

**IN DEFENSE OF INTERNATIONAL LAW:  
HAROLD HONGJU KOH ON CONTEMPORARY CHALLENGES TO THE GLOBAL  
LEGAL ORDER**

Harold Hongju Koh is Sterling Professor of International Law at Yale Law School. He returned to Yale Law School in January 2013 after serving for nearly four years as the 22nd Legal Advisor of the U.S. Department of State. Professor Koh is one of the country's leading experts in public and private international law, national security law, and human rights. He holds a B.A. degree from Harvard College and B.A. and M.A. degrees from Oxford University, where he was a Marshall Scholar. He earned his J.D. from Harvard Law School.

***World Outlook:** Looking back on your time in the State Department, what were some of the projects you worked on, and what were your proudest achievements?*

**Harold Hongju Koh:** I had two stints at the State Department: first as Assistant Secretary for Human Rights from 1990 to 2000, and second as Legal Advisor from 2009 to 2011. My first post was at the end of the Clinton administration and my second was during the Obama administration. I worked with two great bosses and leaders: Madeline Albright and Hillary Clinton. Both of them have become good friends of mine and I think the world of both of them. In each situation I got to work with really phenomenal and talented people, so I love the State Department as an institution. The first time around I worked on Kosovo, East Timor, North Korea, and Sierra Leone - the human rights crises of the day. One moment of continuity was that I went to Kosovo when the U.S. was using humanitarian intervention to free Kosovo in the late 1990s, and then argued for Kosovo's legal independence at the International Court of Justice when I was Legal Advisor. My second time around, I worked on everything that crossed the State Department's plate, including drones, Guantanamo [Bay], the Paris climate deal, and the Arab Spring (which were a very challenging set of experiences), and Wikileaks. The most compressed experience was probably the release of Chen Guangcheng, a blind Chinese activist who came into the U.S. embassy. We were there for fourteen days and got him out and into the United States without destroying the relationship between the U.S. and China.

It's hard to know which I would pick as the biggest accomplishment. We announced the first set of rules on cyberwar. I set up the first linkages between the U.S. Supreme Court, the European Court of Human Rights, and the European Court of International Justice. It's sort of like asking what your favorite moment in college was. A lot happened in four years.

***WO:** What were some places you wanted to make progress but hit a wall?*

**HHK:** I think we should have closed Guantanamo. I think it was a mistake that we

didn't and I think we'll regret it.

*WO: How do you predict American exceptionalism in global leadership will be affected by the Trump administration's foreign policy and use of legal doctrines?*

**HHK:** A few years ago, I wrote an article in the Stanford Law Review on American exceptionalism. I said there were two kinds of exceptionalism – positive exceptionalism and negative exceptionalism. Positive exceptionalism is exceptional American leadership. Negative exceptionalism is when America tries to exempt itself from international rules. What people don't quite get is that everybody wants positive American exceptionalism because it's the only way to get things done on very critical issues. You can't have Middle East peace without American leadership. With negative exceptionalism, it detracts from capacity building.

I think the danger of Trump, which is similar to the danger of George W. Bush, is that the more the U.S. exercises negative exceptionalism, the more it impairs its power to engage in positive exceptionalism. It diminishes the capacity to lead. It happens gradually, so it's a little like someone who has lost their moral authority saying "let's do this." They could be right, but if they don't have moral leadership then nobody is going to follow them. So you can't take influence for granted.

*WO: A common critique of international law is that it is applied selectively. This is apparent with the NATO intervention in Libya's civil war but not in Syria's, even though many of the same international law principles are being violated there. What are some positive and negative aspects of the lack of an international legal enforcer?*

**HHK:** You have to distinguish between spotty enforcement and there being no rule. If people break into cars in Hanover, New Hampshire, that doesn't mean it's not illegal to break into a car. It just means the law is not perfectly enforced. Domestic law is easier to understand. We have an executive, judicial, and legislative branch. Congress passes the law, the president enforces it, and the court decides whether it's lawful. It's a simple process. International law is enforced by a complex process I call the transnational legal process, where there are many legal enforcers. The president is an important actor, but is by no means the only one. And so what ends up happening is that there are default patterns of behavior that are created by law. And when you have a default pattern, there's an impulse to follow it. It's harder to break away from that than you think.

We're seeing Trump claim to want to make radical changes. As we speak today, the immigration order from January 27 was in existence for about twelve hours, which were twelve hours of chaos, and since then it's been blocked. The thing about selective enforcement is enforcers have to get together to make sure that important rules

are followed. If on this campus you suddenly had a violation of free speech, I'm sure all the students would get together and march to make sure it didn't happen again, even if they didn't agree with the speech. You can call that selective enforcement, but in fact it's this complex enforcement process playing out. I think it's very interesting to watch. In other words, it's easy for people who aren't lawyers to think that the law doesn't belong to the people, but it sure does. And we have a president who is coming to understand that he doesn't own the law.

*WO: What are the international law consequences of increasing isolationism among world powers, notably Trump's campaign rhetoric and Brexit? Do you think international issues will increasingly be addressed unilaterally rather than through coalitions or international organizations as a consequence of this isolationist impulse?*

**HHK:** First of all, it's early days for Trump. There's no way he's going to leave NATO. One of the perils of making a lot of shallow promises is that when you back away from those promises, it doesn't make any sense. People will notice you broke away from your promise. That's a process of education. Brexit is a serious mistake. One of the dangers of popular democracy is that people have to be well informed. Demagogues can mischaracterize decisions to voters, which can lead to mistakes like Brexit. It turned out before Brexit, leaders told the public that the money going to Brussels would come back in, but the day after they said "it's not true." Europe and the UK are so deeply integrated now; it's just very hard to unscramble those eggs. The biggest point though is that there are pendulum swings, and the actual path is closer to staying on track. On one hand, these guys act like they're making dramatic changes, but they tend to go back toward the default, and there's a reason that something can come from this result. It might be the thing that best represents everyone's interests and concerns. The Brits have an expression – Keep Calm and Carry On – and that's what we have to do about Brexit: it's not over until it's over. And the Brexit vote was on June 2nd. Today's date is February 16th. It's been blocked by the Supreme Court of the UK and they're not even close to giving the notice. There's similarity there with Trump. There's a difference between talk and action.

*WO: Recently we have seen action from other countries that may not have been at the forefront of global leadership before, like Germany regarding the refugee crisis or China investing in infrastructure development in Sub-Saharan Africa. Who are other key players in the game who may be willing to take up the mantle of global leadership if the UK and U.S. follow through on threats to step back?*

**HHK:** Well the BRICS (Brazil, South Africa, India, China) played a big role in climate change. And some other countries like Canada, New Zealand, and Australia. On different issues there are different coalitions of countries that can make a difference. But these people don't think the big powers don't own the interests. One reason we're

at an important moment is that there's a big difference between spheres of influence and real cooperation in the world of law. And spheres of influence is what we had with the Monroe Doctrine and similar policies, but real cooperation in the role of law means everyone plays by the same rules. That system has been led by the U.S. for as long as I've been alive. I think what's at risk is that the U.S. will sacrifice that position and no one will step in. I think Angela Merkel is doing a brilliant job and deserves credit.

*WO: When Obama's Deferred Action for Childhood Arrivals (DACA) plan was struck down, it represented a check on executive power in immigration. Do you think that precedent will withstand the current administration?*

**HHK:** It's happening already. The states of Washington and Minnesota just won a suit against Trump on immigration. There's a difference though between policies that are smart and self-sustaining, and policies that are dumb and likely to fail. We have millions of immigrants in the country and the ones who are going to school and doing well in public universities are the people most likely to make a big contribution and become citizens. So if you're going to have a procedure where you prioritize how you deport people, you always put those people last. All the Obama program did was say this formally. Now, in the early days of the Trump administration, we have these immigration raids going after people with criminal offenses. The question is are they picking the right people. You can have a violation for turning on a traffic signal! But the question is how much people really want federal money to be going to a wall or to a deportation force. American people don't like wasting money on stupid things.

It's early days, but what you want to watch is what are the real priorities of this administration. I think their real commitments are minor and if they get resistance they'll shift to something else. Republicans are angry at Trump because he's making few friends with this immigration business: it wasn't their priority. In the UK you can have a coalition government where two minority groups combine and control the government for a while, but if you break them apart they're both minority groups. The overlap between the Republicans' interests and Trump's interests are pretty small. There are so many issues that they disagree on. And if they pick a bunch of wedge issues, then it turns out that one side will distance themselves. Look what happened with the Secretary of Labor. Trump picked him because it's a personal relationship and did a terrible job vetting him. Few Republicans defended him so they had to pull his nomination. And it's only day thirty.

*WO: You've written about how whistleblowing puts civil servants and military servicemen in danger, and hold the opinion that these are crimes that should be punished by law. In light of recent concerns about the Trump administration's practice of concealing or deleting information regarding climate change data, tax releases, or the President's relationship with*

*Russia, have your personal or legal views softened on the issue?*

**HKK:** No. There's a difference between whistleblowing and truthfulness. Take the Pentagon Papers case, in which whistleblowers turned documents over to the New York Times and the Washington Post, which are reputable journals with processes for vetting and selecting what to publish. That's different from the case of Julian Assange, who I do not think was a hero and was very openly uninterested in what the negative consequences were in bringing all of this stuff up. In fact, Wikileaks published the names and addresses of human rights workers who were all of a sudden in jeopardy in countries across the world – this was all about publicity and not about doing the right thing. Now that means that you need to have whistleblowing but according to certain rules. Everybody was praising Wikileaks, but now it turns out all they're doing is giving stuff to the Russians; during the election Wikileaks was not acting in a bipartisan way or according to journalistic conventions. In some strange way they were trying to influence the outcome, to bring us Donald Trump.

So I think there's a place for whistleblowing and there's a place for confidentiality. Let's use an example: suppose you're in a student group and you have an agreement that you're not going to tell anybody what people say. Every single person in the world is part of some group that has a rule of confidentiality that you don't likely breach because it allows the group to function. And I think we've acknowledged that. Things that the government does require some degree of confidentiality, at least for a certain period of time. We also have other ways to make information transparent such as the Freedom of Information Act, I'm certainly all for that. I'm for the government proactively revealing information, I'm for freedom of information, I'm for the orderly disposition of information.

*WO: But if the government were not to freely disclose that information, do you think there is a place for that kind of behavior, like the scientists trying to preserve government climate change data before it disappears from the White House website?*

**HKK:** In terms of the Wikileaks account, no. Who is Julian Assange accountable to? Himself. I think powerful institutions should be accountable. WikiLeaks has become a powerful institution and that's supposedly their model, but if you want accountability you have to explain what your principles are and consider if your rules for distributing information are you favoring one side or the other. The cult of Assange I think is a sad thing. Take another person you know, Chelsea Manning, who is in a very sad situation and has already paid a price in terms of punishment. This is a person who is very young who I think should be given another chance. Assange, on the other hand, has a long history of very strange and antisocial behavior.

*WO: Drones and torture are issues that get a lot of public attention, but what are some others international law issues that you think will become salient in the coming years?*

**HKK:** How we make agreements and how we break agreements. I have an article in the Harvard Law Journal about this issue, which argues that it was lawful to enter the Paris Climate Change agreement and that Trump can't get out of it so easily. How we make deals is extremely important, and it's not something that private citizens understand very well. International law and emerging technology is huge, and so is reproductive technology. One of the most interesting things that happened when I was in the government was a lesbian couple decided to have a baby by in vitro fertilization. One mother is American and the other is not; the American woman carried the baby to term and the fertilized egg was implanted in her body, but the child was born in the other mother's country. The sperm that created that egg was from an American sperm bank; because of confidentiality reasons we don't actually know what the citizenship was of the sperm donor. So the baby's born of an American mother in a foreign country, and the question is what is the nationality of the baby? Now if the mother had done this through the traditional process, the kid would be American because mother and child have a "natural relationship," which is typically construed to mean shared DNA. In this case mother and child do not share DNA, but she did carry the baby for nine months in her body, which I argue was a different kind of natural relationship: gestational rather than genetic. Otherwise the baby would be stateless and have no passport, right? You can't survive in this world without one.

Literally every day I ran across an issue that had something related to emerging technologies, and you have to adjust your perspective to meet these challenges. There are two ways to address a new issue. One is to say, "nobody thought about it, so it's a black hole, there is no law, and you can do whatever you want." The problem with that is that the powerful get what they want. The other way is to translate existing rules to the current situation in the spirit of the laws. Now people can disagree when you translate things, but you're at least trying to apply law. Someone could disagree with my view that a gestational baby has a natural relationship with the mother, and then launch a legal debate about the definition of "natural," but the debate happening within the framework of law, not outside of it.

**WO:** *Have you ever had to balance a clash between your personal ethics and your professional duty, and how did you resolve that tension?*

**HKK:** Not really. When I went to the government I said to Madeline Albright that I could defend any decision that I was a part of, because there was an opportunity to make my voice heard and ultimately the decision was hers to make. Also, I could leave at any time because I have tenure: if I don't like it, I leave and I make more money and I work less hard. But I never thought about leaving because I respect those decisions, and I don't do anything I don't believe in. That's why you should work with people you believe in. Do I agree with Hillary Clinton or Barack Obama about every single

thing? No, but do I generally agree with them? Do I think they're good people? Do I think they're the right guys for the job? Yes. I don't agree with Trump and I could never work with him, because I don't respect him as an intellectual person. Why would you work for a person you don't respect? Life is too short. As I like to say to my students, you're only as good as the principals who you work for and the principles that you stand for.

**WO:** *What advice would you give to undergraduate students who are in the process of applying to law school, and what qualities make successful law students?*

**HKK:** What qualities make successful law students? Honesty, hard work, resilience. So honesty: you have to take a hard look at a case and say how strong it is or how weak it is, and you don't do anybody favors by saying a case is stronger than it is. Hard work, there's just no substitute for it. People talk about imaginary people who are brilliant and do things effortlessly. I don't know anyone who is really that way – successful people work hard. And resilience – everything won't go your way and you'll get knocked down, but you have to get back up – I think that's the theme of every Rocky movie.

Those considering a legal career should get to know lawyers. Talk to lawyers, understand what they do in their life and see whether it's something you find exciting and attractive. I didn't know that many lawyers growing up – my father was legally trained but he wasn't a practicing lawyer. I'd never been in a courthouse I'd never been in a courtroom. I didn't know any judges. I didn't even know that many people who'd gone to law school, but they're all around you and worth seeking out. One of the greatest challenges is how you consider your education when you're not in a great university. In university you often take your education for granted, but in life you teach yourself. So you have to teach yourself how to read and how to learn about the world and how to keep yourself informed. You know we have a president now who has a very short attention span, he says it himself, and he doesn't read much, and there's a cost to that – we're seeing that cost. One of them is that he doesn't see connections between things. Bill Clinton likes to say that some people can see around corners because they think through things all the way to the end; they don't just do the thing that's most attractive to them at that moment. You want to get experienced at thinking down the road – when my own children were little I'd say to them every day, “think ahead, think ahead, think ahead. Have you thought ahead enough?” and now I'm glad to say they think very far ahead. Don't act on impulse, act on reason.