

# Donald Trump's Policies and International Law

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**Abstract:** This paper specifically examined selected policies and statements under the Donald Trump's Administration and its implications to international law. These policies are: (1) The Travel Ban (Muslim Ban); (2) Waterboarding and Torture; (3) Withdrawal from the Paris Agreement 2015; (4) Withdrawal from Iran's Nuclear Deal (JCPOA); (5) North Korea Strategy; and (6) Recognition of Jerusalem as Capital of Israel.

**Keywords:** Donald Trump, International Law, Travel Ban, Waterboarding, Torture, Paris Agreement, Iran's Nuclear Deal, North Korea, Jerusalem.

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## I. INTRODUCTION

Since Donald J. Trump was elected as the President of the United States of America, issues on international law are consecutively barraging his administration. Many commentators wrote that Trump's actions as the US President always affect the conduct of international law. Being the foremost leader of the known Hegemonic state in the world, Trump's foreign policies and public statements provoked many people throughout the world to react against him, try to understand him as well as to analyze his political behavior.

Specifically, this paper will examine selected policies and statements under the Donald Trump's Administration and its implications to international law. These policies are: (1) The Travel Ban (Muslim Ban); (2) Waterboarding and Torture; (3) Withdrawal from the Paris Agreement 2015; (4) Withdrawal from Iran's Nuclear Deal (JCPOA); (5) North Korea Strategy; and (6) Recognition of Jerusalem as Capital of Israel.

## II. DISCUSSION

### *The Travel Ban or Muslim Ban*

On January 27, 2017, U.S. President Donald Trump signed the Executive Order No. 13769 known as Protecting the Nation From Foreign Terrorist Entry Into the United States<sup>7</sup>. The executive order imposed a "Travel Ban" for ninety (90) days blocking the entry of citizens from the seven (7) predominantly Muslim countries which eventually reduced to six (6) and included North Korea and Venezuela by virtue of the Executive Order No. 13780<sup>8</sup>. It also banned individuals from those countries in re-entering even with valid visas and green cards. Moreover, the order suspended the U.S. Refugees Admissions Program (USRAP) for one hundred twenty (120) days and for an unspecified period of time it blocked all Syrian refugees.

The main purpose of the executive order is to ensure that the United States' territory will not be entered by those individuals with hostile attitudes toward it and its founding principles as well as those who do not support its Constitution and other laws. It also intends to protect its citizens from foreign terrorist attacks and exploitation of its immigration laws for malevolent purposes. However, many protests and complaints were raised against the constitutionality of Trump's policy and its alleged violation of international law. Nevertheless, this paper mainly focuses on the issue of whether or not Trump's executive order is a breach of international law.

The argument against the constitutionality of the E.O. 13769 and 13780 was claimed to be a violation of the Establishment Clause because the executive order predominantly barred the entry of citizens from predominantly Muslim countries, the complainants contend that Trump's E.O. was a clear expression of religious discrimination. It is also argued that it was in violation of the Immigration and Nationality Act (INA) of 1952 where exclusion based on national origin is not allowed.

In the context of international law, since the United States has been a party for a long time in three major related treaties namely, the International Covenant on Civil and Political Rights (1967), the International Convention on the Elimination of All Forms of Racial Discrimination (1969), and the Convention and Protocol Relating to the Status of Refugees (1951), the provisions of the E.O. which could discriminate the said countries because of their religion and place of origin as well as the suspension of the acceptance of refugees are clear violations of these treaties. Besides, the US Constitution acknowledges the Treaties made as part of the supreme law of the land. Based on the foregoing, Trump's Travel Ban implies that the President has not been careful in the execution of the US laws because it is his duty to comply with the US legal obligations under both treaty and customary international law.

The US Supreme Court on the other hand, ruled in favor of the Travel Ban in *Trump vs. Hawaii*, where it decided that the ban was not a violation of the Establishment Clause and of Immigration and Nationality Act. It was discussed that the number of Muslims banned by the E.O. did not comprise the majority of the Muslims in the world so it cannot be counted as racial or religious discrimination. It is also mentioned that Trump has sufficiently fulfilled the requirements to justify national security measures that the entry of the covered aliens would be detrimental to the national interests.

Analyzing both sides, although Trump's Travel Ban was upheld by the Supreme Court as constitutional and protecting national interests, it will still generate some effects and consequences in the reputation of the United States in the international community. Trump's action in this particular issue could create a negative impression to other countries about the US' political commitments in international relations and system which may result to further transnational legal processes that could eventually be encountered by the US.

#### ***Waterboarding and Tortures***

Last January 26, 2017, President Donald Trump gave a controversial statement that he wants to "fight fire with fire" in stopping terrorism. It suggests that he could be willing and open to bring back torture because he believes it really works. He argued that if the ISIS is ruthless in beheading citizens and posting it online, then it is not good that the United States is not allowed to do anything. He also stated during his campaign that when elected, "we'll use waterboarding and a hell of a lot worse than waterboarding." After he was elected, there was a draft executive order disclosed by the press which intends to reinstate the discredited program of interrogation of high-value alien terrorists to be operated at "black sites," former detention facilities under CIA which is outside the United States.

Consequently, Trump was blasted again with many reactions because of his statement that probably may result into actions that will violate human rights. Although, a rhetoric and a draft are not yet laws and not enforceable, the issue in this case is that whether or not Trump made a negative impression to US' integrity in the international community. While Trump wants to protect his country against high-valued alien terrorists, his statement may incur damages against the reputation of the U.S. on its commitment to international law and human rights.

The United States is one of the signatories of the United Nations Convention Against Torture, an international human rights treaty under the United Nations to prevent any form of torture, cruel, inhuman, or degrading punishment around the world. Being party to such Convention, Trump should abide in the agreement not only because it is codified but it is dignified. There is no doubt that as whether or not a state is a party to the Convention it is an obligation of every state to obey customary human rights law which includes the prohibition of torture, genocide, slavery and the prohibition of discrimination. The Universal Declaration on Human Rights (1948) clearly prohibits such practices.

#### ***Withdrawal from the Paris Agreement 2015***

Another controversy about the administration and policies of President Trump was his intention to withdraw from the Paris Agreement 2015. It is an international multilateral agreement aiming to mitigate the effects of the climate change. This Deal was negotiated under the auspices of the United Nations Framework Convention on Climate Change (UNFCCC), a treaty of which the United States became after its Senate gave its advice and consent in 1992. It was reported last June 1, 2017 that President Trump plans to withdraw from this agreement because he does not want to compromise US' economy for the sake of others. He argued that the agreement will just hobble, disadvantage, and impoverish his country. Though his intent to withdraw has no legal force now, the issue is whether or not President Trump could withdraw unilaterally from the Paris Agreement.

In order to understand the legality of Trump's intention to unilaterally withdraw from the said agreement we need to answer these questions: (1) What form of international agreement the Paris Agreement of 2015 is? and (2) What are the

domestic and international policies and practices related to the treaty termination and withdrawal will apply in this case? The United States pacts with foreign nations may be in the form of treaties, executive agreements, or non-legal commitments, which involves the making of political commitments. In this case, the Paris Agreement was considered under the Obama Administration as an executive agreement which does not require senatorial or congressional approval. Interestingly, the US Constitution is very clear when it comes to the procedures in entering into international agreements. However, there is no clear provision about unilateral presidential withdrawal from these agreements. It suggests that if the US domestic law allows the President to enter into executive agreements even without senatorial or congressional advice or consent then it may also claim authority to withdraw from such without seeking the approval from the legislative department.

For purposes of identifying US historical practice in treaty termination, Stephen Mulligan, in his report entitled *Withdrawal from International Agreements: Legal Framework, The Paris Agreement, and The Iran Nuclear Agreement*, enumerated five (5) categories:

1. executive withdrawal or termination pursuant to prior authorization or direction from Congress;
2. executive withdrawal or termination pursuant to prior authorization or direction from the Senate;
3. executive withdrawal or termination without prior authorization, but with subsequent approval by Congress;
4. executive withdrawal or termination without prior authorization, but with subsequent approval by the Senate; and
5. unilateral executive withdrawal or termination without authorization or direction by Congress or the Senate.

The first four (4) methods were practiced during the 19th century, but at the beginning of the 20th century, the fifth method began to be used especially during the Franklin Roosevelt Administration and World War II and thus became the norm. In connection with the unilateral withdrawal from a treaty by the President, *Goldwater v. Carter* discussed the issue relative to President Carter's termination of a treaty with Taiwan. The Court held that the President may terminate which closely involves his foreign relations authority. This must be a political question between the executive and the legislative departments and therefore is not reviewable by the Supreme Court.

Since there is no question about the domestic policy on the President's withdrawal, there is still a need to look at the method of treaty withdrawal and termination under international law. The most authoritative international legal basis for treaty termination and withdrawal is the Vienna Convention on the Law of Treaties (1969). The Convention provides in Article 54 that:

The termination of a treaty or the withdrawal of a party may take place:

- (a) in conformity with the provisions of the treaty; or
- (b) at any time by consent of all the parties after consultation with the other contracting States.

In the case of the Paris Agreement of 2015, Article 54 (a) of the VCLT will apply in terms of termination or withdrawal by any of the parties. Since not the United States did not have the consent of the parties, Article 54 (b) is not applicable. It will become clearer when we look at the Article 28 of the Paris Agreement which provides that:

1. At any time after three years from the date on which this Agreement has entered into force for a Party, that Party may withdraw from this Agreement by giving written notification to the Depositary.
2. Any such withdrawal shall take effect upon expiry of one year from the date of receipt by the Depositary of the notification of withdrawal, or on such later date as may be specified in the notification of withdrawal.
3. Any Party that withdraws from the Convention shall be considered as also having withdrawn from this Agreement.

We can see that the date that the Paris Agreement of 2015 entered into force was November 4, 2016 to which when we apply the above provisions will only allow the parties to complete the withdrawal process until November 4, 2020. Therefore, Trump Administration have no choice but to comply with the requirements of the Agreement until the allowable date of withdrawal.

However, the only option the Trump Administration may do to withdraw from the Agreement is to apply Article 28 (3) which is to withdraw from the UNFCCC. The withdrawal process in the UNFCCC is nearly identical with the Paris

Agreement, but it is possible for Trump to use it because the Convention entered into force in 1994 which means that the three-year withdrawal prohibition had expired. Hence, withdrawal from both the Agreement and the Convention could be consummated within one year. But as Trump did not make any actions to withdraw from the parent treaty, the United States remains a party to the subsidiary Paris Agreement until eligibility to withdraw will be allowable.

#### ***Withdrawal from the Iran's Nuclear Deal (JCPOA)***

On October 13, 2017, President Donald Trump criticized the Joint Comprehensive Plan of Action (JCPOA) related to Iran's nuclear program entered into under Obama Administration in 2015. The JCPOA was finalized by Iran and the P5+1 (United States, United Kingdom, France, Russia, China and Germany) placing limitations on Iran's nuclear program as well as providing voluntary measures in which the P5+1 provides relief from sanctions imposed on Iran in exchange for certain Iranian nuclear related measures. Trump announced that he would not renew certain certifications related to JCPOA, although he has an intention to not comply to certifications, it does not mean that the United States automatically terminate its participation in the JCPOA.

The JCPOA is an unsigned document that encourages "voluntary measures" rather than binding obligations. The previous US administration considered this document as a political commitment that did not require congressional or senatorial approval. There is nothing in domestic law or international law that can prevent Trump in withdrawing from this plan of action. However, on July 20, 2015, the UN Security Council approved the Resolution No. 2231, which on the Implementation Day, terminated the prior sanctions. Although the document of JCPOA rely on "voluntary measures", the U.N. Security Council Resolution 2231 may convert non-binding political commitments in the JCPOA into a legal obligation under the UN Charter. The UN Charter provides in Article 25 that the Council's decisions are legally binding. Usually, the nature of the decisions of the Council depends on the language used in the resolution. It is when we look at the content of the resolution that we can determine if it is binding or non-binding. It happened that the Resolution 2231 is a combination of non-binding recommendation and binding decisions. Another point is that, US Congress did pass a legislation to supervise Iran's compliance with the plan of action and this is known as Iran Nuclear Agreement Review Act.

In view of the above information, we can see that in the context of international law, the issue is whether or not President Trump violates international law in non-performance of its commitments in the JCPOA. By looking at the Article 3633 of the JCPOA it provides for dispute resolution mechanism that can be invoked by the United States or any of the parties if any of them believes that Iran is not complying with the plan of action. If the dispute remains unsettled, Article 36 allows the United States to stop performing its commitments in case Iran's actions constitute "significant non-performance" of the JCPOA. As of now, there is no clear definition of the term "significant non-performance".

#### ***North Korea Strategy***

President Donald Trump statements against North Korea is one of the issues encountered by his administration. Trump issued various threats against North Korea like when he said "fire, fury and frankly power of which this world has never seen before." He also threatened at the UN General Assembly, that he will totally destroy North Korea if did not stop from its harmful activities. This uncontrolled Trump's rhetoric could provoke the unstable leader Kim Jong-Un to do actions which may worsen the situation. This conflict between two egotistical leaders may result into encounters that will serve no one's best interest but will be only destructive.

As we examine the history of nuclear diplomacy, threats are not the best solution to encourage surrendering of weapons. Like Iran and Libya, it is through concerted, unified multilateral diplomacy and relief from sanctions that work better rather than violent threats. We can also notice that when intensive diplomatic dialogue increases, the more the North Korean aggravation decreases. This only implies that diplomacy is the best way to end the North Korean crisis. It is therefore critically advisable that the Trump Administration still abides in the Nuclear Deal and participate in the continuous multilateral dealings on the issue of North Korea.

#### ***Recognition of Jerusalem as Capital of Israel***

On December 6, 2017, President Donald Trump publicly declared his recognition of Jerusalem as the capital of Israel. This statement was so opposite with the past US Administration's foreign policy. He also stated that he will be moving the American embassy from Tel Aviv to Jerusalem. This Trump's decision to recognize Jerusalem will greatly isolate the US to the most sensitive issue in the Middle East. It has brought many criticism and reactions from Arab and European

leaders. It is also inviting threats to peace in the Middle East. Jerusalem as the place sacred to Judaism, Islam and Christianity, is a very important matter on cultural differences. Oppositions argued that careless decisions like what Trump has made will eventually trigger conflicts and struggles on the disputed city. This decision by Trump was widely condemned by the world leaders and international organizations. On the other hand, Trump Administration claimed that this will not promote conflict but will give way to a more realistic peace negotiation. The issue in this case is whether or not Trump's declaration to recognize Jerusalem as the capital of Israel is against international law.

Following the Trump's recognition of Jerusalem as capital of Israel, the UN General Assembly voted for Resolution ES-10/L.22 condemning the US declaration on the status of Jerusalem as null and void. UN General Assembly Resolution No. 181 Partition Plan of November 29, 1947 called for the partition of the British-ruled Palestine into a Jewish State and Arab State. This resolution is also a basis about the internationalization of Jerusalem. The United States was one of the parties who voted in favor of this resolution.

### III. CONCLUSION

The administration of President Donald Trump is obviously challenging the system of international law. Based on the above analyses of the selected policies and statements by Trump, there is always an implication to international relations. The role of international law is still to maintain peace and balance. We can see that when there is an action by Trump there is also an opposite reaction by the international law. As a result, transnational legal processes are increasingly operating.

As Professor Harold Koh explained in his lecture on the Trump Administration and International Law, that every time Trump tries to challenge international law then there comes a counter-strategy which could be from Non-Governmental Organizations (NGOs) or Governmental Organizations (GOs). The counter strategy by these NGOs is also called as outsiders' strategy. This is a process where external actors from different non-state actors will conduct interaction, interpretation and internalization of norm. On the other hand, the internal actors will react through insider's strategy by engaging, translating and leverage. These counter-strategies are unlike Trump's strategy prefer patterns of obedience and persuasion and coercion.

The analogy used by Koh was the "Rope-A-Dope". He explained that when Muhammad Ali fought George Foreman, Ali surprised everyone by retreating to the ropes and letting the champion pound him, taking pains only to avoid getting knocked out. After many rounds, Ali allowed his opponent to punch him out, until in the late rounds, Ali finally came off the ropes and knocked out his now exhausted and weakened opponent. This analogy means that if the Trump Administration threatens to violate international law, actors outside the federal government can apply the external strategy. Meanwhile actors inside committed to international law can continue to pursue the internal strategy.

Trump as the loud player who loudly launches various ineffectual initiatives to change the status quo will force little change, get tired, exhausted, and frustrated from all failing around, and ultimately find himself getting politically "knocked-out."

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