taught me was that this intertwining of international and domestic law is both natural and original.

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<sup>49</sup> *The National Security Constitution: Sharing Power after the Iran-Contra Affair*, 1990, Yale University Press, 340 pp.

<sup>50</sup> 2019, Oxford University Press, 221 pp.

<sup>51</sup> With O.A. Hathaway, 2005, Foundation Press, 393 pp.

<sup>52</sup> 2008, Foundation Press, 276 pp.

<sup>53</sup> Brett Michael Kavanaugh, (b.1965). American lawyer and jurist. Associate Justice of the Supreme Court of the United States (2018-).



And there are a bunch of people who swim against this tide and want to re-write history; I don't think they're particularly persuasive. But it's very interesting because I think that the way that they do it is that they try to denude international law of influence by saying, 'I've focused in on this little rule, can you track influence from this particular rule?'. Well, the way rules affect things is that they are deeply interconnected. You sent me, for example, this book review by Goldsmith<sup>54</sup>, who was another one of my students. The two things that struck me about it, first, is that he's a very pessimistic person; he has a kind of sad and dark view of the world, you know, from his perspective Trump has already won, he's given up. But, more fundamentally, he wants to divide, isolate, the impact of an international rule and then say, 'See it didn't have any power'. Well that's exactly what you don't do. A rule's interconnectedness with all the other rules and policy and political incentives, etc., is what gives it its force. Sometimes the international norm can be the glue that makes the difference.

As we're speaking today, the day after Memorial Day 2019, Trump proposed to pardon soldiers who had committed war crimes. Anyway, he didn't do it, because there was massive protest. And it's a combination of things, you know, it obviously violates the Geneva Conventions, the International Committee of the Red Cross spoke against it. Those generals in the US Army, and also military people in other countries all protested. They made clear that Trump would lose the support of his generals, which is a political disincentive, but it scared him off doing something; he was just focused on the short-term impact on one tiny constituency and now he's backed off. Now, you know, Trump is a wilful and difficult enough person, so it's not over. But that's the mistake of trying to isolate these things and measure the influence of rules incrementally.

This also goes, by the way, to the relationship between law and politics and law and political science. I don't think that the law I'm studying is a science, I think it's a craft. A good example of this is that political scientists have become very quantitative, and they ask the same thing, 'How do we measure?' What I like to say is, 'If you can't measure what's important, you make important what you can measure'.

I remember being at a political science conference where someone was talking about treaty violations and how can you count treaty violations and measure the impact of law? And I finally said to him, 'Suppose you go to dinner at high table and you have too many glasses of wine and then you get into your car and you drive home. But, because you don't want to be stopped, you take a different way and you drive very slow and you stop at every light, and if you're tired, you pull over and you ultimately make it home late, but you never encounter the police'. Every single action was influenced by law, but there's no violation. So how am I going to count that? The same criticism goes to Goldsmith, you know, he wants to isolate the impact of an international rule and then say that the impact of international rule is not significant and that, therefore, international law doesn't matter. But that's again a conclusion driving analysis; it shows someone who isn't kind of steeped in the way that international law really works in the world.

When I come over here, there's a culture in Cambridge. You discern the culture and you try to fit into the culture even without sacrificing your core identity. That's not dissimilar to what happens when America tries to adjust its system of international law to a global context.

## **12. Coming then, specifically, to your first book which we've mentioned. It was at the time extremely well-received and focused on the flaws which you've touched on à propos**

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<sup>54</sup> Jack Landman Goldsmith, (b.1962). Henry L. Shattuck Professor Harvard Law School, US Assistant Attorney General (2003-04) for President George W Bush.



**the Trump administration, the balance of US foreign policy implementation by the three fora of state power US foreign policy implementation. So, who did you actually write that book for, initially? Was it a teaching tool intended as or...?**

Well, there are two answers. I wrote it for myself to understand it, but I wrote it to explain the Iran Contra-Affair. The Iran Contra-Affair was this moment in the Reagan administration where a shadow foreign policy was created and people were talking about it like it was Watergate, and I thought, 'no the Iran Contra-Affair is really a foreign policy crisis like Vietnam.' And in this effort to try and figure out who's the culprit, they weren't blaming the system, the system is the culprit. So how is the system the culprit? And it occurred to me there are two visions of the Constitution – one is a vision of what I call executive unilateralism – the President can do whatever he wants. And then the other's a system of checks and balances, which I think is captured in the *Youngstown*<sup>55</sup> case, the Steel Seizure case, which is the courts, Congress and the President check each other.

And these two visions, extreme executive power vs. balanced institutional participation, have been warring throughout US history; there are periods in which one is more assertive and the other is recessive and vice versa. But that's the constitutional legal version; the political problem is that each of these branches has incentive, political incentive, and whether the President is strong or whether the President is weak, he has an incentive to do things by himself. I mean look at Trump, he can't get things through Congress because they're so outrageous, so he tries to figure out a way to claim he has exclusive power to do it. Then Congress has incentives to not be on the record, to acquiesce, to not be responsible. And then the courts have an incentive to decline to adjudicate.

So the executive unilateralism vision keeps reasserting itself because the President acts, Congress acquiesces and the courts defer, even if the President is wrong. So, there's a tension between the legal desideratum, which is to balance power, and the way that political life unfolds, toward unilateralism. And so, you have a moment like 9/11 where George W. Bush<sup>56</sup> wildly overreacted to the 9/11 attacks and, essentially, the courts and Congress both deferred, which was a mistake and, therefore, did not protect the vision of the National Security Constitution.

So, the book that I want to write now doesn't start with the Iran Contra-Affair; it starts in the middle of the prior book, which is the beginning of the American Republic and to try to sketch the emergence of these two visions, and then I'll get to the modern day, and I'll talk first about the Iran Contra-Affair; that's already written. Then I'll talk about 9/11, I've written lots about that, and then I'll talk about the Trump administration as kind of an outer limit of these outrageous claims of executive power. As we speak, Lesley, the President is saying there's a national emergency at the border that requires you to separate parents from their children and this is outrageous. So, I'm going to call this one 'The 21<sup>st</sup> Century National Security Constitution', because I'd like it to have a little bit of a longer half-life. So, this is an idea I keep returning to. Maybe this is the point; the big idea that has been driving me throughout my career is how to preserve the rule of law in international affairs and, particularly, of my country of origin and my adopted country. And I see the country as having great potential to do good, but also great potential to do evil and to seek exemptions for itself to be exceptionalist in a bad way. And the two ways to urge it to do the right thing,

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<sup>55</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), a US Supreme Court decision that limited the power of the President of the United States to seize private property in the absence of either specifically enumerated authority under Article II of the United States Constitution or statutory authority conferred on him by Congress.

<sup>56</sup> George Walker Bush, (b. 1946). 43rd President of the United States (2001-09), 46th Governor of Texas (1995-2000).



I think, are first to put external pressure – engage, translate, interact, interpret, internalise – via this transnational legal process. The other way is for the forces within the government to play a restraining way on executive adventurism. What I say in the Trump book is that a combination of this inside and outside checking strategy work together to restrain Trump.

So one reason why we see so much activity by Trump is because everything he's doing is being blocked. To the outside world, it looks like everything he's doing is succeeding but, in fact, he keeps shifting to new policies because the last one got blocked.

Now one view is that Trump is doing unbelievable damage, it's all over in two years. In two years, it's all over. You know, we've had this system in place for hundreds of years, I don't think it falls apart that fast, but that doesn't mean we don't have a very bad President who's stumbling around like a bull trying to destroy what's been created in the china shop. But the china shop's been around for a long time.

**13. You've mentioned your Trump book which is a jump 30 years later from the Constitution book, and your Trump book has received high praise from, *inter alia*, Professor Allott, who admires it greatly and calls it, 'A searingly clear analysis of the Trump administration's challenges to international law'. It seems that history has turned full circle and we are back in this unbalanced world that you visited in your 1990 book. Would you agree that there's some truth in this analogy of *déjà vu*?**

Yes, yes. Well, Yogi Berra, the American baseball player said, 'It's *déjà vu* all over again'. There's a kind of amnesia that afflicts people. It's part of the notion that what's going on is a problem of bad people, rather than bad structure.

You know, if it's bad people then throw the rascals out and everything will be fine. If it's a bad structure, then the problems will recur, even with good people, and that's been my position. So, I really have two ideas. One is the National Security Constitution, checks and balances, in US foreign policy. And the other is transnational legal process which is how to check rogue actors in international affairs through external and internal checking strategies. The Trump book is kind of bringing those two ideas together. I think that one of the tragedies has been, over the last 20 years, the Republicans like George W. Bush or Trump, are wildly aggressive in the wrong direction, using and abusing executive power, and led by people like John Bolton<sup>57</sup>.

The Democrats, after criticising this, under-correct. I think Obama under-corrected for Bush, I think Bob Mueller<sup>58</sup> under-corrected for Comey<sup>59</sup>, and, as a result, the pendulum was pushed very hard to the right, and then pushed only part way back, and so the pendulum keeps moving in that direction. And that's why the next election is so important, because we need to have someone with the courage and vision and experience, frankly, to push hard back in the right direction.

**14. You mentioned the review by Professor Goldsmith and he assumes that your main thesis is that Trump is trying to alter US foreign policy on the issues which you've mentioned – immigration, trade agreements with China, Paris Agreement, Iran deal, use of force – and he says that by and large Trump has failed to achieve his goals because the transnational legal process has hindered him. Do you think this is a fair**

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<sup>57</sup> John Robert Bolton, (b. 1948), American attorney, US Ambassador to UN (2005-06), 27th US National Security Advisor (2018-).

<sup>58</sup> Robert Swan Mueller, III (b. 1944), 6<sup>th</sup> Director US Federal Bureau of Investigation (FBI), (2001-13). Special Counsel overseeing investigation allegations of Russian interference in the 2016 U.S. presidential election (2017- 19)..

<sup>59</sup> James Brien Comey Jr. (b. 1960), 7th Director US (FBI) (2013- 17).



**summary of your thesis by Professor Goldsmith and that, in fact, the transnational legal processes, have, in fact, set Trump back?**

That's my thesis and, if that's what he says, you know, my view is Trump is not winning. Goldsmith's counterview, although he doesn't say it so explicitly, is, 'The sky is falling', that Koh's optimism blinds him to the fact that we're a world in grievous disruption. In my view it's a little early to take such a depressive view of the world. A big part of my book, if I were to say, is first, Trump is not winning although he's battering the system – two: the reason is because transnational legal process preserves the fidelity of the rule of law even against these kinds of rogue elephants – but third, the outcome is not a forgone conclusion, that we need to fight for it.

Each of the issues, as I discussed, are areas where there's been a concerted effort to push back on Trump and then he's given way. So, what I didn't understand about Goldsmith's book review, is on the one hand he acknowledges the basics of what I said, but then his bottom line seems to be, 'Oh gee, it's really terrible. Let's give up. Trump has done grievous damage, it's over'. And my view is, "gee, it's a little early to make that kind of assessment and by the way, if that is your assessment, then it's easier to give up, which is not at all what I'm interested in doing".

**15. And he says that it's clear that Trump's *modus operandi* is unconventional and one can see that he is generally clumsy, if not incompetent, at wielding executive power and he asks, 'Isn't this alone sufficient to account for any of his failures?'. Goldsmith seems to think that it's not necessary to, as you have done, to attribute Trump's failings to a descriptive analytical tool.**

Well, Goldsmith was my student and I don't think he's always the shrewdest observer. He's also an executive-power advocate who also doesn't believe much in international law. I think what he would really like to do is to treat Trump as aberrational, but try to normalise George W. Bush so Mitt Romney<sup>60</sup> or someone could be a reasonable alternative, because they're not incompetent. He doesn't like Obama; he constantly is criticising Obama and Hillary Clinton. And I think it's false –he has, as I said, a kind of depressed view of the world which I think is too bad. Life is too short to have such a discouraged view of the world. As I've explained, you know, in my own life there are so many moments where it should have been over or where doom was upon us. But there's always hope; here I'm sitting in this beautiful college and talking to someone who's been nice enough to look at my work and how can I feel so pessimistic about the possibilities of the world.

So, let's face it, we are living through a terrible moment in our lifetime – the combination of Trump and Brexit<sup>61</sup> is devastating – but it's not over and the idea that the forces of international law should somehow surrender strikes me as a) premature and b) really against the idea of progress in civilisation. So maybe we will be overwhelmed by climate change because people like Trump will discourage the political forces from doing anything, but I still think there's time, and I still think that people can see the light, and I think it's the duty of those of us who care about, as I say, law and the process of humane globalization to push for that outcome. That's certainly what I see my life's mission as.

If you want to be a naysayer or a doomsayer, there's a role for such people, and they help people surrender. But it's too good an invitation to be passive and, in my view, that's not how you live your life. If my parents had been passive, my mother would be in North Korea

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<sup>60</sup> Willard Mitt Romney, (b. 1947). 70th Governor of Massachusetts (2003-07), Republican nominee in 2012 US Presidential election.

<sup>61</sup> Reference to 2016 referendum directing UK to leave the European Union.



and my father would be in a fishing village, buried in a cemetery somewhere, and I wouldn't exist. They fought hard to change their own existence and I think that's the way progress gets made.

**16. So, a final question on your last book and this is to bring UK politics in, one area where you do make direct reference to the UK in your book is the matter of Brexit. And, on page 92, you imply that military actions in Syria have destabilised that country and this conflict, *inter alia*, caused Brexit, presumably reference to the refugee influx into Europe. I wonder if you could comment on that.**

I was the Assistant Secretary for Human Rights during Kosovo and after Rwanda, and it seems to me that there is a role within international law for preventing genocide and war crimes before they happen. And that's what we tried to do in Libya; the follow through was imperfect, but we saved hundreds of thousands of lives. The idea that you don't have any responsibilities and people are just stuck in place when they're being subjected to gross violations, I think is wrong. I think we thought that Syria could implode and that's their problem, that's certainly the claim that Trump is now making. But it's not so easy, you know, it was one of the stable points of the Middle East, it's destabilised the Middle East. It put astonishing pressure on Turkey; Turkey has now gone very nationalistic and conservative. Erdogan's<sup>62</sup> become a human rights' violating dictator. Jordan is under incredible pressure, Egypt is under incredible pressure and they've become much more nationalist. Germany was under assault because Merkel<sup>63</sup> allowed people to come in and then started to create here a feeling of 'Fortress UK'.

All of this started to come to a head about the time that the Brexit referendum was happening and then the forces of fear and xenophobia led people to make a vote that they were being demagogued by people misstating the costs, and three years later we're still in it. There are real problems in the world, and for the last three years the UK has been struggling to deal its own self-inflicted wound, and we Americans every day have to get up and deal with Trump generating problems when the Chinese and the Russians are very focused on their own objectives. While Trump is loudly attacking the World Trade Organisation and the World Bank and NATO, the Chinese are quietly building the Belt and Road Initiative and their own bank. And their view is, 'We had to live 70 years under this western liberal post-war order, but now's our moment. These Western powers are distracted and, therefore, we can be focused'.

Putin's<sup>64</sup> view - extrapolating from where he is - 'I can interfere in the electoral systems of foreign countries and get away with it'. So, if you have a second referendum in the UK, what's to protect the UK from having Trump use bots and trolls to try and influence that? You know we have 22 candidates running for President of the United States, why can't the Russians use the exact same methods to tip it towards the person who Trump can beat, who I think is probably Bernie Sanders?<sup>65</sup> You know that we have no confidence now in the integrity of the process, so the denialist approach to these things, as Santayana<sup>66</sup> once said, 'If you don't learn from history, you're destined to relive it'.

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<sup>62</sup> Recep Tayyip Erdogan, (b. 1954). 12th President of Turkey (2014-).

<sup>63</sup> Angela Dorothea Merkel, (b. 1954). Chancellor of Germany (2005-).

<sup>64</sup> Vladimir Vladimirovich Putin, (b. 1952-). President of Russia (2000-08, 2012- )

<sup>65</sup> Bernard "Bernie" Sanders, (b. 1941-) American politician, junior United States Senator from Vermont (2007-) . Ran unsuccessfully for the 2016 Democratic nomination for president.

<sup>66</sup> George Santayana (1863-1952), originally Jorge Agustín Nicolás Ruiz de Santayana y Borrás, Spanish philosopher, essayist, poet, and novelist, worked in USA (Harvard) until 1911, known for his aphorisms.



**17. Your next book, your *Transnational Litigation in United States Courts*<sup>67</sup> was, to me, personally particularly interesting because it was one of the lectures that you gave at The Hague. I've had the great privilege of interviewing Judges Higgins<sup>68</sup>, Schwebel<sup>69</sup>, Crawford<sup>70</sup> and Professors Lauterpacht<sup>71</sup> and Bowett<sup>72</sup>, who also contributed to The Hague, and I wondered if you could say something about The Hague experience?**

I love The Hague Academy; I love The Hague generally. I'm going to Hague next week to argue at the International Court of Justice in *Ukraine v Russia* and then to argue at the Law of the Sea arbitral panel, also in *Ukraine v Russia*. In January, just before I came to start the second and third terms here at Cambridge, I gave the keynote speech at the first winter session of The Hague Academy of International Law on "American Schools of International Law". This is, by the way, another one of my projects. There's an Australian scholar, Anthea Roberts<sup>73</sup>, who has written a book, 'Is International Law Really International?', and she's basically arguing that Americans don't believe in international law. Now this may be true of some American international lawyers, like Eric Posner<sup>74</sup> or Goldsmith, but it's not true of me, or I would argue of the vast mainstream of American international lawyers. So that's a minority jurisprudential strand.

The Hague Academy I think is a remarkable world resource; I was very lucky to be invited. Peter Trooboff<sup>75</sup>, who was the American member of The Curatorium was my first boss at Covington & Burling and he got me invited there in 1993. It's not a great story about myself. I had been litigating this Haitian refugee case, non-stop 24 hours a day, seven days a week, for almost 15 months, and the Supreme Court decided the case and the Haitians on Guantanamo were released on June 21<sup>st</sup>, and three days later I had to go to The Hague to give these lectures. So, ideally, I should have written the lectures before. Instead, I went and gave the best lectures I could give under the circumstance. But then, I essentially wrote them for publication, and then they were published as a private volume at the *Recueil des Cours*.

Then, after five years, the copyright reverts to you and so then I thought, 'This is still pretty current and there haven't been that many new cases, and I ought to be able to do this'. So, I revised and updated it and then published it. But my son, William, to whom it's dedicated along with my daughter, when I went to give lectures in The Hague in 1993, the first round, he was three years old; but when the book came to me in final published form he was going off to college. It just shows you that books can gestate longer than children. But it got done and I'm happy with it. I may update it at some point in the future, who knows.

This book project is something that really began when I was clerking for Justice Blackmun and Judge Wilkey. One of the cases I talk about at some length, *Piper v Reyno*<sup>76</sup>, was the term I clerked for the Supreme Court. Almost every case discussed in some detail I worked on in some fashion from between 1980 and when the book came out. It goes back to

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<sup>67</sup> Foundation Press, 276pp.

<sup>68</sup> Dame Rosalyn Higgins, (1937-), President ICJ (2006-09).

<sup>69</sup> Stephen, M. Schwebel, (1929-), President ICJ (1997-2000).

<sup>70</sup> James Richard Crawford, (1948-), Whewell Professor (1992-2015), Judge ICJ (2015-).

<sup>71</sup> Professor Sir Elihu Lauterpacht, (1928-2017), Director, Research Centre for International Law, Cambridge (1983-95), Judge *ad hoc* ICJ (1993-2002).

<sup>72</sup> Sir Derek William Bowett (1927-2009), Whewell Professor (1981-91).

<sup>73</sup> Professor Anthea Roberts, ANU College of Asia and the Pacific.

<sup>74</sup> Eric Andrew Posner, (b.1965) Professor of international law, contract law, and bankruptcy, University of Chicago Law School.

<sup>75</sup> Peter Dennis Trooboff, (b.1942-), Partner & Senior Counsel, Covington & Burling, Washington DC. Hudson Medallist 2018.

<sup>76</sup> *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), <https://www.loc.gov/item/usrep454235/>



baseball; I'm a fan and the great hitter was Ted Williams<sup>77</sup> and he used to get hits all the time; I idolised him. And they asked him once, 'Why are you so good?', and he said, 'I never swing unless it's in the strike zone'. I remember seeing this when I was three or four years old and I said to my father, 'Gee that's very obvious', and he said, 'No, Williams is a genius.' I asked, 'Why?', and he said, 'Do you know how many people don't know their strike zone'? He said, 'You have to know what your focus is and then if it's in that zone give it your all and swing with all your might; but even if it's outside a little bit, just stay away, because you don't want to divert your energy'.

With this transnational litigation issue, I started to watch this strike zone in 1980, and I remember thinking at the time, 'I'll never master this.' But 39 years later, almost everything that passed through that strike zone I ended up having some little piece of. And it gave me a kind of overview that I thought I might as well write it down. So the different areas on which I'm trying to give a scholarly focus—the National Security Constitution, Transnational Legal Process, Law and Globalisation, Transnational Public Law Litigation, how it affects our current situation with Trump and Brexit—are all an effort to use this microscopic lens of the strike zone, to see deeper than the most obvious, superficial analysis.

### **18. Have there been since the book was published many Supreme Court cases bearing on international law?**

Surprisingly few. Probably the only big one this year is a case called *Jam v International Finance Corporation*;<sup>78</sup> it's about the immunity of an international organization. I helped write a brief in that case for a group of scholars in which we argued that an international organisation should not have more immunity than its member states, and that was the position that prevailed before the Supreme Court. So that's been the main one; it's not necessarily been directly connected to any of these issues, but strangely the Supreme Court's docket has started to decline.

When I was a law clerk in 1981/82, they heard 130 cases a year in full argument; now they hear about 60 – less than half. They used to hear about four, three or four, international cases a year, and now they hear about two, which by the way I think is both bad and good. It's bad because there are so many issues that are never really addressed that are critical to American society. The justices barely understand the internet. A number of our justices supposedly don't have passports which makes them incredibly insular. You know, it's no surprise that Stephen Breyer<sup>79</sup>, the most internationalist was a Marshall scholar, he's married to a British woman, speaks French; therefore, he doesn't see the United States as the centre of everything, whereas others, I think, have this very limited view. [LD - in *Jam v International*, in a 7-1 verdict, Breyer gave the one dissenting decision]

### **19. I found a review of this book by Professor Anupam Chanda<sup>80</sup>, and he is very complimentary and says that you set yourself a mammoth task in sorting out this huge array of topics in international jurisprudence to make a coherent picture. And he says, 'The book is lucid, has economic explanations, sophisticated and a major contribution**

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<sup>77</sup> Theodore Samuel Williams, (1918-2002), American professional baseball player for Boston Red Sox (1939-1960).

<sup>78</sup> 139 S. Ct. 759 (2019). [https://www.supremecourt.gov/opinions/18pdf/17-1011\\_mkhn.pdf](https://www.supremecourt.gov/opinions/18pdf/17-1011_mkhn.pdf)  
<https://www.lawfareblog.com/supreme-court-rules-jam-v-international-finance-corporation>

<sup>79</sup> Stephen Gerald Breyer, (b. 1938-). Associate Justice of the Supreme Court of the United States (1994-), Law professor and lecturer at Harvard Law School

<sup>80</sup> Anupam Chander, Professor, Georgetown Law School, previously Davis School of Law, University of California.



**to the field'. And he characterises your notions of uploading domestic law to international law, downloading international law to domestic law, and horizontal transplanting across jurisdictions as cross-cutting dynamics, allowing you to move back and forth between US Federal decisions and international conventions.**

**I wonder where you conceived the scheme and whether it was from your association with Justice Harry Blackmun.**

Well, it certainly began there. At Yale for years I taught international business transactions, which is one such topic; I taught human rights which was another such topic; I taught immigration which is another such topic. These are transnational in the sense that they are hybrids between domestic and international. I taught international trade law which is also hybrid. And so, the idea, again, is that international concepts developed in the international law realm are downloaded into domestic law. Here's a good example. You know in the UK we have the metric system – but is that a British concept or is it an international concept? It's a hybrid. Or dotcom, you know, there are dotcoms everywhere – is that an international concept or is it a domestic concept? It's a hybrid.

That's why I use the word transnational. In many respects, it is artificial to characterise things as international or domestic anymore; this is a Benthamite construction that was imposed on the law as a way of understanding it; I think now it confuses more than it clarifies. I think what I tried to do in the Transnational Litigation book is, instead of just talking about topics and cases, I wanted to extract themes that explain why the courts rule in particular directions. Like some of it is to protect the autonomy of parties to contracts, some of it is separation of powers, some of it is sovereignty. Comity is another. And in different cases, you see the courts invoking different ideas and giving different ones higher or lower priority, and sometimes one or the other is more controlling of the outcome. So the idea was, you could have 10 cases apparently concerning different aspects of a lawsuit—immunities, choice of forum, choice of law, enforcement of judgments, etc.—but the same themes are cost-cutting and that it's a very consistent pattern being invoked. Now different justices invoke these themes in different ways; you have different coalitions. What Chander's nice book review was getting at is that the idea is to give the reader a sense that, when you approach these things, these are the competing ideas that the justices are bringing to their analysis.

**20. I was intrigued by your description in your book, page 248 to 252, and then the last few pages, 258 to 260 of the two strands in US Supreme Court thinking – the transnationalist judges and the nationalistic judges – how have things evolved since 2008, especially in the development of a global legal system?**

Well, obviously, the two Trump appointees – Gorsuch<sup>81</sup> and Kavanaugh are nationalists. The last two Obama appointees – Sotomayor<sup>82</sup>, who speaks Spanish, and Kagan<sup>83</sup> are transnationalists – so it's two and two with respect to the latest appointees. Some of the justices who've got off the court – Souter<sup>84</sup>, O'Connor<sup>85</sup> and Kennedy<sup>86</sup> – had transnationalist leanings. Roberts<sup>87</sup>, who's the Chief Justice, is a strong nationalist. So right now, there's a five/four majority for a nationalist position.

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<sup>81</sup> Neil McGill Gorsuch, (b. 1967-). Associate Justice, US Supreme Court (2017-)

<sup>82</sup> Sonia Maria Sotomayor, (b.1954). Associate Justice US Supreme Court (2009-)

<sup>83</sup> Elena Kagan, (b.1960). Associate Justice US Supreme Court (2010-)

<sup>84</sup> David Hackett Souter, (b.1939). Associate Justice US Supreme Court (1990-2009).

<sup>85</sup> Sandra Day O'Connor, (b.1930). Associate Justice US Supreme Court (1981-2006).

<sup>86</sup> Anthony McLeod Kennedy, (b.1936). Associate Justice US Supreme Court (1988-2018).

<sup>87</sup> John Glover Roberts Jr. (b.1955). Chief Justice US Supreme Court (2005-)



My view this is very unfortunate. The United States is the leading global power; what Justice Blackmun said, which is very simple, and he said in the *Aérospatiale* case<sup>88</sup>, ‘An American judge should not simply think about what’s good for America; they should think about whether the rule that’s been adopted leads to the smoother functioning of the international system’.

In the same way as you pick a legal rule that makes the United States as a nation operate better, in a system of global commerce, why doesn’t a rule of judicial interpretation make the world markets operate better? Now, this leads us to sovereignty objection which is, I find it almost comical; you can’t apply foreign law. In the United States, conservatives say you should apply American law and this to me is like like saying, you can’t put kimchi in a taco. America’s a nation of borrowers and it amalgamates culinary traditions; everything is a hybrid. I’m married to an Irish woman. It’s crazy to say, I can put kimchi in a taco and enjoy that, but I can’t borrow British law and put it into a US opinion. In fact, the United States jurisprudence has a history of borrowing from the UK and the Commonwealth, not to mention other countries. So, this view is not dissimilar to Trump – a kind of insulated Fortress America’s view of the law versus an inclusive interpretive approach, looking for the best global principles.

**21. It reminds me on the question of statehood and sovereignty which in relation to the interview I had with Judge Crawford last year, and he said that in respect of the Montevideo Convention for Statehood, he said, ‘Let’s get rid of the Montevideo Convention. It’s imperfect, it’s partial, and we have to clarify our concepts. Nevertheless, a propos the necessity for recognising states for the functioning of international law, he also said that in the present conception of international law, yes, they are, he states, “are necessary to solve the problems of the world, international law is a law of coordination addressed to human problems and these can’t be solved by individual assertions of sovereignty, but by coordination”. Does this mean that your transnationalistic Supreme Court vision equates with the Crawfordian vision, while the nationalist view adheres more to the Montevideo Convention scenario?**

Yes, for example, the inter-national, inter hyphen national, vision thinks that an international law is for states only. The nation of Tuvalu versus Microsoft is not comparable in power. You know, private collections of power and influence and collaborations among private actors is what makes law. Now, the main point is that this was the originalist vision. The original notion of a *Lex Mercatoria*, a law of merchants. When Marco Polo went to buy noodles from Chinese people or vice versa, and had to pay them in the markets, there was no national law; they were from different countries, so they developed a transnational law of commerce which has come to be known as the law merchant, the *Lex Mercatoria*, The British carried that law because of their naval power and also their colonial power, and then the US inherited it. So what Judge Crawford is saying is to focus in on those states that meet the narrow Montevideo criteria as the only meaningful players, when you have so many other transnational actors is narrowminded. Indeed, this is the theme of my book on Trump.

Climate change is not controlled by the United States –Trump is a powerful actor in this story but so are a zillion other entities – and they can all push in a different direction. In fact, make-up for some of the losses by Trump and the deficits. And so, if we think preserving the law’s for states only, then we say there’s nothing we can do. If we think we

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<sup>88</sup> *Société nationale industrielle aérospatiale v. US District Court for the Southern District of Iowa*, 482 US 522 (1987).



are participants and we own it too, it imposes on us a moral duty to try to participate.

I mentioned that my brothers are doctors - I'll never forget my father said when they got their medical degrees – he said, I quote this in the book, he said, 'Before you understood the human body you didn't have an obligation to your people', a moral obligation - he said, 'You didn't know how'. He said, 'But now you have that knowledge and that can raise with it this ethical obligation to make people healthier'. So if I understand how the body politic works, or how the body legal works, I have a moral obligation to try to make that system work better, and not collapse, not just to say, 'The sky has already fallen'.

If I'm a participant in the process, why should I defer to a Donald Trump? I mean, he's certainly a player in it and he certainly has resources, and he certainly has authorities, but if he's mucking it up, we need the forces on the other side to push back. This is the role that universities play; this is the role that knowledge plays. Maybe this is a bad moment. Another thing that my father said to me is, 'The world is filled with good people countries and bad governments'. As we speak, you have no prime minister here, and we have Donald Trump as our President. But I've been travelling around the UK—what a wonderful country—and the United States is still the same country that elected Obama or cast more than 3 million votes for Hillary Clinton over Trump. So, I can't give up on our country. The law is not made by these public entities alone.

**22. Your last book that we'll look at briefly is the compilation with Professor Oona Hathaway<sup>89</sup>, *Foundations of International Law and Politics*, and here you select mainly journal articles to illustrate various concepts, bringing international law and international relations together, and these articles range in age from 1994 HLA Hart's article, to your own in 2005,. What motivated you to compile this book? Was it again primarily a teaching aid?**

George Bernard Shaw<sup>90</sup> said that America and England are, 'Two countries divided by a common language'. It turns out international law and international relations are two disciplines divided by methodology. So, the world of international law talks about relations among transnational actors making legal rules, where the international relations talk about how powerful entities in the system interact with each other and create norms, and they don't do much to translate the idea of norms into the idea of law. My teacher, Abram Chayes said, 'international relations scholars hate to say the L word'. Now, I was struck by this because I studied political science and then I went into law. It was almost like we would study the exact same subjects, like the Cuban Missile Crisis, and one discipline would study entirely from a political science perspective, and on the other international lawyers would suddenly talk about the legal rules that were made and never should the twain meet. So, for example, Cambridge have a phenomenal International Law Faculty, but you've also got a Politics and International Relations department. At Oxford, they have Politics and International Relations, but they also have International Law. But all too often these disciplines don't talk to each other.

Hello, oh hold on, this is my student coming in. Hi, come on in, do you mind having a seat here? This is Lesley Dingle.

**23. Hello.**

This is Thandolwethu (Thando) Mlambo of Magdalene College. She's a friend of my student at Yale who is studying here at Cambridge; we've been trying to get together –

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<sup>89</sup> Oona Anne Hathaway, (b.1972). Gerard C. and Bernice Latrobe Smith Professor of International Law, & Director Center for Global Legal Challenges, Yale Law School.

<sup>90</sup> George Bernard Shaw, (1856-1950). Irish playwright.



Thando, just have a seat over here – we’re finishing up a conversation.

So, in the late 1990s, there was an effort funded by the Ford Foundation to try to bridge the gap between international law and international relations. I think it got to a certain place and then the international relations people - I don’t think - appreciated much about the role of law. I gave you an example of someone whose behavior is influenced by law, but who never violates the law. The international relations methodology is counting and they’re looking for data points and I think they end up, therefore, ignoring the pervasive influence of law. So, the point of the book was to try to pick readings so that people on both sides of this scholarly divide could understand what the other people are thinking and see the deep connections. Because it shouldn’t be as it was for me that when I’m studying international relations, I am reading a bunch of literature and learning jargon, but I’m thinking, ‘What does it have to do with international law?’ Then I get to the international law side and nobody mentions the international relations literature that I’ve been reading. It’s crazy, so that was what the book was intended to do. It can be used in college courses, it can be used in graduate programmes in international relations, but it can also be used in international law theory courses, etc.

**24. I was interested to see in your preface that you cite Professor Myres McDougal<sup>91</sup> as a pioneer in the modern collaboration between international law and international relations. Of course, he was someone under whose spell Dame Rosalyn Higgins fell and she was enchanted by him when she was at Yale, and he taught her that, and I quote from her interviews that, ‘International law is not about rules but mostly about norms’, and these were concepts that she hadn’t met here in Cambridge. Was there still a lingering legacy of the spell of this extraordinary man by the time that you arrived at Yale, and did this somehow influence you?**

Yes, he was there the first five years I was there, he passed away, and he was a very dominating force. He was a gigantic guy, he was about 6’ 3” but a huge and very powerful personality – also very funny, charismatic. You know, he was the founder of the New Haven School. I’ve written two things – 2007 *Yale Journal of International Law* called ‘Is there a new New Haven School of International Law?’<sup>92</sup> I think the transnational legal process school is the new New Haven School. It’s a combination of norms and process, so I think it’s actually a cross between Harvard’s International Legal Process and Yale’s Policy Science approach. And then I’ve just written a chapter in a book<sup>93</sup> by Jeffrey Dunoff<sup>94</sup> and Mark Pollack<sup>95</sup>, called, ‘The new New Haven School’, and the speech I just gave at The Hague Academy on American Schools of International Law argues that, in fact, this transnational legal process view is the dominant approach to international law in the United States.

Here’s another way to put it. You hear a lot about kind of schools that are more at the margins, so there’s what I call a left critical school, with people like David Kennedy, Martti Koskenniemi’s<sup>96</sup> connected to that. There is a Chicago law and economic school - people

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<sup>91</sup> Myres S. McDougal, (1906-98). Sterling Professor of International Yale Law School (1934-84).

<sup>92</sup> Harold Hongju Koh, Is there a “New” New Haven School of International Law, *Yale J. Int’l L.* (2007); <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=https://www.bing.com/&httpsredir=1&article=1309&context=yjil>

<sup>93</sup> *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2013).

<sup>94</sup> Jeffrey Dunoff, Laura H. Carnell Professor of Law Temple University

<sup>95</sup> Mark A Pollack. Professor of Political Science and Law and Jean Monnet Chair, Temple University

<sup>96</sup> Martti Antero Koskenniemi (b. 1953). Professor of International Law and Director of the Erik Castrén Institute of International Law and Human Rights at the University of Helsinki. Visiting Goodhart Professor of Legal Science (2008-09).



like Andrew Guzman<sup>97</sup>, Eric Posner<sup>98</sup>, they believe it's all economic incentives. There's a kind of Harvard School, led by Goldsmith, and Curtis Bradley<sup>99</sup> is very much a nationalist school. So, all of these get attention but, in fact, I think they are the hole and not the doughnut; if you look at 90% of what's going on in US international law, it's transnational legal process. So, my view is that the dominant American School of International Law is the new New Haven School, which I think is an advancement beyond what McDougal did. It builds on and blends the Harvard and Yale approaches. In fact, it reflects the various influences that I saw, plus this international relations theory, all of these international influences come in.

**25. Thank you. Well I could ask you questions endlessly about this but sadly time is running out, and so just to conclude, what would you describe as the highlights of your time at Cambridge?**

I think there are two.

The experience around writing the Trump and International Law book – and then having a chance to workshop it with many parts of the UK has been a real joy. It's been so nice to return twenty years after being a visiting professor and then another twenty years after being a student. When I was here a year ago this book was in my mind – and now I'm talking to people who are reacting to it and that's given me a whole set of new thoughts for the next 10 years.

The other highlight has been just the emotional experience of being at Cambridge as an adult. You know, when I went to Oxford as a student, what's the best way to put it? I was terrified by the university. I was young and the whole place seemed to be full of invisible rules. I kept wondering, 'who am I and what am I doing here?', and I just somehow felt I would never be comfortable or at home here; I was constantly afraid of picking up the wrong fork. And I think it was only towards the end of my two years as a student that I started to appreciate the wonderful people and the wonderful country and the brilliance of the universities, etc. But this time around, I'm in the later stages of my career, so I'm actually happy that I don't have to worry about these things anymore.

For example, the other day when I went to a dinner, they brought out a little glass of water – a bowl of water with lemon in it – so I thought I was supposed to put my fingers in it. Somebody else picked it up and drank from it, which was what we were supposed to do. In prior visits, you know, this kind of thing would have shattered me, but in fact this time it was just funny. But I just read CP Snow's<sup>100</sup> book, *The Masters*, which is obviously about how the Master of Christ's gets chosen, so that was fascinating to read in its own right, and partly because it grows out of the culture of Cambridge. But then at the very end, there's an appendix where he describes how Cambridge University came into existence. It reminds me of the statement that some authors are architects and some are gardeners, and the gardeners plant seeds and then the seeds come up in different ways and make a garden. And it was in this kind of organic bottom up way in which Cambridge became this world-class university, and the colleges and the structure of the colleges and the social life and political life, grew out of that. And that's really the story of how *The Masters*' fits into some broader scheme.

That's what I think I appreciate more now. You know, I've lived in universities my

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<sup>97</sup> Andrew T Guzman, Dean & Carl Mason Franklin Professor in Law USC Gould School of Law.

<sup>98</sup> Eric Andrew Posner, (b.1965) Professor of international law, contract law, and bankruptcy, University of Chicago Law School.

<sup>99</sup> Curtis A Bradley, William Van Alstyne Professor of Law, Professor of Public Policy Studies, Duke University Durham NC.

<sup>100</sup> Charles Percy Snow, Baron Snow, (1905-80), English novelist and physical chemist.



whole life and, in fact, my parents have lived in universities on several continents, but there's something very special about the British universities. The greatest universities around the world are modelled -including my own, Yale - on Oxford and Cambridge. And so learning about Cambridge has been the best thing. As an Oxford man, I think I always feared Cambridge as this "other place," but I now I feel like it's a little bit of a home now too – and that's nice.

**26. Thank you. Well all that remains is to thank you again so much for this fascinating account. I'm very grateful to you.**

Oh, thank you for all the work you did. I'm very touched that you're interviewing me for an archive that they have here for the Goodhart professorship I've been so privileged to hold.

