

BOOK NOTE

The Trump Administration and International Law, by Harold Hongju Koh, Oxford University Press, 2019, 212 pages, \$27.95.

BOOK NOTE BY BENJAMIN HELFAND*

On September 10, 2018, John Bolton, President Trump's National Security Advisor, denounced the International Criminal Court (ICC) as "ineffective," "unaccountable," "deeply flawed," and "outright dangerous."¹ Bolton's remarks were a response to a request by the International Criminal Court's prosecutor that the Court open an investigation into American officials for detainee abuses in Afghanistan.² The position articulated in Bolton's remarks follows a continued and determined effort by the Trump Administration to recalibrate America's stance towards international law. But how has and will international law shape the Trump Administration and its policy initiatives? Conversely, how has and will the Trump Administration shape international law? This inquiry is the driving force behind Harold Koh's latest publication: *The Trump Administration and International Law*.

The Trump Administration and International Law is an ambitious undertaking delivered in a concise, reader-friendly format. Koh, drawing on his experience as Legal Adviser at the State Department during the Obama Administration (2009-2013) and as Assistant Secretary of State for Democracy, Human Rights, and Labor during the Clinton Administration (1998-2001), provides an accessible reading experience for the non-lawyer and lawyer alike interested in understanding how the Trump Administration's policy initiatives shape and are shaped by international law.

Koh argues the Trump Administration's approach to engaging with the international system is driven by the following impulses: "[w]herever possible disengage from globalism. Undermine inter-

* J.D. 2019, The George Washington University Law School; B.A. in Political Science and Government 2016, The George Washington University.

1. John B. Bellinger III, *The Trump Administration Throws Down the Gauntlet to the ICC. The Court Should Decline the Challenge*, INTERNATIONALIST BLOG (Sept. 11, 2018), <https://www.cfr.org/blog/trump-administration-throws-down-gauntlet-icc-court-should-decline-challenge>.

2. *Id.*

national institutions and resign from global leadership. Reverse what Barack Obama did . . . [and] [w]hen in doubt, adopt an isolationist ‘hard power posture.’”³ However, Koh notes that this approach to foreign policy has failed to achieve many of the Trump Administration’s policy objectives due to “transnational legal process;” a hybrid body of law that is simultaneously domestic and global, public and private, that has resulted in the internalization of a rules-based order by international organizations, nation-states, and sub-national entities, including local governments and corporations.

The Trump Administration and International Law approaches the Administration’s interactions with international law and transnational legal process in four sections. The first section has a domestic focus and examines two situations: the Administration’s Travel Ban and then Candidate Trump’s proclaimed desire to reinstate the use of waterboarding in counter-terrorism operations.⁴ Koh demonstrates how transnational legal process was a driving force behind much of the opposition to the Administration’s Travel Ban, pointing to the swift legal challenges to the Travel Ban in Federal Court, the refusal by then Acting Attorney General Sally Yates to defend the Travel Ban in court, and widespread international criticism of the Travel Ban from members of the G-20 and many of America’s closest allies.⁵ To illustrate his second example of transnational legal process at work domestically, Koh identifies the appointment of former military officials to civilian national security posts who have internalized international legal principles forbidding the use of torture, as the driving force behind the nullification of Candidate Trump’s announcements that the United States would reinstate the use of “waterboarding and a hell of a lot worse than waterboarding.”⁶

Koh’s second section, “Resigning Without Leaving,” examines the Trump Administration’s disengagement from international treaty regimes—the Paris Agreement on Climate Change, the Trans-Pacific Partnership (TPP), and the Iran Nuclear Deal—the United States joined, or planned to join, under the Obama Administration. Koh demonstrates how the Administration’s decision to withdraw from the Paris Agreement did not “legally disengage” the United States from the Agreement, as the Agreement’s terms

3. HAROLD HONGJU KOH, *TRUMP ADMINISTRATION AND INTERNATIONAL LAW* 13 (2019)

4. *Id.* at 22, 34.

5. *Id.* at 24–26.

6. *Id.* at 34.

provide that a party cannot give notice of withdrawal “until three years from the date on which the agreement has entered force.”⁷ Koh argues that in announcing its intent to withdraw from the Paris Accords, the United States merely identified itself as a lame duck, which has led the international community to look to sub-national actors in the United States—states, localities, and corporations—to meet America’s pledged greenhouse gas emissions reduction targets. This, according to Koh, is transnational legal process at work.⁸ In the same vein, Koh argues that the Trump Administration’s withdrawal from the Iran Nuclear Deal has not had the effect of dismantling the agreement. Instead, as the other members have continued to comply with its terms, European members of the Deal have proposed to expand this agreement beyond nuclear weapons capacity.⁹ Koh’s point: transnational legal process continues even in the face of American disengagement, leaving the United States isolated in the eyes of the international community and at risk of alienating our trading partners and allies.

Koh then turns to the Trump Administration’s efforts at trade diplomacy to demonstrate how the Administration’s aggressive efforts to renegotiate America’s trade agreements have left the United States with an expanded trade deficit in goods. Beginning with the Trump Administration’s withdrawal from the TPP, Koh outlines how the remaining members of the agreement went ahead with a modified version, leaving the United States on the sidelines. Similarly, Koh points to the Trump Administration’s difficulty in renegotiating the North American Free Trade Agreement and the Republic of Korea-U.S. Free Trade Agreement as evidence of the challenges the Administration has had, and will continue to face, as it seeks to unilaterally rewrite American trade policy in a world that is increasingly reliant on multilateral trade regimes.

Sections three and four critique the Trump Administration’s disengagement-hard-power based approach to international diplomacy while offering a blueprint for engaging with “countries of concern”—namely North Korea, the Russian Federation, and Ukraine—and policy proscriptions for winding-down America’s military engagements in the Middle-East. This is perhaps the most ambitious section of *The Trump Administration and International Law* as Koh seeks to address some of the most pressing and vexing issues facing American foreign policy officials to date, ranging

7. *Id.* at 40–41.

8. *Id.* at 52.

9. *Id.* at 65.

from North Korean denuclearization, an increasingly aggressive Russian Federation, ending America's war in Afghanistan, addressing Al Qaeda and the Islamic State, and the ongoing humanitarian crisis in Syria. While his proposals are unlikely to become policy during the Trump Administration, Koh offers readers with a "Smart-Power" based alternative vision for American foreign policy, policies similar to those promoted by former Secretary of State Hillary Clinton during her 2016 presidential campaign.

In the final section of the *Trump Administration and International Law*, Koh explores whether the Trump Administration's disdain for international law is not a cause but rather a symptom of a resurgence in global authoritarianism that threatens to undermine the Post-World War II rules-based international order.¹⁰ Although the focus of Koh's book is the Trump Administration and International Law, these final notes leave the reader with far more questions than they answer. If the Trump Presidency is merely a symptom of a broader resurgence in global authoritarianism, what is the cause of this global resurgence? Koh does not offer an answer to this question. However, this question is one that international leaders and policymakers committed to maintaining a rule-of-law based international order sorely need to address.

At its core, *The Trump Administration and International Law* is a cautionary tale, a warning that the post-World War II Kantian international order is under siege. It is also a clarion call to arms for members of the legal community who share Koh's belief that "we are all participants in transnational legal process" and have an obligation to ensure that the "moral arc of history . . . bends toward justice."¹¹ Koh's timely work is a sobering reminder that President Trump's "relentless disdain for international law may undo the 'stickiness' of our standing rules and institutions" and usher in the collapse of our rules based international order.¹² For this reason alone *The Trump Administration and International Law* is a worthy read.

10. *Id.* at 142–43.

11. *Id.* at 153.

12. *Id.* at 16.