**The Trump Administration and International Law**

By Harold Hongju Koh

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Review by Martin Hittelman

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Harold Hongju Koh is a legal scholar. He served as Legal Adviser of the Department of State under President Obama from 2009 to 2013. After serving under Obama, he returned to his former position as a law professor at Yale University. While a professor at Yale, he led a group of Yale students and human rights lawyers in successful litigation against the United States government to free Haitian refugees interned at Guantanamo Bay, Cuba.

His book on the Trump Administration and International law begins with an Introduction discussing the Trumping of international law: “*As you read these words, the U.S. administration of Donald J. Trump has been in office for nearly two years, a tumultuous period that has disrupted many things, including the world of international law. Our experience thus far has raised a haunting question:* ***will the Trump administration’s many initiatives permanently change the nature of America’s relationship with international law and its institutions?***

*To answer that question, one must consider two others. First, is there a counterstrategy that those who resist Trump’s broader approach can jointly and severally apply to increase the odds that America’s existing legal obligations will be faithfully executed? Second, looking past the daily skirmishing and even beyond the Trump administration, what is ultimately at stake?* ***Can across-the-board resistance—strategically applied—prevent the slow backsliding of our postwar system of global governance into a far nastier, more brutish world, less respectful of democracy, human rights, and the rule of law?***”

Koh’s approach to resistance to the transformation of law he calls a ***“transnational legal process****.”*  He then proceeds, in great detail, to describe “*how this counterstrategy has played out during the first years of the Trump administration, in such areas as immigration and human rights; attempts to “****resign without leaving****”* ***such international arrangements as the Paris Climate Deal and trade agreements; bilateral actions involving countries of concern, such as North Korea, Russia, and Ukraine; and in the conduct of America’s ongoing wars.*** *In each of these areas, I argue, transnational actors both inside and outside the United States* ***have employed techniques of transnational legal process to mitigate the Trump administration’s efforts to break, stretch, or violate international law.*** *This counterstrategy, I argue, has proven both an appropriate and largely effective response to* ***curb the Trump administration’s excesses and to preserve America’s constitutional obligations to comply with binding international standards.***”

Koh’s thesis is that the Trump assault on international agreements contains a much deeper threat to the world then “*the string of unending political scuffles we daily watch unfolding on cable television.*” He concludes that what is at stake is **two competing views of the future world order**. “*Since World War II, the leading democratic nations of the world have* ***collectively worked toward an admittedly imperfect, but adequately functioning, Kantian vision of a law-governed international society****.* ***Trump’s motley array of instincts and impulses has been uniformly directed toward disrupting this vision****. How successfully we collectively resist the dark impulses revealed by the early days of the Trump administration thus reflects far more than an exercise in ordinary politics. It will determine whether—as we enter the mid-twenty-first century—****history will remember Trump’s election as a grim pivot toward a more cynical, Orwellian system of global governance dominated by realist great-power spheres of influence.*** *As the next years unfold, our challenge will be to preserve and improve upon this Kantian vision and to resist those who would discard it, of whom Donald Trump is only the most visible.*”

The layout of the book details both the challenges and a counterstrategy of a resistance:

“*1.Trump’s “Strategy” and the Counterstrategy of Resistance*

*A. Trump’s “Strategy”*

*B. Transnational Legal Process*

*C. An Outside–Inside Counterstrategy*

*D. The Emerging Trump Philosophy*

*E. Transnational Legal Process as Rope-a-Dope*

*F. Intertwined Constraints: Law, Policy, and Politics*

*2.The Counterstrategy Illustrated: Transnational Legal Process in Action*

*A. Immigration and Refugees*

*B. Human Rights*

*3. Resigning Without Leaving*

*A. Climate Change*

*B. Trade Diplomacy*

*C. The Iran Nuclear Deal*

*4. Countries of Concern*

*A. North Korea*

*B. The Russian Federation*

*C. Ukraine*

*5. America’s Wars*

*A Al Qaeda and IS*

*B. Ending the Forever War*

*C. Syria*

*6. What’s at Stake*

*A. Early Lessons*

*B. A Historical Tipping Point?*

*C. Techniques of Resistance*

*D. The Tally to Date”*

Koh begins by pointing out that while Trump “***acts based not so much on strategy as on instinct and impulse***”, his instincts and impulses move toward disengagement from globalism. Trump’s aim is to **undo what Obama’s *“inside strategy*” accomplished.** Koh describes the Obama approach as “a***smart-power strategy.” A smart power strategy “****means first that, given the choice, the United States—and other like-minded states—****should choose engagement over unilateralism****. When faced with a foreign policy problem, the United States should not proceed alone but rather seek to engage with other countries and adversaries around common values, in search of diplomatic solutions that* ***can be embedded within durable international law principles”***

*“Second, a strategy of “international law as smart power” suggests that wherever possible, the United States should* ***choose a persuasive lega*l *translation based on existing law over denying the applicability of law altogether****.*”

“*The third element of the inside strategy is a commitment to* ***leveraging international law as smart power to achieve sustainable policy solutions.*** *This means blending legal arguments with other tools—including military force, diplomacy, development, technology, markets, and international institutions—to achieve complex foreign policy outcomes that* ***cannot be achieved without the legitimacy that international law bestows****: examples include the Dayton Peace Accord, the New START Treaty, or the Paris Climate Change Agreement.”*

In contrast, the Trump regime’s approach is: “*Wherever possible,* ***disengage from globalism****.* ***Undermine international institutions and resign from global leadership.*** *Reverse what Barack Obama did and what a President Hillary Clinton would have done. When in doubt,* ***adopt an isolationist “hard power” posture.*** *And if challenged,* ***defend the president’s legal right to act with extreme claims of presidential power that demand broad deference from Congress, the courts, our allies, media, and nongovernmental organizations.”***

“*Trump’s means to achieving these ends have become equally predictable.* ***Make radical shifts with little or no notice.*** *“****Flood the zone”*** *with relentless initiatives so that the world quickly forgets yesterday’s surprise because of this morning’s tweet. When confounding a settled wisdom, call the truth itself into question by challenging media reports as* ***“fake news”*** *and* ***denigrating settled knowledge,*** *especially scientific expertise. Diminish diplomacy as a soft-power tool by* ***demoralizing and gutting the career bureaucracy****. And cloak discriminatory actions in the* ***veil of presidential power and “national security process,****” which his underlings advise us “will not be challenged.”*

**Koh recognizes that Trump’s approach must not be under estimated.**Koh notes that: *“Still, we must acknowledge an inner logic underlying Trump’s rhetoric that* ***viscerally touches real and deep American fears.*** *In Trump’s worldview, the rush to globalization has* ***left the American working class behind, particularly those who believe their jobs have been taken by immigrants****. The United States has lost competitiveness vis-à-vis other countries, in what he perceives to be a* ***zero-sum game****. Because the United States has enough trouble dealing with its own problems, he contends, it should not needlessly waste energy judging or solving the problems of others. In his view, the United States now bears too much of the burden of international leadership, which should instead be shared or offloaded. To respond to Trump’s approach, any successful counterstrategy must not only respond to his immediate means and ends but* ***also address these deeper populist currents*** *into which he has plainly tapped. It is to that counterstrategy that I now turn.”*

Koh performs a real service by putting in print a detailed analysis of what has been happening since Trump was elected. His desire is to make United States policy and practice more successful on the international stage. He is, however, dismissive of some of what he considers “populists objections” to such agreements as NAFTA. I, on the other hand, agree with many of the populist objections to the past policies of the United States which were aimed at making the **world safe for American capitalism**. But even with that disagreement, I think that Koh has much of value to say about the current follies of the Trump regime.

I do believe that there is value in having agreed upon rules of social engagement -personally, nationally, and internationally. I believe that there are some norms that have developed that should be respected such as not smoking in public facilities, putting recyclables in recyclable bins, buckling seat belts, not stealing from others or cheating people, protecting the environment, using government to address problems that are better solved collectively, and the basic universal rights outlined in the United States Constitution.

Koh points out that “*The Trump approach does not value concerted efforts to translate existing legal rules but rather claims that there are* ***no rules that bind our conduct****. Under this worldview, the United States should act based on its perceived national interests, not international rules: an approach grounded on perceived national rights, not the universal rights on which this country was founded and that form the foundation of modern international human rights law.*” And of course, Trump feels the same about his own personal and political behavior – he acts exclusively based on his own personal and economic interests.

Koh concludes Section 1D with the following: “*But as the chapters that follow will demonstrate, the various ways in which the Trump administration has announced its disengagement from global governance* ***have thus far proven largely ineffective.*** *This is precisely because the United States has become so deeply enmeshed with the laws, norms, and institutions of international law. In an increasingly integrated, globalized world, a nation-****state can no more resign from the global system than an individual can resign from the human race.*** *As Americans have learned since Trump’s election—and the British have learned since their tumultuous June 2016 Brexit vote—like it or not, our societies are all deeply enmeshed in that globalized system, over which we exercise limited influence, even as it governs us.*

*To be sure, the United States of America—and its president in particular—are powerful players in the making and unmaking of international law. But upon inspection, the wide-ranging counterstrategy of damage control surveyed in the chapters that follow has spawned a de facto path of least resistance. Under that default, the United States under Trump* ***rarely exits, but rather stays in and underperforms in existing international regimes.*** *As Chapter 3 argues, the default outcome of Trump’s blustering has tended to be* ***“resigning without leaving”****: the United States remains within existing international institutions but with dramatically reduced influence. While that may be a suboptimal state of affairs, it has the virtue of being curable, at a future time when Trump no longer controls the two houses of Congress or has been supplanted by a more enlightened successor U.S. administration.*”

This book is for readers who are interested in getting past the daily headlines. It is an in depth analysis of the behavior of the Trump regime in the international and national stage. It is an important book.

Hope may not be lost as Kuh points out, but it will take action on a number of levels to save the world from decades of barbarism.

Persevere