

Review

Harold Hongju Koh: The Trump Administration and International law

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The author is Harold Hongju Koh, who is a Sterling Professor of International law and former Dean of the Yale Law School. He served at the U.S. Department of State from 2009 to 2013 as Legal Adviser, and as Assistant Secretary of State for Democracy, Human Rights and Labor between 1998-2001.

*The Trump Administration and International Law*¹ is an exceptionally well-written analysis of the foreign policy and attitude towards international law of the first two years of Donald J. Trump's presidency's. The Trump Administration has been in office since 2017, and before the campaign in the United States intensifies in late 2020, the opportunity presents itself to review Professor Koh's examination of some foreign policy decisions of the current U.S. president, along with his administration's position on some issues of international law.

First of all, it has to be noted that although Professor Koh has written his book in a delightful style, – which can be illustrated for example by one of the main questions of the book: “[s]o will Donald trump international law, or vice versa?”² – I strongly feel that title of the publication was chosen rather poorly, for the main emphasis within the volume is not on international law questions, but on foreign policy *i.e.* what should/could the United States in a given situation do and what should or could not. Therefore, a better choice of title would have been “*The Trump Administration and the Transnational Legal Process*”. The latter phenomenon is emphasized throughout the whole work. The author argues that law, policy and politics are intertwined, therefore they cannot be examined separately,³ which might resolve the issues regarding the choice of the title.

The Trump Administration and International Law is divided into six chapters, with an additional introduction and a bibliographical note, acknowledgments and an afterword, which elaborates more on the issues examined within the main chapters of the book.

The first chapter is entitled “Trump's “Strategy” and the Counterstrategy of Resistance” which deals with the current U.S. president's approach that can be characterized by disengagement from globalization, undermining of international institutions and resignation from global leadership.⁴ Professor Koh argues that an effective counterstrategy against the Trump “Strategy” would be the *transnational legal process*. Transnational law is – according to him – “a hybrid body of international and domestic law developed by a large number of public and private transnational actors.”⁵ This

¹ H. H. Koh, *The Trump Administration and International law*, Oxford University Press, Oxford 2019. ISBN: 9780190912185.

² *Ibid.* p. 15.

³ *Ibid.* pp. 17-18.

⁴ *Ibid.* p. 5.

⁵ *Ibid.* pp- 6-7.

new set of rules has a wide range actors from states, to non-governmental organizations and even committed individuals.⁶ This counterstrategy can be applied in a twofold manner, as an inside-outside strategy. The so-called ‘outside strategy’ – which could be employed by non-governmental organizations – can be characterized by “interaction-interpretation-internalization”. This means that these organizations have to generate some kind of *interaction* with the government, by *e.g.* suing it for illegal conduct, that would lead to a judicial *interpretation*, which will lead to *internalization* of norms at hand which in turn will be binding for the state.⁷ On the other hand, the ‘inside strategy’ requires “engagement-translation-leverage” or in other words, using international law as a “smart power”. Essentially, this obligates the government to *engage* with other states instead of choosing unilateral action. The strategy also calls for *translation* of laws, which means that there should be no legal black holes: existing law should be used to deduce the applicable legal framework from previously unforeseen state action such as drone strikes or cyberwarfare. In the end, states should *leverage* international law with foreign policy, *i.e.* using soft powers together with hard powers to achieve desired goals.⁸ Conversely, Trump’s “America First” uses “disengage-black hole-hard power” as a tool to handle foreign policy.⁹ According to this approach, the U.S. should *disengage* from global leadership and from international cooperation; use whatever policy action it desires, for there are no specific legal rules governing new and unforeseen situations. In other words, it is a legal *black hole*. At the end instead of using diplomatic, legal and military power in combination to solve a foreign policy issue, the U.S. should lean on *hard power* instruments.

I found it necessary to deal with the transnational legal process in a more “in-depth” fashion, for this will be the counterstrategy employed by many actors described in the book’s subsequent chapters. The second chapter illustrates this transnational legal process in action, in light of the immigration and refugee policy¹⁰ and the human rights policy¹¹ of the Trump Administration. In the first half of the chapter, Professor Koh offers a comprehensive history and critic of President Trump’s executive order, the so called “Travel Ban”, which essentially “blocked entry into the United States by citizens of seven predominantly Muslim countries [...]”.¹² The author argues that the executive order, and its successors (up to Travel Ban 3.0) is not simply contrary to international law, but it breaches domestic law as well, without mentioning its unnecessary and discriminative nature.¹³ Professor Koh then goes on to describe the transnational legal process in action against the Travel Ban and how U.S. government reacted to these actions.¹⁴ A summary of the judicial proceeding in relation to the Travel Ban can be found in the Afterword.¹⁵ In the second half of the first chapter, the author describes the counterstrategy offered in the field of human rights, namely the fight against the presidential plan to use waterboarding *i.e.* torture as an interrogation technique. These prospective human rights violations have been successfully deflected by the transnational legal process.¹⁶

The third chapter is entitled “Resigning Without Leaving” which lists international treaties and agreements as regards which President Trump announced some kind of withdrawal by the United States such as the Paris Agreement, various trade agreements *e.g.* the Trans-Pacific Partnership, and the Iran Nuclear Deal.¹⁷ Professor Koh carefully analyses the steps that the Trump Administration

⁶ Ibid. p. 7.

⁷ Ibid. p. 9.

⁸ Ibid. pp. 8-13.

⁹ Ibid. p. 13.

¹⁰ Ibid. pp. 22-33.

¹¹ Ibid. pp. 33-37.

¹² Ibid. p. 22.

¹³ Ibid. pp. 23-24.

¹⁴ Ibid. pp. 24-33.

¹⁵ Ibid. pp. 199-212.

¹⁶ Ibid. pp. 33-37.

¹⁷ Ibid. pp. 39-70.

has taken to withdraw from the agreements, and finds for example in case of the Paris Agreement that the United States cannot fully withdraw from the agreement, only after President Trump's first term has ended.¹⁸ The author also argues that international agreements do not collapse after the U.S. withdraws from them. For instance, the Trans-Pacific Partnership turned into the Comprehensive and Progressive Agreement for Trans-Pacific Partnership and the Iran Nuclear Deal was still intact until January 2020.¹⁹ Thus, states either hold up the working international institutions or improve them without the participation of the United States. It is this phenomenon of disengagement from international agreements, short of breaking the ties of the state to international institutions legally that Professor Koh illustrates as “resigning without leaving.”²⁰

In the fourth chapter, the author investigates foreign policy decisions of the Trump Administration in “Countries of Concern” which is also the title of this part of the volume. The author offers a comprehensive analysis of the foreign policy issues concerning North Korea, most prominently in light of the denuclearization of the Korean Peninsula and U.S. relations towards South Korea.²¹ Professor Koh also examines the election hacking in the U.S. by the Russian Federation²² and the Russian interference in Ukraine from 2014.²³

The fifth chapter is entitled “America's Wars” which deals with a number of international law questions in connection with *jus ad bellum* and *jus in bello*, although it does most of these from a policy perspective, stemming from the intertwined approach applied by Professor Koh. In the first part, which is connected to Al Qaeda and the Islamic State, the author goes on to explain how the “Global War on Terror” has transformed under the Obama Administration to a more specific armed conflict with various terrorist organizations.²⁴ After a detailed analysis of the policy decisions and considerations behind the Obama Administration's counter-terrorist strategies,²⁵ Professor Koh warns about the Trump Administration's loosening of various standards that were employed under its predecessor.²⁶ A great emphasis has been placed on “ending the forever war” which according to the author has to happen in three steps: 1) disengaging from Afghanistan; 2) closing Guantánamo and the military commissions; finally 3) formally ending the war by repealing or/and reforming the Authorization for Use of Military Force both for Iraq and the Al Qaeda.²⁷ The author also focuses on the notion of “associated forces” with which the United States are already at war. According to Professor Koh, an associate force has to bear three characteristics: it is 1) an organized armed group, 2) which has entered the fight alongside the Al Qaeda against the U.S., 3) making it a co-belligerent in the ongoing hostilities.²⁸ Another fascinating claim can be found in the part dedicated to Syria, in which the author argues that unilateral humanitarian intervention – *i.e.* intervention in the absence of a United Nations Security Council resolution – is not always illegal, which was brought up in connection with the 2017 and 2018 spring airstrikes in response to suspected use of chemical weapons.²⁹ Professor Koh claims that he does not “broadly endorse[...] unilateral humanitarian intervention as a matter of law or policy”³⁰, but rather considers the humanitarian claim as a “defense”

¹⁸ Ibid. pp. 39-54.

¹⁹ *Iran rolls back nuclear deal commitments*, BBC News (5 January 2020) <https://www.bbc.com/news/world-middle-east-51001167> (25 February 2020).

²⁰ Koh 2019, pp. 54-70.

²¹ Ibid. pp. 71-81.

²² Ibid. pp. 81-87.

²³ Ibid. pp. 87-90.

²⁴ Ibid. p. 95.

²⁵ Ibid. pp. 97-101.

²⁶ Ibid. p. 101.

²⁷ Ibid. p. 106.

²⁸ Ibid. p. 119.

²⁹ Ibid. p. 130-132.

³⁰ Ibid. p. 134.

which would serve as an exemption from a state of legal wrongfulness.³¹

In the last chapter, the reader is faced with the question: “What’s at Stake”? Professor Koh identifies the election of President Trump as not the cause, but rather a symptom of a globalized shift in political direction. Instead of pursuing the Kantian legal order that was established after World War II, populist political parties all over the world are seeking to create an Orwellian society of states, where spheres of influence dominate.³² At the beginning of this review I have highlighted a well-framed question that the volume seeks to find answers to: Will Donald Trump international law? According to the author: “we shall see”, but Professor Koh calls for optimism seeing the transnational legal process in action within the tally to date (*i.e.* Autumn of 2018), when the Travel Ban was only narrowly upheld by the Supreme Court of the U.S. with possible blockage at lower level courts; various trade agreements are still operating and President Trump might want to reenter one or two of these, and policy constraints are loosened on the conduct of hostilities against Al Qaeda.³³

Apart from the choice of its title, I believe this book is an exceptionally well-written analysis of U.S. foreign policy under the Trump Administration. As Professor Koh himself aptly put it “[o]bviously, I am no fan of the Trump administration”³⁴ and this can be felt throughout the whole work, but it is not biased in any way. The author uses his own understanding of the transnational legal process and international law, which he applies either in favor of or against the Trump Administration. Professor Koh’s work sheds light on the phenomenon that law, policy and politics are intertwined with each other, therefore their separate examination will not lead to the correct results at all times. The book is a recommended read to all who are interested in U.S. foreign policy and the international law behind that foreign policy. It is however definitely not a comprehensive examination of the entirety of the Trump Administration’s conduct in the president’s first two years from an international law point of view.

I certainly feel that the publication of the book had perhaps been a bit premature since many events and incidents have happened since the manuscript was closed that would be worth the attention of Professor Koh and his theory of the transnational legal process. To name but a few: the death of Abu Bakr al-Baghdadi, the head of the Islamic State, who killed himself when U.S. troops were conducting a targeted killing operation against him³⁵; the withdraw of U.S. troops from Syria³⁶; the Soleimani strike³⁷; withdrawal from the U.N. Human Rights Council³⁸; calling the International Court of Justice “politicized”³⁹ and many more. Of course, history and international relations do not stand still for the sake of the publication of a scientific work. I hope that we shall see a second edi-

³¹ Ibid. p. 134.

³² Ibid. pp. 141-147.

³³ Ibid. pp. 147-153.

³⁴ Ibid. p. 131.

³⁵ M. Ryan & D. Lamothe, *Trump says Islamic State leader Abu Bakr al-Baghdadi blew himself up as U.S. troops closed in*, Washington Post (27 October 2019). https://www.washingtonpost.com/world/national-security/us-forces-launch-operation-in-syria-targeting-isis-leader-baghdadi-officials-say/2019/10/27/081bc257-adf1-4db6-9a6a-9b820d-d9e32d_story.html (23 January 2020).

³⁶ M. Landler & H. Cooper & E. Schmitt, *Trump to Withdraw U.S. Forces From Syria, Declaring ‘We Have Won Against ISIS*, The New York Times (19 December 2018) <https://www.nytimes.com/2018/12/19/us/politics/trump-syria-turkey-troop-withdrawal.html> (25 February 2020).

³⁷ *Quasem Soleimani: US kills top Iranian general in Baghdad air strike*, BBC News (3 January 2020) <https://www.bbc.com/news/world-middle-east-50979463> (25 February 2020).

³⁸ G. Harris, *Trump Administration Withdraws U.S. From U.N. Human Rights Council*, The New York Times (19 June 2018) <https://www.nytimes.com/2018/06/19/us/politics/trump-israel-palestinians-human-rights.html> (25 February 2020).

³⁹ R. Rampton & L. Wroughton & S. van den Berg, *U.S. withdraws from international accords, says U.N. world court, politicized*, Reuters (3 October 2018) <https://www.reuters.com/article/us-usa-diplomacy-treaty/us-reviewing-agreements-that-expose-it-to-world-court-bolton-idUSKCN1MD2CP> (25 February 2020).

tion of this book that will include some of the abovementioned incidents and developments as well.