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BOOK REVIEWS

The Trump Administration and International Law. By Harold Hongju Koh. New York, New York: Oxford University Press, 2019. Pp. viii, 221. Index.
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Will President Donald Trump “permanently change the nature of America’s relationship with international law and its institutions?” (p. 1). Will he “disengage from globalism?” (p. 5). Will he “[u]ndermine international institutions and resign from global leadership”? (*id.*) Or, as Harold Koh, Sterling Professor of International Law at Yale Law School, also asks twice in his new book, “will Donald trump international law?” (pp. 15, 147).

These are distinct questions, but Koh’s overall view is pretty clear. He examines whether Trump will succeed in altering the U.S. stance toward international law and institutions, such as through the immigration ban, the trade war, the U.S. withdrawal from the Paris Agreement and the Iran Deal, and the uses of force against the Islamic State and in Syria. Koh’s main conclusion (though he hedges a lot throughout the book) is that the president has not and will not trump international law. “Trump’s strategy—systematic disengagement from nearly all institutions of global governance—is failing to achieve its desired goals,” Koh says at the book’s outset (p. 6). “[T]he story I have told here should give some ground for cautious optimism,” he says near the end (p. 148).

The reason Trump is failing, Koh argues, is “transnational legal process.” This is

the theory and practice of how public and private actors—nation-states, international organizations, multinational enterprises, non-

governmental organizations, and private individuals—interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law.¹

The transnational law that Koh has in mind is “the hybrid law that combines domestic and international, public and private law—by generating *interactions* that lead to *interpretations* of international law that become *internalized* into, and thereby binding under, domestic law (in this case, United States law)” (p. 7).

Koh offers transnational legal process as a descriptive explanation for why Trump’s actions have been checked *and* as a normative “political counter-strategy” of how best to resist Trump (p. 8). The normative counter-strategy calls for actors inside and outside government “to resist, absorb punishment, parry where possible, and strategically counterpunch” (p. 16). Koh likens this approach to the “rope-a-dope” boxing technique that Muhammad Ali famously used against George Foreman in 1974. “[T]hose in today’s New American Resistance are making much the same strategic bet as Ali made in Zaire: that over time, the energetic aggressor who loudly launches multiple ineffectual initiatives to change the status quo will force little real change” (*id.*).

Koh examines his claims through case studies, but the claims are hard to assess. He constantly shifts between descriptive analysis (whether and to what degree Trump’s assault on international institutions is working), normative criticisms (why Trump’s actions are bad), and normative prescriptions (about tactics “the Resistance” should deploy). Koh also measures what counts as success or failure for Trump’s initiatives in

¹ Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183–84 (1996).

many different ways. And he swings between confidence that Trump is losing and concern that he might be winning.

Despite these turnabouts, the overall sense one gets from the book is that transnational legal process has been an important influence in checking Trump's actions against international law and institutions. Is this true?

Koh's central "illustration" of "Transnational Legal Process in Action" (p. 21) is the response to Trump's controversial immigration travel ban. The first two executive orders instantiating the ban were the most extreme but, due to court challenges, never meaningfully went into effect.² The third order—the one now operative—placed entry restrictions on the nationals of eight foreign states, two of which were not Muslim-majority countries.³ Koh says that transnational legal process explains the "furious legal challenge" to all three executive orders (p. 24).

This claim is unsupported by the evidence. The resistance to the ban consisted almost entirely of domestic actors—domestic civil society groups, domestic politicians, current and former U.S. government officials, state and local governments, and American universities. Koh mentions two non-domestic influences on the fate of the travel ban orders. First, he notes that Iraqi general Talib al Kenani stated: "I'm a four-star general, and I'm banned from entering the U.S.?" Koh maintains that "such political pressure led to Iraq being removed" from the original travel ban list (p. 26). Second, he says that a few foreign leaders, including Justin Trudeau and Angela Merkel, "raised the issue directly in early conversations with the new president" (*id.*). But there is no indication that these private conversations influenced Trump or the travel ban litigation.

International law, another element of transnational legal process, had even less influence on the

legal challenge to the travel ban than non-domestic actors. Koh says that the travel ban "facially violates" both the Refugee Convention, which requires that refugees receive its protections "without discrimination as to race, religion or country of origin," and the International Covenant on Civil and Political Rights (ICCPR), which provides that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law" (p. 23). A proper assessment of this argument would require analysis under international law of issues similar to those that divided the U.S. Supreme Court under domestic law: the relevance of presidential motive to the validity of the orders, and their proportionality to ostensible national security aims. Koh provides no such analysis.

This analysis is not necessary for assessing Koh's claims, however, since international law played no role at all in the travel ban litigation. None of the many court of appeals decisions on the three executive orders addressed whether they violated the Refugee Convention, the ICCPR, or any other international law.⁴ The majority, concurring, and dissenting opinions in the Supreme Court's ninety-two-page decision in *Trump v. Hawaii* also did not mention international law—probably because neither petitioner nor respondents mentioned it in their briefs.⁵ There were fifty-five amicus briefs filed on the merits in support of the respondents who challenged the

² Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017); Exec. Order 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

³ Proclamation No. 9,465, 82 Fed. Reg. 45,161 (Sept. 24, 2017). Chad was dropped from the list on April 10, 2018, leaving in place restrictions on the seven remaining states. Proclamation No. 9,723, 83 Fed. Reg. 15,937 (Apr. 10, 2018).

⁴ *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam) (affirming temporary restraining order blocking first order); *Washington v. Trump*, 858 F.3d 1168 (9th Cir. 2017) (denial of rehearing en banc); *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) (affirming injunction of second order); *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017) (en banc) (same); *Hawaii v. Trump*, 878 F.3d 662 (9th Cir. 2017) (affirming injunction of third order); *Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233 (4th Cir. 2018) (en banc) (same).

⁵ *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); Brief for Respondents, *Trump*, 138 S. Ct. 2392 (No. 17-965); Brief for the Petitioners, *Trump*, 138 S. Ct. 2392 (No. 17-965); Reply Brief for Petitioners, *Trump*, 138 S. Ct. 2392 (No. 17-965).

travel ban.⁶ Only one of them—a brief by international law scholars and non-governmental organizations—squarely argued that the Trump executive order violated international law.⁷ No foreign nation filed an amicus brief, even though such filings are now common at the Supreme Court.

The final awkwardness for Koh's descriptive and normative claims is that the Supreme Court affirmed the travel's ban's legality and thus blessed its continuance. Koh mentions this inconvenient fact nine pages into his paean to transnational legal process's impact on the travel ban. He calls the decision "grievously wrong" (p. 31). And in a long Afterword necessitated by the decision, he says the ruling "decides less than it symbolizes" because (among other reasons) "transnational actors will surely invoke transnational legal process to contest and limit the impact of the Court's ruling" (p. 203). Perhaps so, but there is little evidence of that to date.

It is hard to know what to make of the fact that Koh's central example of transnational legal process influence on Trump displays no such discernible influence. But it may be useful to speculate why international law played no role in the travel ban litigation. The Refugee Convention and the ICCPR are non-self-executing and thus are not sources of domestic law.⁸

⁶ *Trump v. Hawaii*, SCOTUSBLOG, at <http://www.scotusblog.com/case-files/cases/trump-v-hawaii-3>.

⁷ See Amici Curiae Brief of International Law Scholars & Nongovernmental Organizations in Support of Respondents, *Trump*, 138 S. Ct. 2392 (No. 17-965). Two other amicus briefs made arguments in passing related to the travel ban and international law. See Brief of Amici Curiae Retired Generals & Admirals of the U.S. Armed Forces in Support of Respondents at 30, *Trump*, 138 S. Ct. 2392 (No. 17-965) (travel ban "creates a strong perception of nation-specific religious discrimination contravening the international norms enshrined in both U.S. law and international treaties"); Brief of Amici Curiae Immigration Equality et al. in Support of Respondents at 20–21 & 20 n. 56, *Trump*, 138 S. Ct. 2392 (No. 17-965) (ICCPR is a "useful guide" to interpreting domestic immigration law) (quoting *Khan v. Holder*, 584 F.3d 773, 783 (9th Cir. 2009)).

⁸ On the ICCPR, see *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004). On the Refugee Convention,

One might have expected courts to consider these treaties as part of a *Charming Betsy* argument for construing the immigration statutes in the immigrants' favor.⁹ One might also have expected to see amicus briefs by affected countries or many more international organizations involved in immigration and refugee advocacy. But this did not happen. These silences might be explained by Trump's fervent nationalism and anti-internationalism, and the Supreme Court's general (though not inevitable) aversion to the incorporation of international law, which together made a transnational legal process strategy unattractive and possibly self-defeating. Whatever the explanation, the most notable thing about transnational legal process's impact on the travel ban litigation was its utter absence.

In a chapter entitled "Resigning Without Leaving," Koh analyzes Trump's efforts to alter the U.S. stance toward the Paris Agreement on climate change, international trade laws, and the Iran nuclear deal. Unlike the travel ban, these three regimes obviously implicate international law and transnational legal process.

Most observers think Trump is wreaking havoc in these areas. Koh agrees that Trump's

calamitous trade diplomacy . . . has disrupted alliances, potentially sparked trade wars, stalled freer trade, [l]eft the United States on the sidelines of major trade liberalization initiatives, . . . damage[d] the United States' reputation as a reliable treaty partner and diminishe[d] its long-term capacity to exercise leadership within those treaty arrangements in times of genuine global economic crisis." (Pp. 54, 60–61)

He is more equivocal about Trump's impact on the Paris Agreement and the Iran deal.

In 2017, the Trump administration notified the United Nations that the United States intends to withdraw from the Paris Agreement

see, for example, *Hernandez v. Sessions*, 884 F.3d 107, 111 (2d Cir. 2018); *Haitian Refugee Ctr., Inc. v. Baker*, 949 F.2d 1109, 1110 (11th Cir. 1991) (per curiam).

⁹ *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

consistent with its terms.¹⁰ Koh claims that this step was “legally meaningless” (p. 52) because the earliest effective date of any withdrawal is November 4, 2020, the day after the next U.S. presidential election. In the meantime, he says, “the global community can just keep doing what it is doing” and work with states, cities, and business leaders to keep the United States “within striking distance” of its emissions-reduction pledge under the Paris Agreement (pp. 52, 51). If the United States falls behind on its pledge, he says, “domestic and international stakeholders can exert pressure to force this administration and the next to make up the difference” (p. 52). Koh concludes that “the rope-a-dope seems to be working” with the Paris Agreement, even as he acknowledges that “[o]nly time will tell whether, with concerted effort and aggressive innovation—in Humphrey Bogart’s words—‘we’ll always have Paris’” (pp. 52, 54).

Koh’s optimistic focus misses what is most significant in Trump’s acts related to global climate change. The Paris Agreement obligates every party to submit a public emissions-reduction pledge and to publicize whether it is complying with that pledge.¹¹ But the Agreement also allows each country to decide for itself how much to reduce emissions, and it imposes no legal penalties for violating these unilaterally assumed pledges.¹² The hope was that mandatory transparency and regular cycles of commitment, combined with leadership and nudging from a few important countries, especially the United States, would enable this largely voluntary system

to overcome the free-riding problem that has long plagued global climate change negotiations.¹³ The success of the Paris Agreement thus turns on transparency, leadership, reputational pressure, and good faith.

The United States was a leader in fostering this regime through 2016. Yet since its inception, the Trump administration has abandoned the United States’ leadership role and has been hostile to the Paris Agreement, and to domestic laws addressing climate change, in ways that damage the Agreement’s aims regardless of whether the United States formally withdraws in 2020.¹⁴

On the domestic front, the administration has moved to dismantle nearly every component of Obama’s climate regulatory program. Its failure to make much progress to date has nothing to do with transnational legal process, as Koh implies, and everything to do with domestic administrative law and Trumpian incompetence.¹⁵ But even mere proposals to reverse or weaken Obama’s domestic climate initiatives have created regulatory uncertainty that has increased “dirty” fossil fuel investment and

¹³ See, e.g., Daniel Bodansky, *The Paris Climate Change Agreement: A New Hope?*, 110 AJIL 288, 289 (2016).

¹⁴ See Joseph Curtin, *The Paris Climate Agreement Versus the Trump Effect: Countervailing Forces for Decarbonization*, INST. INT’L & EUR. AFF. (Dec. 3, 2018).

¹⁵ Koh asserts that in domestic litigation over the Trump regulatory rollbacks, “environmental groups could well claim that the president has failed faithfully to execute continuing U.S. international legal obligations under the Paris Accords [sic]” (p. 43). I have not been able to discover a court or environmental party that mentioned the Paris Agreement as a legal basis for maintaining the Obama regulations. See, e.g., *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017) (vacating the Environmental Protection Agency’s stay of its final methane rule on Clean Air Act grounds). One reason why is that the domestic and international legal regimes are legally independent of one another. “[T]here would be no violation of international law were a Party to change its domestic measures. If a domestic stakeholder sought to invoke the Paris Agreement in a domestic challenge to withdrawing the Clean Power Plan, courts would almost certainly find that the agreement does not constrain executive branch action.” *Legal Issues Related to the Paris Agreement*, CTR. CLIMATE & ENERGY SOLUTIONS (May 2017).

¹⁰ United States Department of State, *Communication Regarding Intent to Withdraw from Paris Agreement* (Aug. 4, 2017).

¹¹ See UN Framework Convention on Climate Change Conference of the Parties, Twenty-First Session, Adoption of the Paris Agreement, UN Doc. FCCC/CP/2015/L.9/Rev.1, Art. 4.2 (requiring all parties to “prepare, communicate and maintain” a national pledge); Art. 13 (establishing a transparency mechanism).

¹² See *id.* Art. 15.2 (“The [compliance] mechanism . . . shall consist of a committee that shall be expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive.”).

slowed green energy investments.¹⁶ Today, the United States' Paris pledge looks increasingly out of reach, even accounting for remedial state and local action.¹⁷

On the international front, President Trump has been openly hostile to the Paris Agreement and some (but not all) of his representatives have been antagonistic at conferences of the parties to the Paris Agreement.¹⁸ The Trump administration flouted transparency by failing to submit some required climate reports on time,¹⁹ and reneged on \$2 billion of Obama's \$3 billion

pledge to the Green Climate Fund to help developing countries address climate change.²⁰

These various assaults on the Paris Agreement framework have given some nations cover to take it less seriously, and have created disincentives for other nations to meet their Paris pledges while the heavy-polluting United States violates its own pledge.²¹ All of this is happening at the inception of the Paris framework, when initial successes are critical for building momentum and legitimacy. So yes, Koh is right that the United States cannot formally withdraw from the Paris Agreement until 2020. But that almost does not matter. Trump's negative impact on the agreement and on global climate change policy more generally has been significant, regardless of the United States' participatory status, and especially when compared to a counterfactual Hillary Clinton presidency.

As for the Iran Deal, Koh's descriptive and normative claims about the significance of Trump's withdrawal are all over the map. Koh is harshly critical of Trump's moves. At times he suggests that their impact may be small or ineffectual.²² At other times he says that the Iran deal is "fragile" (p. 62), that its future is in "considerable jeopardy" (*id.*), and that it might die a "death by a thousand cuts" (p. 67). It is hard to assess what these positions say about transnational legal process

¹⁶ Curtin, *supra* note 14, at 1, 4–5.

¹⁷ U.S. carbon dioxide emissions rose approximately 3.4% in 2018, the largest increase in eight years. See Rhodium Group, *Preliminary U.S. Emission Estimates for 2018* (Jan. 8, 2019). Trump's actions are not responsible for all of this increase, but they contributed to it, and they will make the increase harder to reverse, and the Paris targets harder to reach. In order to achieve its Paris Agreement pledge to reduce its greenhouse gas emissions by 26 to 28% compared to 2005 levels by 2025, the United States would have to reduce emissions between 2018–2025 more than twice as fast as it did between 2005–2017. See *id.* Trump's successor will have a much harder time meeting this target than he or she would have if Hillary Clinton had won in 2016.

¹⁸ See, e.g., Eric Levitz, *Trump Deals New Blow to Paris Climate Accord Ahead of Conference*, N.Y. MAG. (Nov. 26, 2018); David Nakamura & Darryl Fears, *Trump Administration Resists Global Climate Efforts at Home and Overseas*, WASH. POST (Dec. 9 2018); but see Frank Jordans, *Nations at UN Climate Talks Agree on Universal Emissions Rules*, ASSOC. PRESS (Dec. 15, 2018) (describing Trump administration role at recent conference of parties as "schizophrenic" since, despite pushing back against many progressive initiatives, it worked hard for transparency rules concerning emissions).

¹⁹ See Nicky Sundt, *U.S. Fails to Submit Reports on 1 January as Required Under U.N. Climate Treaty*, CLIMATE SCI. & POL'Y WATCH (Jan. 4, 2018). As of this writing, the United States still appears to be non-compliant. See Third Biennial Reports – Annex I, available at <https://unfccc.int/process/transparency-and-reporting/reporting-and-review-under-the-convention/national-communications-and-biennial-reports-annex-i-parties/submitted-biennial-reports-brs-from-annex-i-parties>. The United States has submitted other required reports, however. See National Inventory Submissions 2018, available at <https://unfccc.int/process-and-meetings/transparency-and-reporting/reporting-and-review-under-the-convention/greenhouse-gas-inventories-annex-i-parties/national-inventory-submissions-2018>.

²⁰ See Matthew J. Kotchen, *Trump Will Stop Paying into the Green Climate Fund. He Has No Idea What It Is*, WASH. POST (June 2, 2017). Koh acknowledges this point but optimistically asserts that "domestic and international stakeholders can exert pressure to force this administration and the next to make up the difference" (p. 52).

²¹ Curtin, *supra* note 14, at 9 (noting that Turkey, Brazil, and Australia have invoked Trump's actions as a reason for their own anti-Paris steps). According to the most recent authoritative report, seven G20 countries in addition to the United States (Argentina, Australia, Canada, EU28, South Korea, Saudi Arabia, South Africa, and the United States) are not on track to meet their Paris Agreement pledges. See United Nations, Emissions Gap Report 2018, at 9 (2018).

²² Koh paints a number of scenarios in which Trump's impact might be minimal (e.g., pp. 64–67) and notes, for example, that "[a]ll Trump has done is force that process of engage—translate—leverage to shift its focus from Iran, and to take place without him and about him" (p. 69).

and the Iran deal. But the reality is that despite that process, Trump's unilateral actions have had a large impact—larger than many commentators, including myself, thought possible—on the Iranian economy, on third party firms and countries, and on Middle East politics.²³

The contradictions in Koh's book reach their height in his analysis of war powers. Much of the discussion has little to do with transnational legal process and seems better directed toward the Obama administration in which, as he notes many places in the book, he served. Koh says that Obama wanted to end the "perpetual war-time footing" of the "Forever War" against Islamist terrorists and he criticizes Trump for dropping that goal. Obama did state a desire to end the Forever War, but in practice he expanded the war dramatically when he unilaterally extended it to the Islamic State. And Trump has taken more aggressive steps than Obama both to defeat the Islamic State and to wind down the U.S. presence in Syria and Afghanistan (though the extent of the wind-down in both places remains unclear). Koh also provides an oddly detailed roadmap for how Trump can close the Guantánamo Bay detention center—something Obama pledged but failed to do, and something Trump does not support.

Koh ties himself in the tightest knots on Syria. He is a leading champion of humanitarian intervention in Syria and elsewhere.²⁴ He continues this theme in the book when he says that the "absence of a threat of lawful force has crippled effective diplomacy and created a mismatch

between broader policy objectives and available soft-power tools" (p. 127). Koh nonetheless criticizes Trump for twice doing something Koh has advocated, and something Obama declined to do even after pledging to do: using U.S. military force in Syria in response to Syrian President Bashar al-Assad's use of chemical weapons. Koh derides Trump's lack of an effective strategy, and complains that Trump was insufficiently aggressive because he allowed Assad "to keep exterminating Syrian innocents by conventional means, so long as he does not use chemical weapons," and he did not act firmly enough against the Russians (p. 128).

Koh's position on humanitarian intervention under international law is hard to square with his commitment to transnational legal process, which at its core is about taking international legal rules seriously and absorbing them into the domestic legal culture. The UN Charter clearly prohibits one nation from using force against another nation absent consent, UN Security Council authorization, or a valid claim of self-defense. The dominant consensus among nations and international law commentators is that the Charter rules out humanitarian intervention.²⁵

But Koh dissents. He denigrates the "never-never rule" on humanitarian intervention for exhibiting "the absolutist, formalist, textualist, originalist quality Americans usually associate with the late Justice Antonin Scalia," and argues that "[a]s a matter of international law, the never-never rule cannot be squared with the object and purpose of the UN Charter, whose broad purposes include 'promoting and encouraging respect for human rights'" (pp. 129, 130). Koh further claims that a handful of humanitarian interventions in the twentieth century that were

²³ See, e.g., Thomas Erdbrink, *Iran's Economic Crisis Drags Down the Middle Class Almost Overnight*, N.Y. TIMES (Dec. 26, 2018), at <https://www.nytimes.com/2018/12/26/world/middleeast/iran-middle-class-currency-inflation.html>; Peter Kenyon, *Squeezed by U.S. Sanctions, Iran Has Had an Especially Bad 2018*, NPR (Dec. 18, 2018). I once predicted that "[a]ny reimposition of U.S. sanctions against Iran on January 20, 2017, would largely fail to change Iran's behavior and would primarily hurt U.S. firms." Jack Goldsmith, *The Contributions of the Obama Administration to the Practice and Theory of International Law*, 57 HARV. INT'L L.J. 2, 17–18 (2016).

²⁴ See, e.g., Harold H. Koh, Address, *The War Powers and Humanitarian Intervention*, 53 HOUS. L. REV. 971 (2016).

²⁵ For a good explanation, see Oona A. Hathaway, Julia Brower, Ryan Liss & Tina Thomas, *Consent-Based Humanitarian Intervention: Giving Sovereign Responsibility Back to the Sovereign*, 46 CORNELL INT'L L.J. 499, 533–35 (2016). Koh has cited only three nations—the United Kingdom, Denmark, and Belgium—that have publicly maintained that humanitarian intervention can be consistent with the Charter. See Koh, *supra* note 24, at 980. The United States, as Koh notes, has not (pp. 134–35).

widely seen as violations of the Charter are in fact exemplars of controlling state practice.

This is not the place to debate the legality of humanitarian intervention. The more pertinent question is whether Koh would adopt this casual approach to interpreting international law in other contexts, or how this approach fits with his transnational legal process's aim of "lead[ing] a nation into a pattern of sustained default compliance with international law" (p. 12). Koh's position on humanitarian intervention leaves him open to the charge that his commitment to "transnational legal process" is opportunistic and unprincipled. It is certainly jarring in a book that is otherwise so unrelenting about the virtues of compliance with international law.²⁶

Despite Koh's hopeful assertions that Trump is or will be checked from having various adverse impacts on international law and institutions, he says near the end that he is "not claiming, as a predictive matter, that Trump and his kind will inevitably be checked by transnational legal process" (p. 152). Instead, the main aim of the book is Koh's request "as a normative matter, for committed international lawyers to keep fighting to invoke that process—repeatedly, if need be—to preserve and advance the imperfect world we have inherited" (*id.*)

²⁶ It also raises hard questions for the normative side of transnational legal process. Koh's book, like his prior work, urges activists to "participate in, influence, and ultimately enforce transnational legal process." Harold Hongju Koh, 1998 *Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 624, 680 (1998). Koh assumes this role in his book by offering strategies to preserve most of pre-Trump international law and arguing for a sharp change in international law concerning humanitarian intervention. But if transnational legal process includes altering international law in addition to preserving it, is Trump not an actor in the process who seeks through interaction, interpretation, and internalization to alter international law, just like Koh with humanitarian intervention? Koh seems to assent when he notes at the very end that "[w]e are all participants in transnational legal process," and urges those who care about international law to "push even harder" than the "antiglobalist forces" (p. 153). It is hard to see the point of the normative side of transnational legal process if it contemplates international law advocacy from all perspectives.

This is a candid self-assessment: the book is more than anything else an effort to rally the troops of resistance. But this assessment, along with the book's failed case studies, calls into question the value of "transnational legal process" as a descriptive analytical tool. Transnational legal process is the sum of related domestic and foreign influences that via "interactions," "interpretations," and "internalizations" create "default patterns of international law-observant behavior for all participants in the process" (p. 7). One problem with this idea, as Koh's book demonstrates, is that it is hard to know what if any influences this theory leaves out, or how the influences relate to one another. Another problem, which the book also demonstrates, is that the theory is incapable of accounting for deviations from "international law-observant behavior"—for example, Trump's flouting of trade rules, his humanitarian interventions, and, possibly, his immigration policies.²⁷

Koh sometimes focuses on the gap between Trump's stated aims and his accomplishments regarding international law. Viewed charitably, the faintest version of Koh's descriptive thesis is that transnational legal process is responsible for much of this gap. I have tried to show that in many contexts, transnational legal process had much less influence on Trump than Koh claims. But in some contexts, international commitments and interpretations made by prior presidential administrations, and the domestic and international coalitions that support them, and the hard-to-reverse consequences of path dependency, threw up roadblocks to Trump. This always happens when an administration seeks to change the international law direction of its predecessor. Neither George W. Bush nor Barack Obama was able to realize his starkly different goals for international law and institutions, although both presidencies were ultimately quite consequential, and both shaped and violated international law. The same will be true of Trump and his successors. One does not need a fancy theory to understand these broad patterns,

²⁷ On these two problems in Koh's work, see ERIC A. POSNER, *THE PERILS OF GLOBAL LEGALISM* (2009).

and the theory of transnational legal process does not allow for more fine-grained assessments.

The hard question for Koh is why Trump has been able to bring as much change as he has to international law and institutions in such a short period.²⁸ Trump has announced that the United States will withdraw from at least six international agreements, including a major arms control agreement and Obama's two signature agreements (Paris and Iran). He has refused to conclude, or stopped negotiating over, two important international trade agreements. He has upended the international trade system and publicly trashed the North Atlantic Treaty Organization, the G7, the G20, the United Nations, and most of the United States' traditional allies. He has withdrawn from two important human rights bodies, reversed the United States' historic position on human rights leadership, taken an aggressive initiative against the International Criminal Court, stopped cooperating with human rights rapporteurs, and possibly violated international law with his travel ban.

Perhaps, as Koh hopes, the Resistance will eventually reverse these initiatives. Its success will depend on the identity and attitude of the next administration, the depth and rigidity of the new international relations paths Trump charted during his years in office, and the impact of the actions Trump took (and did not take) on U.S. relationships with nations and international institutions. It will also depend on larger structural trends in international relations that were operating before and independent of Trump, but which Trump might have accelerated. These trends include the rise of China as a global power; the many failures of "liberal internationalism," which have contributed to a global populist and nationalist backlash; and the blowback and exhaustion from American military and financial overstretch during almost two decades of global war.

The future is hard to predict. But any way one looks at it, Trump has brought enormous change

to international law and institutions in just two years even though he is generally incompetent at wielding executive power. His actions to date attest to the fact that we live in an era of unprecedented presidential dominance over international law.²⁹

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Not Enough: Human Rights in an Unequal World. By Samuel Moyn. Cambridge, Massachusetts: Harvard University Press, 2018. Pp. ix, 220. Index.
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Many will read Samuel Moyn's latest, powerful book, *Not Enough*, as an intended wake-up call. For some of human rights law's critics on the left, the book's interrogation of human rights law's silence in the face of growing social and material inequality will seem a necessary and welcome call to arms. In human rights' failure to respond to the 2008 financial crisis or the trans-Atlantic populist politics that followed, those detractors see an indictment of human rights' collusion with neoliberalism. For defenders of human rights law, the reaction might instead be anger. To them, the strident and condemnatory tone—particularly of the last chapter, in which Moyn, the Henry R. Luce professor of jurisprudence at Yale Law School and professor of history at Yale University, calls human rights law "unambitious in theory and ineffectual in practice" (p. 216)—will seem unwarranted, unfair, and misdirected. Moyn, for his part, tries to tamp down these reactions. No fewer than six times, Moyn writes that human rights did not "abet" neoliberalism (pp. xi, 187, 192, 202), and he specifically writes that he is trying to find a middle path between "corrosive attack[s]" and "complacent apologetics" (p. xi). Nonetheless, "there is no doubt that the transition

²⁸ The points in this paragraph are fleshed out in Jack Goldsmith & Shannon Togawa Mercer, *International Law and Institutions in the Trump Era*, 61 GER. Y.B. INT'L L. (forthcoming 2019).

²⁹ See generally Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control Over International Law*, 131 HARV. L. REV. 1201 (2018).