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WHY SHOULD WE CARE ABOUT INTERNATIONAL LAW?

Monica Hakimi*

THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW. By *Harold Hongju Koh*. New York: Oxford University Press. 2018. Pp. 232. \$27.95.

INTRODUCTION

International lawyers are used to having their discipline dismissed. A conspicuous strand of thought in U.S. foreign policy circles—known as realist—posits that international law does not matter. Realists of course recognize that states and other global actors speak the language of international law. But they view this discourse as cheap talk or epiphenomenal. They contend that state decisions on the international plane are animated not by the dictates of international law but by material interests and power. States act consistently with international law insofar as they have independent reasons for acting that way. If those reasons dry up, states, especially powerful states, can just violate the law; because the international legal system lacks centralized enforcement agents, any repercussions for the violation will be determined not by law but by the participants' own interests and power relations. International law is again irrelevant.¹

The realist position goes to the heart of the enterprise, so international relations and legal scholars have devoted enormous energy to refuting it. There is now an expansive literature on the efficacy of international law. Most of this work measures international law's efficacy in terms that realists

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1. This strand of thought has roots in international relations theory. See, e.g., Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 214 (1993) (describing the realist claim that international law is not "capable of producing outcomes significantly *different from* those that a pure power theory would predict"); Richard H. Steinberg, *Wanted - Dead or Alive: Realism in International Law*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 146, 165 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013) ("Without elaboration from other disciplines and approaches, it is hard to identify what 'work' law is doing—how and why it affects behavior and outcomes, and the contexts in which it does so.").

can appreciate, by asking whether international law helps to achieve specific policy outcomes—for example, reductions in greenhouse gas emissions, trade restrictions, or incidents of torture. The analysis ultimately turns on the facts. But it also entrenches a particular view of what makes international law worthwhile. It suggests that international law matters insofar as it advances the material outcomes that it itself prescribes.

Harold Hongju Koh² has contributed enormously to this debate. More than twenty-five years ago, he articulated what is now a foundational theory about the efficacy of international law.³ The theory, in essence, is that states are habituated to comply with international law through a complex transnational legal process. Once a state engages with international law, disparate actors within and outside of government can invoke it to foster “institutional *interaction* whereby global norms are not just debated and *interpreted*, but ultimately *internalized* by domestic legal systems.”⁴ Internalized norms operate as domestic law; they establish “default patterns of international law-observant behavior,” which are “routinized and ‘sticky’ and thus difficult to deviate from without sustained effort” (p. 7). So the reason that international law is effective is that the transnational legal process pushes states toward obeying its mandates and thereby achieving its prescribed outcomes.

In *The Trump Administration and International Law*, Koh argues for reinvigorating this process during the presidency of Donald Trump. The Trump Administration, not coincidentally, describes its foreign policy as realist.⁵ The central message of its “America First” platform has been that international law is not particularly relevant to the uberpowerful United States.⁶ Koh counters that message with two claims about the efficacy of international law. First, international law has constrained U.S. foreign policy and curtailed U.S. disobedience even under President Trump. Second, international law could empower Trump. The president would be more effective at achieving longstanding U.S. foreign policy goals if, instead of dismissing international law, he harnessed it to get things done. To support these claims, Koh works through several policy issues, ranging from immigration to climate change to the denuclearization of the Korean Peninsula. The up-

2. Sterling Professor of International Law, Yale Law School.

3. Harold Hongju Koh, *Refugees, the Courts, and the New World Order*, 1994 UTAH L. REV. 999, 1014–18. For Koh’s two foundational pieces on the transnational legal process, see Harold Hongju Koh, Review Essay, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (reviewing ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995), and THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995)) [hereinafter Koh, *Why Do Nations Obey?*], and Harold Hongju Koh, Lecture, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996).

4. Koh, *Why Do Nations Obey?*, *supra* note 3, at 2602.

5. WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA I (2017) (“An America First National Security Strategy is . . . a strategy of principled realism that is guided by outcomes, not ideology.”).

6. See *infra* Part III.

shot, which is certainly worth highlighting, is that international law can have real operational value, including—perhaps especially—for the United States.

But Koh did not write the book just to reiterate that point. He is clearly worried that Trump is doing damage both to the current international legal order and to the U.S. relationship with it. Thus, he intends for the book to be a “call to action.”⁷ He implores people to keep using the transnational legal process to uphold international law and to fight the Trump Administration’s antagonistic policies.

This is where the book falls short. It does not give readers compelling reasons to fight not just against Donald Trump but for international law. What about international law is both worthwhile and at risk under President Trump? The final chapter—entitled “What’s at Stake”—is meant to address this question, but the answer is cursory. Koh says that Trump threatens the U.S.-led, Kantian global order in which “states collectively explicate shared moral commitments to democracy, the rule of law, individual freedom, and the mutual advantages derived from peaceful intercourse . . . to achieve shared outcomes” (p. 143). As I will discuss, Koh expands on this claim in the rest of the book. But his normative case for international law remains thin. He is not alone. Many people advance similar narratives about international law,⁸ even though many others have argued that these narratives are too pat⁹ or have reported being unmoved by them.¹⁰

So, we still have work to do. Those of us who are invested in international law need to drill down to explain what makes Trump corrosive and why people should care. And to do that, I’ll argue, we need to look beyond the old efficacy debate, which frames international law’s relevance primarily, if not entirely, in terms of the discrete regulatory outcomes that it helps to produce. That frame is too narrow in two respects. The first arguably is im-

7. See Harold Koh, *Trump vs. International Law: He’s Not Winning*, OPINIO JURIS (Oct. 2, 2018), <http://opiniojuris.org/2018/10/02/trump-vs-international-law-hes-not-winning/> [<https://perma.cc/JER8-DCED>].

8. See, e.g., G. JOHN IKENBERRY, *LIBERAL LEVIATHAN: THE ORIGINS, CRISIS, AND TRANSFORMATION OF THE AMERICAN WORLD ORDER* (2011); Ian Hurd, *Enchanted and Disenchanted International Law*, 7 *GLOBAL POL’Y* 96 (2016) (describing the claim’s prevalence and then critiquing it).

9. See, e.g., Graham Allison, Essay, *The Myth of the Liberal Order: From Historical Accident to Conventional Wisdom*, FOREIGN AFF., July/Aug. 2018, at 124; Patrick Porter, Policy Analysis, *A World Imagined: Nostalgia and Liberal Order*, CATO INST. (June 5, 2018), <https://www.cato.org/publications/policy-analysis/world-imagined-nostalgia-liberal-order> (on file with the *Michigan Law Review*).

10. In an extensive study on the foreign policy views of U.S. voters, the partisan Center for American Progress found that “traditional language from foreign policy experts about ‘fighting authoritarianism and dictatorship,’ ‘promoting democracy,’ or ‘working with allies and the international community’ uniformly fell flat. . . . Voters across educational lines simply did not understand what any of these phrases and ideas meant or implied.” John Halpin et al., *America Adrift: How the U.S. Foreign Policy Debate Misses What Voters Really Want*, CTR. FOR AM. PROGRESS (May 5, 2019, 2:00 PM), <https://www.americanprogress.org/issues/security/reports/2019/05/05/469218/america-adrift/> [<https://perma.cc/GMB3-EP77>].

placit in Koh's theory of the transnational legal process. International law shapes behavior in complex and diffuse ways, not all of them captured by indicia of obedience. It might have regulatory purchase, even when its material impact cannot be neatly isolated or measured.

The second point is more fundamental. International law does important work apart from the material outcomes that it produces. In this Review, I draw on insights from legal and political philosophy to advance a claim that, though straightforward, is often elided in American conversations about international law: a lot of what makes law worthwhile, both domestically and at the international level, is that it commits us "to a certain method of arguing about the exercise of public power."¹¹ International law invites people across national borders to communicate in relatively constructive ways about what is happening in the world, why it is happening, and whether anything should be done about it. This discursive practice is not, as some suggest, just cheap talk,¹² a means for achieving concrete ends,¹³ or a smokescreen for reinforcing positions of dominance.¹⁴ It has independent, if somewhat intangible, value. And it is deteriorating under President Trump.

I. INTERNATIONAL LAW AS AN OPERATIONAL TOOL

Koh weaves three normative claims about international law into his book. He variously contends: (1) that international law helps to produce desirable material outcomes, (2) that states should obey it to achieve these outcomes, and (3) that the United States should harness it to exercise leadership in solving concrete problems. These claims are all about international law's

11. Jeremy Waldron, *The Rule of Law as a Theater of Debate*, in DWORIN AND HIS CRITICS 319, 330 (Justine Burley ed., 2004).

12. See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 170–84 (2005).

13. Koh hints at this position in the book. See, e.g., p. 11 (arguing for "blending legal arguments with other tools . . . to achieve complex foreign policy outcomes that cannot be achieved without the legitimacy that international law bestows"); p. 105 ("Going forward, the broader U.S. counterterrorism approach cannot maintain its effectiveness unless it preserves its perceived legality."). However, he has pushed the position more forcefully in other work. For example, he has argued that the U.S. practice of exempting itself from various human rights obligations is "more America's problem than the world's" because "the relevant question is not nonratification but *noncompliance*"—that is, whether the United States is working to achieve the material outcomes that international law prescribes—and the United States has a "practice of . . . *compliance without ratification*." Harold Hongju Koh, Foreword, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1484, 1485 (2003). On the more general suggestion that international law's "justificatory discourse" matters because it "generates pressure on states to behave in accordance with the law," see IAN JOHNSTONE, *THE POWER OF DELIBERATION: INTERNATIONAL LAW, POLITICS AND ORGANIZATIONS* 7 (2011).

14. See, e.g., Stephen D. Krasner, *International Law and International Relations: Together, Apart, Together?*, 1 CHI. J. INT'L L. 93, 94 (2000) ("If there were rules at all, they would be set by powerful states, and these rules would change if the distribution of power changed."); Makau Mutua, *What Is TWAIL?*, 94 AM. SOC'Y INT'L L. PROC. 31, 31 (2000) ("[I]nternational law is illegitimate. It . . . reproduces and sustains the plunder and subordination of the Third World by the West." (footnote omitted)).

efficacy as an operational tool. They are not, in my view, wrong. But they are on their own terms overdrawn or unsubstantiated. They do not make a strong case that people, especially Americans, should support international law or that President Trump poses it an unusual threat.

A. *Material Outcomes*

Koh at times speaks of international law as if its outcomes are self-evidently desirable. For example, he defends the current international legal order on the grounds that it establishes the “basis for our United Nations system to end war and promote human rights, our treaty structure for mutual security (e.g., NATO), and our system to end global depression and poverty” and that it “enable[s] . . . like-minded nations to organize an ambitious multilateral assault on all manner of global problems: e.g., climate change, denuclearization, intellectual property, and global health” (p. 143). This claim is articulated at such a high level of abstraction that it’s hard to imagine a normative objection. Would anyone seriously contend that we need more war or poverty in the world? If international law consistently alleviates such problems, then surely it does good and deserves our support.

One could at this point ask whether international law actually alleviates such problems. On a number of the issues that Koh mentions, the relevant international law is widely perceived to have little or no material impact. But I want to stay focused on the normative question: Assuming that international law is effective in advancing the outcomes that it prescribes, are these outcomes desirable? To substantiate the claim that they are, one needs to defend their actual policy content, not an abstract ideal of what that content might be. For example, let’s stipulate that international law would do good if it created a “system to end war” (p. 143). It does not do that, at least not unless we define “war” so narrowly as to exclude a lot of conduct that looks exactly like war. Positive international law entitles states to conduct military operations in a broad range of circumstances involving the U.N. Security Council’s authorization, the territorial state’s consent, or a justifiable claim of self-defense. It prohibits some armed conflicts but permits many others.¹⁵ To defend the outcomes that international law helps to produce, one would have to justify not only the norms for ending war but also the norms that license it. Koh does not embark on that project.

If Koh had his way, international law would permit states to use military force in more circumstances than it by most accounts already does. He claims that states may occasionally use force without the U.N. Security Council’s authorization or the territorial state’s consent in order to avert humanitarian crises (pp. 127–40). Although this claim has been extensively debated, the majority position continues to be that it does not reflect positive

15. U.N. Charter arts. 39, 51; *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 246 (June 27) (recognizing that an outside state’s forcible intervention “is already allowable at the request of the government of a State”).

law.¹⁶ The persistent debate on it—as on many other issues relating to the use of force—reveals that people disagree, often vehemently, about the outcomes that international law should prescribe. In pushing a claim that is not widely accepted as law, Koh himself suggests that the law must be improved.

None of this should be surprising. It's completely routine for people to disagree about what law should prescribe. But because they disagree, the claim that international law consistently produces desirable outcomes is hard to sustain. Koh's readers are likely to find some of its outcomes appealing and others problematic. They can reasonably ask why they should support not just the specific regulatory arrangements that reflect their own priorities but the entire enterprise of international law, warts and all.

A more modest version of Koh's claim might be that, despite international law's many imperfections, its material impact is, on the whole, positive; it produces more good than harm.¹⁷ Yet even this more modest claim needs to be substantiated.¹⁸ Many people, including on the American political left, are disenchanted by international law, to the extent that they think about it at all. They complain that international law advances a neoliberal economic agenda to the detriment of other social policies, that it systematically underrepresents the priorities of people in the global south, that it in various ways empowers corrupt and repressive governments, that it frustrates the claims to statehood by disenfranchised groups, that it unduly burdens developing states that want to use nuclear technology for clean energy, and so on and so forth.¹⁹ The question thus remains: why should people commit to international law if it produces, or at least does not impede, many material outcomes that they find repellent?

B. *Obedience*

Koh gestures toward an answer with his claim that states should obey international law. This claim to some extent collapses into the first: Why should they obey international law if it does not do good? But we can con-

16. *E.g.*, *Declaration of the South Summit*, GRP.77 S. SUMMIT (Apr. 14, 2000), http://www.g77.org/summit/Declaration_G77Summit.htm [https://perma.cc/4NT7-JASH] (“We reject the so-called ‘right’ of humanitarian intervention”); Christine Gray, *The Use of Force for Humanitarian Purposes*, in RESEARCH HANDBOOK ON INTERNATIONAL CONFLICT AND SECURITY LAW 229, 253 (Nigel D. White & Christian Henderson eds., 2013) (“It is difficult, if not impossible, to make a legal case for the existence of a right of unilateral humanitarian intervention today.”).

17. See pp. 2–3 (“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.”).

18. For one effort, see STEVEN R. RATNER, *THE THIN JUSTICE OF INTERNATIONAL LAW: A MORAL RECKONING OF THE LAW OF NATIONS* (2015).

19. See, *e.g.*, José E. Alvarez & David Lachman, *Address to the American Society of International Law: International Law: 50 Ways It Harms Our Lives* (June 22, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2991336 [https://perma.cc/K8NA-VQVE].

struct a version of the claim that is not contingent on international law's policy content. The claim would be that obedience is valuable in its own right, for reasons that often get lumped together under the rubric of the rule of law.

The rule of law generally refers not to what law is in a jurisprudential sense but to what makes law, as a political project, worthwhile. Why and under what conditions should we aspire to live in a society governed by law? Although accounts of the rule of law differ, the one that is most prominent in international legal circles prioritizes obedience to law, as a way of ensuring that states do not exercise power arbitrarily or unpredictably. In this account, the rule of law requires (1) relatively precise and transparent conduct rules, (2) that are consistently and impartially applied, (3) to constrain the discretion of the people who are in positions to govern.²⁰ Defining the rule of law in these terms puts a normative gloss on Koh's theory about the transnational legal process. To the extent that the process habituates states to "obey" international law, rather than merely conform their behavior to it when convenient,²¹ they end up following and being constrained by its conduct rules, which is what many say the rule of law requires.

But as other scholars have underscored, that account of the rule of law was developed with domestic legal systems in mind and translates poorly to international law.²² In national settings, the main justification for establishing stable conduct rules that constrain governmental discretion is to protect individuals from abuses that might accompany the centralization of power in the hands of the state.²³ Without constraints on state power, the state could arbitrarily or excessively use law to create a living hell for its people; it could establish the rule *by* law instead of the rule *of* law. That risk is more remote with international law. Although international law occasionally also touches

20. See, e.g., U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004); Geert De Baere et al., *International Courts as Keepers of the Rule of Law: Achievements, Challenges, and Opportunities*, 48 N.Y.U. J. INT'L L. & POL. 715, 752, 753 (2016) (arguing that international courts and tribunals contribute to the international rule of law by "rendering the law clearer, more predictable, and more coherent," providing for its "consistent and impartial enforcement," and "ensuring that legal rules prevail over power in the settlement of disputes"); Jutta Brunnée, *Keynote Speech Part III: Challenging International Law: What's New?*, OPINIO JURIS (Nov. 19, 2018), <http://opiniojuris.org/2018/11/19/keynote-speech-part-iii-challenging-international-law-whats-new/> [<https://perma.cc/P92M-JMRY>] (arguing that a pattern of rule breaking and hypocrisy by Western states has helped to undercut the international rule of law).

21. Koh, *Why Do Nations Obey?*, *supra* note 3, at 2603.

22. See IAN HURD, *HOW TO DO THINGS WITH INTERNATIONAL LAW* 19–46 (2017); Jacob Katz Cogan, *Essay, Noncompliance and the International Rule of Law*, 31 YALE J. INT'L L. 189 (2006); Jeremy Waldron, *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, 22 EUR. J. INT'L L. 315, 323 (2011). To be clear, I am not here arguing that international law cannot satisfy the criteria for, or be consonant with, the rule of law. I am arguing that the criteria that many associate with the rule of law are probably the wrong criteria for defining or appraising the rule of law at the international level.

23. See, e.g., Waldron, *supra* note 22, at 317–23.

people directly, as with criminal prosecutions before international courts, its impact on individual lives is usually more attenuated. As Koh's theory highlights, international law is generally mediated through domestic legal systems. Because national actors must take steps to implement it, they ultimately retain the power to make it relevant (or not) in people's lives. Thus, while individuals still need robust protections from governmental decisions at the national level, including perhaps decisions relating to international law, they are, for structural reasons, more shielded from what happens on the international plane.

Some might be tempted to analogize the position of individuals in national law to that of states in international law—to posit that states need comparable protections from arbitrariness and abuse. But the analogy does not work.²⁴ The international legal system is highly decentralized, so even states that are relatively weak by conventional standards retain considerable control over how international law affects them and their people. A state can opt out of treaties or treaty provisions that it dislikes.²⁵ It can help define international law's content not only at the initial moment of prescription but continually over time.²⁶ If it disagrees with other states, it can obstruct their efforts to achieve their goals through law. It can try to shift decisionmaking to arenas that will be more amenable to its preferences.²⁷ Or it can evade its obligations and suffer the consequences, which in many contexts are insignificant.²⁸ The bottom line is that states have levers of power and resistance that are mostly unavailable to individuals in national law.

To be sure, a state might face pressure, at times even severe pressure, not to use those levers. And there are circumstances in which one state's compliance with international law helps to protect other states (or their people) from arbitrary or excessive exercises of power. But the coercion that a state experiences in the ordinary course of its international relations is not at all comparable to that which it routinely imposes on its own people. The state less often (though not never) needs the same protections from abuse. Moreover, although we might still prioritize obedience to international law for

24. *See id.* at 322–26.

25. Vienna Convention on the Law of Treaties arts. 19, 24, 54–60, May 23, 1969, 1155 U.N.T.S. 331.

26. *Id.* arts. 31–32 (on interpretation of treaties).

27. SURABHI RANGANATHAN, STRATEGICALLY CREATED TREATY CONFLICTS AND THE POLITICS OF INTERNATIONAL LAW 3 (2014) (describing as common the practice of creating new treaties to undercut or challenge existing treaties); Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 744 (2010) (“[I]ndividual states (or other actors) may deliberately use soft-law instruments to undermine hard-law rules to which they object, or vice-versa, creating an antagonistic relationship between these legal instruments.”).

28. The perceived inadequacy of international law's enforcement mechanisms has spawned an extensive literature on whether—and, if so, how—international law has regulatory purchase. *See, e.g.*, Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 CHI. L. REV. 469, 489–91 (2005); Jens David Ohlin, *Nash Equilibrium and International Law*, 23 EUR. J. INT'L L. 915, 918 (2012).

other reasons that are independent of its content—for example, to foster predictability or coordination in global affairs—these reasons are ultimately not about protecting individuals from state power. They are less salient than the reasons for insisting that states constrain themselves through domestic law, so they more readily budge in the face of competing considerations.

The competing considerations can be significant. States vary enormously in their needs, interests, values, and capacities. Insisting that they all consistently obey the same conduct rules will in many (though again not all) circumstances be counterproductive or itself a source of oppression. Any one rule is likely to be inconsistent with what the people in some states need or want, or with what their governments can realistically provide. This helps explain why so much of international law does not come in the form of stable conduct rules—why its content is often fluid or contextually variable, rather than fixed or consistently applied.²⁹ States demand and to some extent need the flexibility to adapt international law to their own circumstances. Indeed, given the world's diversity, pushing them all to obey the very same conduct rules will often mean locking them into arrangements that they accepted before the full implications were apparent, or expecting them to go along with majoritarian preferences in the interests of international cooperation. There is little reason to believe that those results would systematically advance basic rule-of-law values, such as justice, fairness, and human freedom.

The point is not that states should aimlessly disregard international law but that the normative case for establishing conduct rules that all states consistently obey, no matter the content, is weaker than many assume. Koh's theory of course places a premium on obedience. But even he recognizes that obedience is not the be-all, end-all. For example, he defends President Obama's policy of targeting to kill suspected terrorists and President Trump's 2017 decision to strike Syria for the use of chemical weapons (pp. 98–100, 131). In defending these actions, Koh takes legal positions that are at best highly controversial and at worst contrary to positive law.³⁰ If

29. Many international legal instruments either define state obligations in contextually variable terms, afford states some discretion to decide what measures they will take to satisfy their own obligations, or allow them to limit the scope or effect of particular obligations as applied to them. *See, e.g.*, Paris Agreement to the United Nations Framework Convention on Climate Change arts. 2(2) & 4(2), Dec. 12, 2015, T.I.A.S. No. 16-1104; International Covenant on Economic, Social, and Cultural Rights art. 2(1), Dec. 16, 1966, 999 U.N.T.S. 3 (entered into force Jan. 3, 1976); General Agreement on Tariffs and Trade, arts. XX & XXI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194; International Convention for the Regulation of Whaling arts. X(3) & VIII, Dec. 2, 1946, 62 Stat. 1716. Thus, international law often does not insist that all states consistently obey the same conduct rules. For more on this point, see Monica Hakimi, *The Work of International Law*, 58 HARV. INT'L L.J. 1, 18–26 (2017); HURD, *supra* note 22, at 32–36; and Ralf Michaels, *Beyond Universalism and Particularism in International Law—Insights from Comparative Law and Private International Law*, 99 B.U. L. REV. ONLINE 18 (2019).

30. On the controversy surrounding U.S. targeted killing operations, see Monica Hakimi, Review Essay, *The Theory and Practice at the Intersection Between Human Rights and Humanitarian Law*, 111 AM. J. INT'L L. 1063, 1064–67 (2017). On the Syria strikes, see, for ex-

obedience were really paramount, he presumably would advocate for “safe” positions to ensure U.S. compliance. The fact that he does not suggests that other considerations are in his view more compelling. Obedience for obedience’s sake is not a sufficiently strong reason for Koh to insist on particular outcomes.

Let’s bring this back to Donald Trump. Koh does not suggest that there has been a significant uptick in U.S. disobedience under President Trump. He argues that the transnational legal process has in various ways constrained Trump. For example, he notes that although candidate Trump threatened to bring back “waterboarding and a hell of a lot worse than waterboarding,” the prohibition of torture was sufficiently internalized in the United States that it was “not so easily ousted” (pp. 34, 37). The “danger,” according to Koh, is mostly prospective—that Trump will over time “undo the ‘stickiness’ of our standing rules and institutions by ‘ungluing’ the elements of administrative and transnational governance that maintain obedience to international rules” (p. 16). Koh never explains why Trump’s violations would be more problematic than past U.S. actions that either also violated international law or, like the targeted killing and Syria operations that Koh defends, were widely perceived to have violated international law. But without such an explanation, we cannot assess the seriousness of Trump’s threat. After all, international law seemed to flourish before Trump’s presidency, despite a litany of actual or perceived U.S. violations.

C. American Leadership

Koh elsewhere suggests that Trump’s threat to the global order comes from his bombastic approach to foreign policy. As Koh describes it, Trump’s foreign policy is defined by a constant emphasis on U.S. hard power, the “systematic disengagement from nearly all institutions of global governance,” and “claims that there are no rules that bind our conduct” (pp. 6, 13). Koh argues that this approach to U.S. foreign policy is problematic because it prevents the United States from exercising global leadership, which it historically has done by harnessing international law to “achieve complex foreign policy outcomes” (p. 11).

Koh’s claim about American leadership surfaces, for example, in his discussion of the North Korea nuclear situation. Koh contends that, although the Trump Administration belittled Obama’s policies on North Korea, it “will have little choice but to revert to a variant of [those] policies” (p. 77). The reason why is that “the only meaningful measure of its success is how quickly, concretely, and transparently it ensures the removal or destruction of Kim Jong-un’s nuclear arsenal” (p. 76). To accomplish that outcome, Koh

ample, Julian Ku, *Trump’s Syria Strike Clearly Broke International Law—And No One Seems to Care*, VOX (Apr. 19, 2017, 8:40 AM), <https://www.vox.com/the-big-idea/2017/4/19/15345686/syria-un-strike-illegal-un-humanitarian-law> [<https://perma.cc/ZH24-MFTF>]; Marko Milanovic, *The Clearly Illegal US Missile Strike in Syria*, EJIL: TALK! (Apr. 7, 2017), <https://www.ejiltalk.org/the-clearly-illegal-us-missile-strike-in-syria> [<https://perma.cc/KN2V-WTHE>].

says, the administration “must pursue a carefully negotiated global diplomatic solution that builds a binding legal regime firmly rooted in international law” (p. 80).

Koh surely is right that international law would be part of any serious effort to denuclearize North Korea. But that just begs the question whether denuclearization is, in the administration’s view, “the only meaningful measure of its success” (p. 76). Perhaps the administration’s foreign policy is driven by something other than a desire “to achieve complex foreign policy outcomes” (p. 11). As Koh at one point concedes, Trump does not want the United States to lead as it historically has done (p. 6). Lots of people share that position; they are ambivalent or worse about U.S. leadership, especially under President Trump.³¹

Koh dismisses that position out of hand. “[I]n the international order,” he says, “there remains only one United States, which, regardless of who is its president, plays a critical role as a balance wheel of the international system” (p. 139). For Koh, the reason to maintain this system, with the United States at the helm, boils down to the material outcomes that the United States can achieve; these outcomes would be unattainable without U.S. leadership. But if that is the reason for insisting on U.S. leadership, U.S. foreign policy must be defended on the merits. Unsurprisingly, many people doubt that it has consistently produced outcomes that were better than the available alternatives or find it objectionable precisely because it is so omnipresent.

More to the point: Even if the United States has historically done more good than harm in the world, why should we think that it will continue to do so? In the current geopolitical climate—characterized by emboldened nationalist movements at home and elsewhere, an already sprawling U.S. military footprint, and a decline in the relative power of the United States—insisting on U.S. leadership might exacerbate, rather than ameliorate, global problems.³² Or it might mean exporting our domestic troubles or regressive politics to other parts of the world. We should at least entertain the possibility that the United States would do good by taking a step back.

* * *

Where does this leave us? Koh’s case for international law focuses on its efficacy in achieving concrete policy outcomes. Koh variously contends that these outcomes are desirable, that states should obey international law to achieve them, and that the United States should take the lead in defining them. His normative claims about international law are, in the end, unsatisfying. Part of the problem is that they are too sweeping. Each needs consid-

31. For an example from the American political left, see Benjamin Wallace-Wells, *Bernie Sanders Imagines a Progressive New Approach to Foreign Policy*, NEW YORKER (Apr. 13, 2019), <https://www.newyorker.com/news/the-political-scene/bernie-sanders-imagines-a-progressive-new-approach-to-foreign-policy> [<https://perma.cc/4KZQ-P38J>].

32. See, e.g., Allison, *supra* note 9.

erably more work to be substantiated or refined. The more fundamental problem is that they all boil down to the question whether international law's outcomes are actually for the good. They might be. But in any large-scale human group, especially one that encompasses the entire world, people are bound to disagree on that question. If we want to make a compelling case for the enterprise of international law, and not just for specific regulatory arrangements to certain groups of people, we need to broaden our normative lens and look beyond the discrete material outcomes that it might produce.

Focusing so intently on these outcomes is problematic for another reason as well: It occludes the nature of Trump's threat. As Koh recognizes, Trump's foreign policy is not defined by disobedience to international law or by disinterest in global affairs, although it contains elements of each.³³ It is defined by hostility to the overall project of international law. Koh suggests that this hostility is a problem insofar as it impedes the United States from achieving the material outcomes that are now or might in the future be prescribed in international law. He cites several cases in which such outcomes are sustained, despite Trump's antics, for the proposition that Trump's approach to foreign policy "leads nowhere" or is "failing to achieve its desired goals."³⁴ I think that assessment misses what Trump is up to and understates what's at stake during his presidency.

III. AMERICA FIRST

Taking a legal system seriously involves more than just making and obeying a bunch of rules for accomplishing discrete policy goals. It involves accepting the basic distinction between sheer power and legitimate authority. Law signals not just that certain outcomes *can* be produced but that they

33. See also Jack Goldsmith & Shannon Togawa Mercer, *International Law and Institutions in the Trump Era*, 61 GERMAN Y.B. INT'L L. (forthcoming) (manuscript at 17) (on file with the *Michigan Law Review*) ("Relatively few Trumpian innovations involve outright violations of international law."); Ingrid Wuerth, *International Law and the Trump Administration*, LAWFARE (Mar. 29, 2017, 9:58 AM), <https://www.lawfareblog.com/international-law-and-trump-administration> [perma.cc/PV5D-JSG8] ("[T]he Trump administration has conspicuously—and surprisingly—complied with international law during its first months.")

34. Pp. 6, 68; see also, e.g., p. 208 ("A pattern has emerged whereby Trump signals that he will disrupt a previously settled relationship, the media explodes, U.S. allies push back, Trump partially recants, and policy eventually resettles in roughly the same place that it was before Trump roiled the waters."); p. 211 ("What this book has shown is that thus far, the resilience of American institutions has largely checked Trump at home."). To be fair, Koh at times says things that can be interpreted to mean that engaging with the transnational legal process is worthwhile, even when it does not advance any discrete material outcomes. For example, he argues that the United States should try to justify its actions in law when they are controversial because doing so "would at least tie the United States' present actions to a broader set of principles that explain why the United States believes it is acting lawfully" and would "clarify the future circumstances in which the United States believes it is legally empowered to act." P. 134. However, Koh does not develop this idea or explain how it is consistent with his claim that Trump's foreign policy "leads nowhere." P. 68.

may, that what is being done is in some sense right or legitimate.³⁵ The central motif of the America First platform is that international law carries little or no authority for the United States.³⁶ This does not mean that the Trump Administration always ignores international law. It does not. But it communicates—more regularly, more openly, and across a broader range of contexts than its recent predecessors ever did—that it does not take international law seriously. If the United States happens to resort to international law, fine. If it does not, also fine. As one senior official explained, Trump’s foreign policy doctrine is that “we’re America, and people can take it or leave it.”³⁷ The United States does what it can, and the rest suffer what they must.

The administration attacks the authority of international law in ways large and small, direct and indirect. For example, President Trump told the U.N. General Assembly in 2018 that “[w]e will never surrender America’s sovereignty to an unelected, unaccountable, global bureaucracy. America is governed by Americans. We reject the ideology of globalism.”³⁸ Trump’s sovereignty language means something specific; it draws on a long political tradition of insisting that states have absolute authority over their own affairs and are accountable to no one.³⁹ Trump’s message to the General Assembly was that states must preserve their national authority by repelling international law and the institutions that it creates. In his words, “nations must defend against threats to sovereignty . . . from global governance.”⁴⁰

The administration has also taken concrete steps to deny international law of authority over the United States. It has withdrawn or indicated that it would withdraw from multiple international agreements, including the Iran

35. E.g., JOSEPH RAZ, *THE AUTHORITY OF LAW* 30 (2d ed. 2009) (“[I]t is an essential feature of law that it claims legitimate authority.”); W. Michael Reisman, Address, *International Lawmaking: A Process of Communication*, 75 AM. SOC’Y INT’L L. PROC. 101, 110 (1981) (“[A] prescription is some authority signal which distinguishes demands backed up only by credible threats—the demands of the thugs in our example—from law.”).

36. See Goldsmith & Mercer, *supra* note 33 (manuscript at 24) (“[Trump] persistently talks as if he does not take international law, including United States commitments under it, seriously.”).

37. Jeffrey Goldberg, *A Senior White House Official Defines the Trump Doctrine: ‘We’re America, Bitch,’* ATLANTIC (June 11, 2018), <https://www.theatlantic.com/politics/archive/2018/06/a-senior-white-house-official-defines-the-trump-doctrine-were-america-bitch/562511/> [<https://perma.cc/53RA-LAJH>]; see also Michael Anton, *The Trump Doctrine*, FOREIGN POL’Y (Apr. 20, 2019), <https://foreignpolicy.com/2019/04/20/the-trump-doctrine-big-think-america-first-nationalism/> [<https://perma.cc/6BQ6-3WZT>] (“Not only is there no superseding authority, no world government, above the nation-state to enforce transnational morality; there is also no higher law for nations than the law of nature and no higher object than self-preservation and perpetuation.”).

38. Remarks to the United Nations General Assembly in New York City, 2018 DAILY COMP. PRES. DOC. 1, 4 (Sept. 25, 2018) [hereinafter *Remarks by President Trump*].

39. See DON HERZOG, *SOVEREIGNTY*, R.I.P. (forthcoming 2020) (manuscript at ii) (on file with the *Michigan Law Review*).

40. *Remarks by President Trump*, *supra* note 38.

nuclear deal, the Paris Agreement on Climate Change, and the bilateral Intermediate-Range Nuclear Forces (INF) Treaty with Russia.⁴¹ It has abandoned the Obama Administration's support for the U.N. Arms Trade Treaty and the Trans-Pacific Partnership.⁴² It has said that some treaties that are almost universally ratified address issues that are, in its view, not appropriate for international regulation.⁴³ It has criticized the Inter-American Commission on Human Rights for encroaching on domestic affairs and then chosen not to appear at commission hearings on the United States.⁴⁴ It has reportedly even decided that the State Department bureau for international organizations, which themselves are constituted by international law, will no longer write memos using the words "international law."⁴⁵

In addition, the administration has gone out of its way to attack the authority of international courts and tribunals. In October 2018, the United

41. Fact Sheet, White House, President Donald J. Trump Is Ending United States Participation in an Unacceptable Iran Deal (May 8, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-ending-united-states-participation-unacceptable-iran-deal/> [<https://perma.cc/39GP-XABB>]; Press Statement, Michael R. Pompeo, Sec'y of State, U.S. Dep't of State, On the U.S. Withdrawal from the Paris Agreement (Nov. 4, 2019), <https://www.state.gov/on-the-u-s-withdrawal-from-the-paris-agreement/> [<https://perma.cc/P925-4RS3>]; Press Statement, Michael R. Pompeo, Sec'y of State, U.S. Dep't of State, U.S. Withdrawal from the INF Treaty on August 2, 2019 (Aug. 2, 2019), <https://www.state.gov/u-s-withdrawal-from-the-inf-treaty-on-august-2-2019/> [<https://perma.cc/4CN5-Y684>]. For a partial list of other international arrangements that have been on the U.S. chopping block, see Hasan Dudar & Deirdre Shesgreen, *Trump's Long List of Global Trade Deals, Agreements Exited or Renegotiated*, USA TODAY (Nov. 21, 2018, 8:08 AM), <https://www.usatoday.com/story/news/2018/11/21/donald-trump-foreign-policy-iran-nafta-russia-mexico-canada-trade/1732952002/> [<https://perma.cc/E7GP-E7LW>].

42. Fact Sheet, White House, President Donald J. Trump Is Defending Our Sovereignty and Constitutional Rights from the United Nations Arms Trade Treaty (Apr. 26, 2019), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-is-defending-our-sovereignty-and-constitutional-rights-from-the-united-nations-arms-trade-treaty/> [<https://perma.cc/L64D-6QCG>]; Presidential Memorandum from the White House to the United States Trade Representative Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement (Jan. 25, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific-partnership-negotiations-agreement/> [<https://perma.cc/R53N-T9YX>].

43. See Draft Executive Order, Moratorium on New Multilateral Treaties, <https://assets.documentcloud.org/documents/3424628/Read-the-Trump-administration-s-draft-of-the.pdf> [<https://perma.cc/74KG-V23M>] ("Whether one agrees or disagrees with these outcomes as a substantive policy matter, these are not appropriate matters for international treaties.").

44. See Jimena Galindo, *U.S. Failure at the IACHR Sets a Dangerous Precedent in the Region*, GLOBAL AMERICANS (Oct. 12, 2018), <https://theglobalamericans.org/2018/10/u-s-failure-at-the-iachr-sets-a-dangerous-precedent-in-the-region/> [<https://perma.cc/ELA8-URZW>].

45. Colum Lynch & Robbie Gramer, *Trump Appointee Compiles Loyalty List of U.S. Employees at U.N.*, STATE, FOREIGN POL'Y (June 13, 2018, 11:01 AM), <https://foreignpolicy.com/2018/06/13/trumps-vino-vixen-compiles-loyalty-list-of-u-s-employees-at-u-n-state-mari-stall-political-appointee-state-department-international-organization-united-nations-political-tribution-chaos-dysfunction/> [<https://perma.cc/F3RT-9WP7>].

States announced that it would withdraw from two treaties that granted the International Court of Justice (ICJ) jurisdiction over the United States and that had recently been invoked for that purpose.⁴⁶ Trump's national security adviser, John Bolton, explained that the withdrawals had less to do with the two pending cases "than with the continued consistent policy of the United States to reject the jurisdiction of the International Court of Justice, which we think is politicized and ineffective."⁴⁷ The decision relates, Bolton said, "to the nature of so-called purported international courts to be able to bind the United States."⁴⁸ Notice that Bolton's language specifically targets the ICJ's authority over the United States. Similarly, the President told the U.N. General Assembly that, "[a]s far as America is concerned, the [International Criminal Court] has no jurisdiction, no legitimacy, and no authority."⁴⁹ And as of December 2019, U.S. actions have caused the Appellate Body of the World Trade Organization to stall out.⁵⁰

Then there are discrete incidents that highlight the administration's disregard for international law. Take Trump's decision, in April 2019, to recognize Israel's sovereignty over the Golan Heights, a small strip of land that Israel seized from Syria during the 1967 Israeli-Arab War.⁵¹ A bedrock rule of international law prohibits forcible annexations of foreign territory, so as a matter of international law, the territory belongs to Syria, even though Israel has for decades occupied it.⁵² The U.S. decision to recognize Israel's sovereignty over the Golan Heights was inconsistent with this bedrock rule. Many would say that the U.S. decision itself violated international law.⁵³ But

46. See John Bolton, Ambassador to the United Nations, Remarks on the Withdrawal from the Optional Protocol on Dispute Resolution to the Vienna Convention on Diplomatic Relations (Oct. 3, 2018), <https://americanrhetoric.com/speeches/johnboltonviennaoptionalprotcolswithdrawl.htm> [<https://perma.cc/E7ZY-6KU3>]; Michael R. Pompeo, Sec'y of State, U.S. Dep't of State, Remarks to the Media (Oct. 3, 2018), <https://www.state.gov/remarks-to-the-media-3/> [<https://perma.cc/H9FB-HG4E>].

47. Bolton, *supra* note 46.

48. *Id.*

49. *Remarks by President Trump, supra* note 38.

50. For evidence that these actions at the World Trade Organization are part of the broader project to contest the authority of international law, see Stewart M. Patrick, *Trump's Search for Absolute Sovereignty Could Destroy the WTO*, WORLD POL. REV. (Mar. 25, 2019), <https://www.worldpoliticsreview.com/insights/27692/trump-s-search-for-absolute-sovereignty-could-destroy-the-wto> [<https://perma.cc/AK5J-TLVD>].

51. White House, Proclamation on Recognizing the Golan Heights as Part of the State of Israel (Mar. 25, 2019), <https://www.whitehouse.gov/presidential-actions/proclamation-recognizing-golan-heights-part-state-israel/> [<https://perma.cc/Y9V7-N9HN>].

52. U.N. Charter art. 2, ¶ 4; S.C. Res. 487 (1981); S.C. Res 242 (1967).

53. See G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States (Oct. 24, 1970) ("No territorial acquisition resulting from the threat or use of force shall be recognized as legal."); Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 112, 114 (2001) (proclaiming that "[n]o State shall recognize as lawful a situation created by a serious breach of [a peremptory norm of international law]" and that "the prohibition of aggression is to be regarded as peremptory").

the striking thing about it was not that the United States might have violated international law. It was that the president of the United States did not even think to consult international law.⁵⁴ And in the immediate aftermath, when Secretary of State Mike Pompeo was pressed to defend the decision, he contemptuously brushed international law aside. What matters, he said, is “reality.”⁵⁵ “The Trump administration sees the world as it is, not as we wish it would be.”⁵⁶

In fact, the administration is not just seeing the world as it is. In this world, international law addresses virtually every facet of modern governance, including areas—such as the protection of women’s and children’s rights—that the administration thinks “are not appropriate matters for international treaties.”⁵⁷ In this world, the ICJ is not a “so-called purported” court with “purported binding jurisdiction”;⁵⁸ it is a real court with actual cases and litigants and decisions that, though sometimes violated, are almost always accepted as binding. And in this world, international institutions are created by and have authority under international law, and governments use these institutions to grapple with problems, like climate change and the health of rape victims in war, that the administration would prefer to ignore.⁵⁹ So, the administration is not just describing the world; it is trying to create a different world. It wants a world that is more like the one that realists pretend we already have, in which material interests and power are all

54. See Roberta Rampton, *Trump Says He Made Golan Heights Decision After a Quick History Lesson*, REUTERS (Apr. 6, 2019, 5:07 PM), <https://www.reuters.com/article/us-usa-trump-israel/trump-says-he-made-golan-heights-decision-after-a-quick-history-lesson-idUSKCN1RI0N7> [<https://perma.cc/W9QD-SH8J>] (reporting on Trump’s description of his decisionmaking process).

55. Julian Borger, *Pompeo Flounders on Why Annexation Is Good for the Golan but Not for Crimea*, GUARDIAN (Apr. 11, 2019), <https://www.theguardian.com/us-news/2019/apr/11/golan-heights-crimea-pompeo-us-state-department> (embedding a video recording of Pompeo and a State Department tweet quoting Pompeo).

56. *Id.* A month later, Pompeo coauthored an opinion piece that purports to justify the recognition decision in international legal terms. Michael R. Pompeo & David Friedman, *International Law Backs the Trump Golan Policy*, WALL STREET J. (May 14, 2019, 7:11 PM), <https://www.wsj.com/articles/international-law-backs-the-trump-golan-policy-11557875474> [<https://perma.cc/J3NN-74BS>]. This piece does not reflect serious legal work; it does not offer cogent legal reasons for the recognition decision or grapple with the well-established, widely held legal position to the contrary. Moreover, by the time it was published, the United States had already communicated that international law was not in its view a relevant consideration.

57. Draft Executive Order, *supra* note 43.

58. Bolton, *supra* note 46.

59. *E.g.*, Liz Ford, *UN Waters Down Rape Resolution to Appease US’s Hardline Abortion Stance*, GUARDIAN (Apr. 23, 2019, 3:36 PM), <https://www.theguardian.com/global-development/2019/apr/23/un-resolution-passes-trump-us-veto-threat-abortion-language-removed> [<https://perma.cc/7CBN-6QUQ>] (on the reproductive health of victims of sexual violence in armed conflicts); Somini Sengupta, *U.S. Pressure Blocks Declaration on Climate Change at Arctic Talks*, N.Y. TIMES (May 7, 2019), <https://www.nytimes.com/2019/05/07/climate/us-arctic-climate-change.html> [<https://perma.cc/JW3P-WYYB>] (on climate change).

that matter on the international stage and the authority of international law is, if not irrelevant, seriously diminished.

We can now bring into sharper focus what Koh's analysis misses. If international law is worthwhile insofar as it contributes to certain material outcomes, then its authority is entirely in the service of those outcomes, and the administration's approach to international law would be troubling only to the extent that it detracts from them. For example, the Golan decision would not be a problem in and of itself. The decision manifested only as a verbal pronouncement and was not accompanied by material action. Although we might still worry about the decision, the reason to worry would have to do with its downstream operational effects—for example, the risk that it will at some point impede Israeli-Arab peace or lessen the inhibitions on using force.

But like much else that the administration does, the Golan decision cannot be understood only in such material terms. The administration itself said that it did not mean for the decision to have an operational effect, whether in the Golan or under the prohibition of forcible annexations more generally.⁶⁰ Rather, its main point was to alter the normative valence of an intractable status quo. Its central message was not that Israel could control the Golan—that much was obvious—but that Israel may, that in the U.S. view, Israel has the authority to rule as it does. Part of what made the decision so disconcerting is that the United States acted as if the international law to the contrary was completely beside the point.

The perverse irony is that the administration's actions and statements that dislodge the authority of international law also reveal that it still matters. It matters even where, as in the Golan, its material impact is imperceptible. We know that it matters because the administration is expending energy to undercut it, and lots of people are working to maintain it or are expressing alarm about losing it.⁶¹ The question is, why does it matter? Again, it might in various ways have a material effect. But let's assume for the time being that it does not—that international law often tracks but does not appreciably alter what global actors do “on the ground.” What would we lose if they did the very same things without international law? As I explain below, we would lose the argumentative practice that is emblematic of law.

IV. INTERNATIONAL LEGAL AUTHORITY

A. *International Law's Argumentative Practice*

Recall that, in general, law's claim to authority highlights that material power is not a sufficient basis for governing. Law thereby fosters the expectation that governance decisions must be rooted in authority; those who have

60. See Borger, *supra* note 55 (“The US policy continues to be that no country can change the borders of another by force.” (quoting the State Department)).

61. On the Golan decision, see Rep. of the S.C., U.N. Doc. S/PV.8495 (2019).

the power to govern are expected to show not only that they can implement a decision but that they may, that they have the authority to do what they want to do. International law is no different in this respect. It also fosters expectations about authority. It just places the relevant authority beyond the jurisdiction of any state, with different transnational collectivities—groups of states, international institutions, and to varying degrees other actors that together create and maintain it.

Of course, once we expect the people in power to show that they have the authority to make particular decisions, we begin to question whether they in fact do. We disagree about who may make particular kinds of governance decisions, in what circumstances, for whom, and with what effects. Law's claim of authority thus generates debates about the exercise of that authority in concrete settings. It fuels an argumentative practice about how authority is used.

To be sure, people might argue about governance decisions even without law. But their arguments would not be in the same register. Law structures a particular kind of argumentative practice—one that is centered on public authority. It directs the participants to tap into its own “fund of public normative references.”⁶² It requires them to justify their decisions publicly and in terms that purport to reflect not just their own preferences but the interests and values of a broader group. It subjects their positions to external scrutiny and debate. It prioritizes some normative principles and methods of reasoning over others. It establishes institutions and processes that discipline their interactions. And because international law places authority beyond the jurisdiction of any state, it fosters this argumentative practice both within and across national borders.

International law's argumentative practice is sustained because enough people who make global governance decisions act as if having authority for their decisions matters. They try to defend their decisions in international law and thus to earn authority for what they want to do. Where they instead diminish or deny that authority, the argumentative practice withers. Arguing about authority is hard to do if your adversary can't be bothered to take it seriously.⁶³

62. Frank Michelman, *Law's Republic*, 97 *YALE L.J.* 1493, 1513 (1988).

63. Shirley Scott has advanced a similar argument, though she speaks of the “ideology,” rather than the “authority,” of international law:

Because the ideology is so valuable to the most powerful state, others within the international order have also been able to use it as leverage . . . against the most powerful, but this has been possible only so long as the most powerful have valued and sustained the ideology.

Shirley V. Scott, *The Decline of International Law as a Normative Ideal*, 49 *VICT. U. WELLINGTON L. REV.* 627, 632 (2018).

B. *The Virtues of the Argumentative Practice*

Although international relations and legal scholars widely recognize that international law structures an argumentative practice,⁶⁴ many suggest that this practice is just cheap talk, a means for achieving certain material ends, or a foil that reinforces positions of power.⁶⁵ Yet quite a bit of legal and political philosophy assigns law's argumentative practice independent value. Jeremy Waldron's work is particularly instructive here. He emphasizes that the argumentative practice that law promotes is a large part of what makes law, as an enterprise, worthwhile. We value law not only because it sometimes establishes conduct rules that constrain governmental discretion or can make life predictable but also, and "at least as important," because of "what we do in law with the norms that we identify."⁶⁶ "We do not just obey [legal norms] or apply the sanctions that they ordain . . ."⁶⁷ "[W]e use our sense of what is at stake in their application to license a continual process of argument . . . about what it means to apply [the law] faithfully . . ."⁶⁸ Waldron's insight is that arguing in law is desirable for reasons that cannot be traced to whatever material outcomes it might produce. It is desirable, even when it does not appear to settle an issue in dispute or to have an operational effect.⁶⁹

This insight is borne out in the everyday operation of international law. To illustrate, consider the experience with U.S. targeted killing operations. Despite the secrecy surrounding these operations, the United States began justifying them publicly under both U.S. and international law in 2010, as they became a routine part of U.S. counterterrorism strategy.⁷⁰ Koh himself, as State Department Legal Adviser, delivered an early speech defending these operations.⁷¹ Other high-level officials followed suit.⁷² And in December 2016, as the Obama Administration prepared to leave office, it released an extensive report outlining its legal and policy positions on targeted killing

64. Martti Koskenniemi is probably the best-known proponent of this view. See generally MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (2d ed. 2007).

65. See *supra* notes 12–14 and accompanying text.

66. Jeremy Waldron, Essay, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 56 (2008).

67. *Id.*

68. *Id.*

69. Some readers might claim that, if international law only structures an argumentative practice, without resolving what ought to be done, it does not operate as law. I disagree; international law's role in these circumstances is more constitutive than it is regulative—it is mostly to structure an argumentative practice, rather than to prescribe certain outcomes—but it is quintessentially legal in nature. See *id.*

70. For a compilation of the government's written and oral pronouncements on these operations, see JAMEEL JAFFER, *THE DRONE MEMOS: TARGETED KILLING, SECRECY, AND THE LAW* (2016).

71. *Id.* at 119–25.

72. *Id.*

operations.⁷³ During this period, the United States did not change its basic legal position, which remains very controversial. But it used international law to frame and elaborate on that position and to engage with its critics.⁷⁴ The Trump Administration has done much less of this. Putting aside the question whether this disengagement from international law has affected U.S. operations on the ground, there are at least three reasons to be alarmed.

1. Respect

First, participating seriously in law's argumentative practice is a way of showing respect to the people who care about or are affected by particular decisions. It treats people like they are not just pawns in a geopolitical game of chess but individuals who deserve an account of what is happening and why, and who might themselves have views on the subject that are worth sharing. "Even if compliance is not the issue," Frederick Schauer explains, "giving reasons [for governance decisions] is still a way of showing respect for the subject, and a way of opening a conversation rather than forestalling one."⁷⁵ Mark Tushnet agrees; the argumentative practice that law fosters "express[es] respect for people as reasoning (and reasonable) beings," which "does seem an unqualified human good."⁷⁶

When the United States tries to justify its lethal operations under international law, it recognizes that it owes various audiences, both within and outside the United States, an explanation for its conduct. It concedes that it may not kill people just because it can. It explains that its operations are based on general principles that, though contested, reflect a considered view of the public good, not, for example, the personal vendettas of the people who happen to be pulling the triggers. And it acknowledges and responds to competing normative positions. Of course, many people would prefer for the United States to stop conducting these operations. But given that it will not, its participation in the argumentative practice at least informs them of what it is doing and why and invites them to think about its logic, voice their objections, and demand a reasoned response.

Three authors have recently drawn on similar themes to contest the Trump Administration's opacity on its targeted killing operations in Somalia:

73. WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS (2016).

74. See JAFFER, *supra* note 70, at 7 ("Perhaps no administration before this one has tried so assiduously to justify its resort to the weapons of war.")

75. Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 658 (1995).

76. Mark Tushnet, *Critical Legal Studies and the Rule of Law*, in CAMBRIDGE COMPANION TO THE RULE OF LAW (Marti Loughlin & Jens Meierhenrich eds., forthcoming) (manuscript at 12) (on file with the *Michigan Law Review*); see also Waldron, *supra* note 66, at 23, 24 (explaining that law "is a mode of governing people that treats them with respect," which it does in large part through its argumentative practice).

Greater transparency—including on what policies are in place to protect civilians in Somalia, on what standards are applied in legally defining and distinguishing combatants from civilians, and on the investigations of civilian casualties—would go a long way to showing the U.S. government’s commitment to the rights and dignity of the people of Somalia.⁷⁷

The claim here is that the United States commits independent wrongs by disengaging from international law’s argumentative practice—by not outlining when or why it targets to kill people and “not consistently acknowledging specific strikes and responding in detail to allegations of civilian harm.”⁷⁸ U.S. disengagement denies Somalis whose loved ones have been killed “the basic recognition of their loss.”⁷⁹ It deprives civilians of the information they need to protect themselves from violence. And it frustrates the work of advocates who want to “communicate their concerns to the United States and its local military partners.”⁸⁰ These grievances are ultimately not about the merits of U.S. targeted killing operations. They are about the expectation that the United States afford Somalis the basic dignity of explaining what it is doing and why. And it’s not just for Somalis. Americans also deserve this information, given that the operations are conducted in our name.⁸¹

2. Transnational Politics

Second, international law’s argumentative practice can help constitute a decent politics beyond the borders of any state.⁸² It enables people in disparate parts of the world to engage together on the global governance issues that they all care about, while structuring in relatively positive ways how they engage. It does so because arguing in law requires people to draw on a set of

77. Rahma A. Hussein et al., *Transparency on Civilian Harm in Somalia Matters—Not Just to Americans*, JUST SECURITY (Apr. 9, 2019), <https://www.justsecurity.org/63554/transparency-on-civilian-harm-in-somalia-matters-not-just-to-americans/> [<https://perma.cc/PN7E-WZA3>].

78. *Id.*

79. *Id.*

80. *Id.*

81. Many commentators have pressed this point. *E.g.*, Luke Hartig, *I Helped Write the Exec Order on Public Reporting of Lethal Operations. Here’s What Trump Has Undone.*, JUST SECURITY (Mar. 8, 2019), <https://www.justsecurity.org/63130/helped-write-exec-order-required-public-reporting-u-s-lethal-operations-heres-trump-undone/> [<https://perma.cc/XPK7-HRK3>]; Rachel Stohl, *America Must Update Its Lethal Drone Policy—Here’s How*, NAT’L INT. (July 29, 2018), <https://nationalinterest.org/blog/buzz/america-must-update-its-lethal-drone-policy%E2%80%94heres-how-26591> [<https://perma.cc/UM9W-QD49>]; NGO *Statement on Reported Changes to U.S. Policy on Use of Armed Drones and Other Lethal Force*, HUM. RTS. WATCH (Mar. 7, 2018, 6:00 AM), <https://www.hrw.org/news/2018/03/07/ngo-statement-reported-changes-us-policy-use-armed-drones-and-other-lethal-force> [<https://perma.cc/Q943-QMDU>] [hereinafter *NGO Statement*].

82. I have argued in other work that international law plays an important role in constituting political communities beyond the state. *See* Monica Hakimi, *Constructing an International Community*, 111 AM. J. INT’L L. 317 (2017).

shared resources—texts, analytic methods, sources of authority, institutions, and so on—to explain why their preferences are consonant with the interests or values of a group.⁸³

To be clear, the participants in these debates plainly disagree about which policies promote the public good. Their disagreements might at times run so deep that they cannot definitively or authoritatively be resolved. And their legal positions will almost certainly be informed by their own interests or passions. Still, there is value to putting them in conversation with one another and pushing them to “see themselves as belonging to the same political association . . . [and] sharing a common symbolic space.”⁸⁴ As others have explained, “debate over principle, over the common good and justice, is a distinctive and invaluable moment of political life.”⁸⁵ It acquires a “depth and seriousness of purpose” not because it is detached from or just a cloak for the participants’ preferences but because it involves the “dissonant intertwining of principle and interest.”⁸⁶ Those who participate in law’s argumentative practice have to define their own priorities in relation to the group’s. They must in some way contend with the politics of the group, confronting what is at stake in concrete decisions not just for themselves but for others who care about the decisions.

Without question, U.S. efforts to defend targeted killing operations in law spawned years of intense debates. These debates played out in manifold arenas—some domestic, others international—and among a broad group of actors.⁸⁷ Although the participants were plainly motivated by their own interests and values, they also argued about principle; they pushed for their priorities to be reflected in the shared “fund of public normative references.”⁸⁸ And although the U.S. legal position has not much changed, its critics evidently still want to argue about and focus the world’s attention on it, rather than passively accept what the United States is doing as inevitable or insoluble.⁸⁹ They want the United States to have to grapple with their opposing views.

83. See, e.g., KARL N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* 277 (1941) (explaining that, in law, “claims get made and urged in terms of the Order” and “tend powerfully to be set up as serving the welfare of the relevant Entirety”).

84. CHANTAL MOUFFE, *ON THE POLITICAL* 20 (2005).

85. DON HERZOG, *POISONING THE MINDS OF THE LOWER ORDERS* 152 (1998).

86. *Id.*

87. See Hakimi, *supra* note 30, at 1069–71 (describing this practice).

88. Michelman, *supra* note 62, at 1513.

89. See, e.g., *NGO Statement*, *supra* note 81; RACHEL STOHL, *STIMSON CTR., AN ACTION PLAN ON U.S. DRONE POLICY: RECOMMENDATIONS FOR THE TRUMP ADMINISTRATION* 1 (2018).

3. Accountability

Third, international law's argumentative practice works to hold decisionmakers accountable for their actions. When they participate in this practice, they concede, even if only implicitly, that they need authority for what they want to do and that this authority is not entirely of their own making. They must earn it from other actors, both at the initial moment of international law's creation and over time by trying to justify concrete decisions in law and responding to competing legal claims. The argumentative practice thus gives external actors an important say on whether particular conduct is acceptable—whether the people in power have authority for what they want to do.⁹⁰ Note that accountability here does not necessarily come from pushing decisionmakers toward compliance or subjecting them to material harm for not complying. Accountability comes from cultivating the expectation that governance decisions that lack authority are in some sense illegitimate and from giving external actors a central role in conferring authority on, or denying it to, the people who are in positions to make such decisions.

This mechanism for holding decisionmakers accountable might seem unsatisfying to those who want international law to establish stable conduct rules against which the legitimacy of particular decisions is definitively assessed. Yet even if this accountability mechanism is not ideal, it might be the best one available. In the case of U.S. targeted killing operations, the applicable international law is extremely contentious. Because international legal authority is collectively established, no one actor is entitled to resolve what international law requires. Meanwhile, the United States appears to have almost complete operational control; others have not created discernible material deterrents to its operations. In these circumstances, the most realistic alternative to accountability through the argumentative practice of international law is not for the United States to be constrained by international legal rules that contravene its deeply held policy positions but for it to do as it pleases, without trying to legitimize its actions to the various constituencies that are paying attention. It's hard to see why that alternative would make the world a better place.

CONCLUSION

Koh and I are both critical of the Trump Administration's approach to international law. We both think that this approach is harmful for the United States and the world. But, I've argued, Koh does not fully elucidate why it is harmful. Although his book is a thought-provoking and at times exhilarating read, it is an insufficient guide for grasping the challenges that we now confront and, therefore, for putting us on a path to identifying possible correctives. And, so I've argued, this means that his theory of international law

90. See Reisman, *supra* note 35, at 110 ("It is the audience, whether or not its members realize it, that endows the prescriber with the authority that renders his communications prescription.").

is also, in important respects, lacking. International law is about much more than defining discrete policy goals and then habitually obeying the dictates that get us there. It is also, and perhaps more importantly, about how we explain, justify, argue about, bolster, and undermine particular governance decisions, which must be made in concrete settings in which different policy objectives invariably intersect and only some people's priorities take precedence.

The remarkable thing about the post-Cold War period is that the world's unquestioned superpower has taken seriously international law's claim of authority over it. The dynamic has not been easy. The United States has often taken controversial positions on the content of international law, as it does on targeted killing operations. It has at times violated foundational rules of international law, such as by instituting a torture program at the CIA. And it has resisted international law's authority on discrete issues and as exercised by particular institutions—for example, by opting out of the international legal regulation of economic, social, and cultural human rights and declining to accept the jurisdiction of the International Criminal Court over U.S. nationals. But on the whole, the United States has acted like having international legal authority for its decisions matters. It has worked hard to establish and maintain this authority. And where it has strayed from mainstream legal positions, it has usually still taken seriously the practice of explaining and trying to justify its conduct with the resources of international law. The Trump Administration is different, if not in kind, then certainly in degree.⁹¹ Its sweeping attacks on the authority of international law are alarming not just because they might detract from discrete material outcomes (though they might) but also because, even if they do not, they strip people around the world of a critical—in some contexts the only—tool for contending with the United States' awesome power and trying to render its conduct legitimate.

91. Cf. Scott, *supra* note 63, at 634 (arguing that what weakens the ideology of international law “is not behaviour contrary to the principles *per se*” but “a combination of rhetoric and action that implicitly asks its audience to believe the principles to be true while the audience at the same time gets the demonstration that this is not the case”).