

Applying Harold Koh's Transnational Legal Model to Current Human Rights Challenges

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For four decades, Harold Koh has been a pivotal figure in the evolving human rights movement. He has advanced scholarship on human rights in the legal academy as a distinguished professor and dean of Yale Law School.¹ He has served in four administrations and in both the Justice and State Departments, working on human rights issues in the Obama administration as the State Department's legal adviser and in the Clinton administration as the assistant secretary of state for democracy, human rights, and labor.² He also has been a leading human rights lawyer outside of government, litigating a wide range of high-profile cases in U.S. and international courts.³

In each of these pursuits, Koh has demonstrated a remarkable intellectual capacity and energy—a rare ability to marry theory and practice. Other scholars might have come up with a theory like his transnational legal process (with Koh's engage-translate-leverage framework).⁴ Diplomats and foreign policy types analyze the value of U.S. engagement with the International Criminal Court and the United Nations Human Rights Council. Many lawyers and legal experts have commented on the visa ban and subjects relating to national security, such as the rules governing security detentions, interrogations, and drones. But Koh does all three and merges these discussions with ease and to the benefit of all.

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¹ *Harold Hongju Koh*, YALE L. SCH., <https://perma.cc/WE3M-PHN7>.

² *See id.*

³ *Id.*

⁴ *See* Harold Hongju Koh, *Twenty-First-Century Problems—Twentieth-Century International Law*, 46 CASE W. RESV. J. INT'L L. 545, 551 (2014) (describing the engage-translate-leverage framework).

Central to all his engagements is a deeply held belief that international law is real and that it reinforces smart policymaking, both at home and abroad. He has observed that “[w]hat Jeremy Bentham once called ‘inter-national law’—the law between and among sovereign nations—has evolved into a hybrid body of international and domestic law developed by a large number of public and private transnational actors.”⁵ He sees this ever-evolving process as being shaped by various levels and branches of governments, the media, nongovernmental organizations, intergovernmental organizations, and engaged individuals.⁶ Koh has advanced this framework for a number of years, and he elaborated on it in detail in his 2018 book, *The Trump Administration and International Law*.⁷

The Trump administration—and especially the former president—rejected Koh’s worldview entirely, asserting, in essence, that international norms or laws should not bind U.S. government conduct.⁸ Under the banner of “America First,” President Donald Trump held that the United States should act based solely “on its perceived national interests, not international rules.”⁹ His America First agenda seemed to rely almost exclusively on hard power, leaving little room for multilateral diplomatic engagement or the law to help solve pressing international problems.¹⁰

Since assuming office in January 2021, the Biden administration has made clear its intention to reverse ground and return to a more rule-based approach to international affairs, including a commitment to promoting human rights.¹¹ Its approach embraces Koh’s fidelity to international law. This is both the right thing to do and will strengthen U.S. interests and the United States’ standing in the world. As the new administration works to apply these commitments, it will face at least three major challenges.

First, the Biden administration will need to restore international partners’ faith in the United States, giving them renewed

⁵ Harold Hongju Koh, *The Trump Administration and International Law*, 56 WASHBURN L.J. 413, 415 (2017).

⁶ *Id.*

⁷ See generally HAROLD HONGJU KOH, *THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW* (2018).

⁸ *Id.* at 13.

⁹ *Id.*

¹⁰ *Id.*

¹¹ See, e.g., Carol E. Lee, *Biden to Give First Major Foreign Policy Address on ‘Restoring America’s Place in the World’*, NBC NEWS (Jan. 29, 2021), <https://perma.cc/F4ZJ-758Q>.

confidence that the U.S. government can be a positive force for human rights. This confidence was badly damaged during the Trump years and will not be restored rapidly or without a concerted and sustained effort.¹² Though the Biden team has quickly announced a return to international organizations and agreements—including the Paris Climate Accord, the World Health Organization, and the United Nations Human Rights Council¹³—it will take a range of actions by U.S. diplomats and political leaders to regain our closest democratic partners' trust and willingness to fully engage. The abrupt and chaotic departure by the United States and its allies from Afghanistan in August 2021 strained those ties. While many shared President Biden's determination to leave Afghanistan,¹⁴ the lack of adequate consultation with allies and the inability to get tens of thousands of vulnerable Afghans out of the country undermined confidence in U.S. leadership and will make renewed engagement more challenging.

A second set of challenges relates to the backsliding on human rights that has taken place over the last four years in a number of countries—from Egypt to Hungary, from Ethiopia to the Philippines, from Russia to Turkey, and from India to Saudi Arabia.¹⁵ In these and other countries, the Trump administration failed to effectively challenge violations as they were occurring.¹⁶ All too often, President Trump extolled the virtues of their autocratic leaders.¹⁷ Now, as the new administration attempts to recalibrate bilateral relations, it must do so based on current conditions and relations, not on where things stood four years ago.

Saudi Arabia presents an early test and illustrates the challenges that the Biden administration faces. Though, to its credit, the administration released a U.S. intelligence report linking

¹² Cf. Harold Hongju Koh, *America's Post-Trump Reckoning*, JAPAN TIMES (Dec. 29, 2020), <https://perma.cc/S7S3-YUFK> (noting that Trump's approach has "devastated long-standing relationships and alliances originally built on genuine bonds of mutual interest, affection, confidence, trust, cooperation and sacrifice").

¹³ Adam Edelman, *Biden Administration to Rejoin U.N. Human Rights Council in Another Reversal of Trump*, NBC NEWS (Feb. 8, 2021), <https://perma.cc/5UU2-P2ZA>.

¹⁴ Catherine Lucey & Joshua Jamerson, *Americans Back Afghanistan Withdrawal, Lament Chaotic Exit*, WALL ST. J. (last updated Aug. 29, 2021), <https://www.wsj.com/articles/americans-back-afghanistan-withdrawal-lament-chaotic-exit-11630231201>.

¹⁵ See KOH, *supra* note 7, at 145–46 (discussing human rights abuses in Turkey, Venezuela, sub-Saharan Africa, and the "illiberal democracies" of Hungary, Poland, the Philippines, Turkey, and Venezuela).

¹⁶ See *id.* at 34.

¹⁷ See *id.* (noting that President Trump congratulated President Recep Tayyip Erdoğan "after visibly irregular elections and an attack by Turkish guards on demonstrators outside the Turkish embassy in Washington, D.C.").

Saudi Crown Prince Mohammed bin Salman to the murder of journalist Jamal Khashoggi, it has thus far failed to directly penalize the Crown Prince for his involvement in Khashoggi's brutal murder.¹⁸ To be sure, U.S. relations with Saudi Arabia involve important strategic interests that the Biden team needs to advance.¹⁹ But the administration will be tested on its ability to balance these interests and core values. This means advancing strong human rights policies in tough places like Saudi Arabia.

A third major challenge facing the new administration is posed by China. It pertains both to China's increasingly prominent global influence—particularly through the Belt and Road Initiative, China's ambitious economic development strategy.²⁰ Like Trump, Chinese Premier Xi Jinping places little stock in the rule of law or human rights.²¹ He views the law mostly as a tool through which he can quell dissent and consolidate his own power. Accordingly, he seeks to advance China's global influence by offering aid and trade agreements under terms that exclude any consideration of human rights.²² Not surprisingly, many poor countries—especially those governed by authoritarian leaders—are eager to embrace this values-free model.²³ Given today's increasingly fierce competition for influence between the United States and China, the Biden team will face stiff headwinds as they assert the importance of human rights in the content of these relationships. But rather than retreating from its commitment to democracy and human rights, the United States needs to find ways to support human rights, including by standing with those within each society who are fighting for democracy and human rights.

¹⁸ David E. Sanger, *Biden Won't Penalize Saudi Crown Prince over Khashoggi's Killing, Fearing Relations Breach*, N.Y. TIMES (Feb. 28, 2021), <https://perma.cc/6ZM6-U596>.

¹⁹ See Ben Hubbard, *In Confronting Saudi Arabia, Biden Tiptoes with a Close Ally*, N.Y. TIMES (Feb. 28, 2021), <https://perma.cc/B53H-CJQH>.

²⁰ For a primer on the Belt and Road Initiative, see Andrew Chatzky & James McBride, *China's Massive Belt and Road Initiative*, COUNCIL ON FOREIGN RELS. (Jan. 28, 2020), <https://perma.cc/V46B-4LZ4>.

²¹ See Kenneth Roth, *China's Global Threat to Human Rights*, in WORLD REPORT 2020, 1 (HUM. RTS. WATCH ed., 2020).

²² See, e.g., James Griffiths, *Neither Human Rights Concerns nor US Disapproval Could Stop the EU-China Investment Agreement*, CNN (Dec. 31, 2020), <https://perma.cc/5ATK-73ZA>.

²³ See Henry Ridgewell, *China Rejects Human Rights Criticism as EU Seeks Trade Rebalance*, VOA NEWS (Sept. 15, 2020), <https://perma.cc/BDL4-UYSW> (noting that during 2020 trade negotiations "Xi rejected any interference in Chinese affairs . . . particularly on human rights").

Within China, Xi's government has escalated a pattern of human rights violations since Xi came to power in 2013.²⁴ In the last four years, Xi's government has cracked down hard on the Uyghurs in Xinjiang province, detaining more than a million people and subjecting them to massive deprivations of human rights.²⁵ In the tail end of the Trump administration, the United States declared Chinese actions in Xinjiang a genocide, a designation that the Biden administration has now endorsed.²⁶ The U.S. government has been extremely reluctant to designate cases of genocide in the past, only making this designation a handful of times and never for a country with China's economic, political, or strategic significance.²⁷ Policymakers in the new administration must walk a challenging line in navigating the considerable U.S. bilateral interests with China while pursuing measures that address the ongoing human rights crisis in Xinjiang.

Hong Kong presents another wrinkle in U.S.-China relations under the Biden administration, and it's one where Koh's global legal theory is perhaps most relevant. For more than two decades—since the British departed Hong Kong in 1997—the people of Hong Kong have been surprisingly successful in maintaining independent courts, a free press, and a vibrant civil society.²⁸ They have done this under the “one country, two systems” formula that the British negotiated with Beijing prior to their departure.²⁹

A big part of Hong Kong's success was a culturally deep-seated obedience to the law.³⁰ As Koh has written, “[M]ost compliance with law comes not from coercion, but from *patterns of obedience*.”³¹ As he explains:

²⁴ See Roth, *supra* note 21.

²⁵ Matthew Hill, David Campanale & Joel Gunter, *Their Goal Is to Destroy Everyone: Uighur Camp Detainees Allege Systematic Rape*, BBC NEWS (Feb. 2, 2021), <https://perma.cc/F8D4-NWEN>.

²⁶ John Hudson, *As Tensions with China Grow, Biden Administration Formalizes Genocide Declaration Against Beijing*, WASH. POST (Mar. 30, 2021), <https://perma.cc/J8FN-XXAZ>.

²⁷ See TODD F. BUCHWALD & ADAM KEITH, U.S. HOLOCAUST MEM'L MUSEUM, *BY ANY OTHER NAME: HOW, WHEN, AND WHY THE US GOVERNMENT HAS MADE GENOCIDE DETERMINATIONS* 3 (2019).

²⁸ Matthew Brooker, *The Twilight of Hong Kong's Independent Judiciary*, BLOOMBERG (Mar. 5, 2021), <https://perma.cc/CUP7-UKG7>.

²⁹ Rick Gladstone, *What Happens to Hong Kong Now?*, N.Y. TIMES (May 21, 2020), <https://perma.cc/GN5C-3PW8>.

³⁰ See Austin Ramzy, *Hong Kong's Courts Are Still Independent. Some Want to Rein Them In.*, N.Y. TIMES (Nov. 30, 2020), <https://perma.cc/M2C6-3JY4>.

³¹ KOH, *supra* note 7, at 415 (emphasis in original).

The prime reason why law-abiding people don't regularly steal from each other is not because it's illegal, or because they fear detection, but because they have internalized a norm, probably learned from their parents, in school or at church, that ethical and law-abiding people do not steal. Internalized norms, not coercion, are the main drivers of legal obedience.³²

This describes the culture of Hong Kong, where legal obedience has come from this internalization of norms.

As Koh observes, "Once norms have been internalized by individuals and institutions, they become habits that, once learned, are not easily abandoned"³³ and are "surprisingly hard to break."³⁴ This is exactly what is happening in Hong Kong today. It helps to explain why the Chinese government is having such a hard time persuading the people of Hong Kong to capitulate to its rigid authoritarian model. Even as Chinese authorities continue a wave of arrests of democratic activists and human rights lawyers, and as tens of thousands of Hong Kong residents flee, there is an opportunity for the United States and other democratic governments to support those who stay and continue to fight for human rights in Hong Kong.

As we offer this support, our commitment to international and transnational law will be a powerful force and a core element of our smart power. More importantly, in places like Hong Kong, where core rights are imperiled, an embrace of what Koh sees as an evolving transnational legal process should serve as a framework for advocacy and a basis for hope.

The Biden administration faces at least three significant challenges in navigating international diplomacy. First, it must restore faith in the United States' capacity to be a force for good on the international stage. Second, it must address backsliding on human rights throughout the world. Third, it must navigate a fraught relationship with China. Koh's framework will be especially helpful in overcoming the first and most important of these challenges, helping to restore the credibility of the United States as a global leader. Leadership requires more than economic or military might. It needs to be rooted in a demonstrated commitment to live by the global rules of the road and to be part of an

³² *Id.* at 416.

³³ *Id.*

³⁴ *Id.* at 465.

international community with shared values and commitments. Fidelity to the international law of human rights is the cornerstone of the commitments. In addressing all these challenges, Koh's framework offers an insightful—and hopeful—path forward.