

FRIENDS DON'T LET FRIENDS DRIVE DRUNK: THE ROLE OF U.S. ALLIES IN KEEPING THE U.S. HONEST*

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This symposium has focused on the nitty-gritty changes and challenges in the international justice domain. I want to broaden the aperture a bit, and make three points.

The first point is this: although we've seen substantial progress in the field of international justice over the last decade, this progress remains very, very fragile. The second point: the current presidential administration of the United States, the Trump Administration, poses serious threats to the fragile progress that's been made. The third and perhaps most important point relates to the role that U.S. partners, allies, and even, sometimes, U.S. adversaries can play in keeping the United States from playing the role of the skunk in the garden.

Let's start with the semi-good news. We really have seen amazing progress in international justice in the twenty years since I graduated from law school. Twenty years ago, the Rome Treaty creating the International Criminal Court (ICC) had not yet been adopted, and there were only a few fledgling international justice institutions: the International Ad Hoc Criminal Tribunal for Bosnia and the former Yugoslavia, for instance, and the International Criminal Tribunal for Rwanda. Today, the situation looks different—and it looks a lot better. 120 states around the world now accept the jurisdiction of the International Criminal Court. That's the large majority of states. We've also seen successful regional and transnational justice efforts in states ranging from Cambodia and Guatemala to Sierra Leone, and together, the various international and regional tribunals have investigated some 300 cases, and convicted 150 individuals. We've also seen—though there has been some backsliding at times - a trend toward renewed interest by national governments in enforcing international justice in their national courts, such as Germany's current efforts to prosecute some of those involved in the Syrian genocide.

That's the good news, but as you know, this has very much been a one-step-forward, three-quarters-of-a-step back process. Progress over

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the last two decades has been slow and episodic, and we have seen some real threats to the overall forward trend.

One threat relates to the call by the African Union for African countries to withdraw from the jurisdiction of the ICC. This comes out of skepticism about the fact that so many of the Court's investigations currently focus on African cases. One could defend the court's recent focus on Africa, of course. One could say: every continent on Earth has taken its turn at terrible wars and atrocities. In the 1970s, we saw genocide in Cambodia, then in the 1980s, Latin America took central stage when it came to war, torture, and disappearances. In the 1990s, Europe played host to a series of brutal conflicts in the former Yugoslavia. It just happens to be Africa in the spotlight right now. But this response, while true as far as it goes, doesn't fully address the deeper concern implicit in the African Union's critique: that powerful states will be happy to support international justice efforts as long as only powerless states are under scrutiny.

Another major critique that can be leveled at the ICC is that it is slow, it is distanced from the affected communities, and it is not always attuned to the political realities on the ground. Such critiques were also leveled at the ICTY and the ICTR, and the ICC is even further removed than those tribunals from the geographic locus of the conflicts at the heart of most current cases. This too is part of what lies behind the African Union's call for African countries to withdraw from the ICC, and several states have heeded that call. Not coincidentally, we've also seen a great deal of reluctance on the part of several African states to cooperate with the ICC's indictment of al-Bashir in Sudan, and we've seen the collapse of the ICC Prosecutor's case against Uhuru Kenyatta in Kenya. All this makes it hard to feel too sanguine about the future of the ICC.

Beyond Africa, there are also reasons for concern. The ongoing atrocities in Syria have not led to any organized, sustained international effort to end the conflict or bring justice to those who have committed the worst atrocities. This remains an open sore. Just as troubling, we've also seen superpowers continuing to do things that fly in the face of broader commitments to international law and principles of legality and international justice. One example would be Russia's 2014 annexation of Crimea and its 2016 withdrawal from the ICC. Another would be China's actions in the South China Sea, and China's refusal to respect the decision of the Permanent Court of Arbitration. And of course we have other examples right here in the United States.

This brings me to my second point: we have a new President who has made it very clear that he has no respect for, or interest in, international justice institutions or international norms more generally. That's

a real shift. Trump was elected following about a decade of a cautious U.S. embrace of international justice institutions. Although the George W. Bush Administration initially repudiated the International Criminal Court—recall the infamous John Bolton, then U.S. ambassador to the U.N., “un-signing” the ICC, an action that now seems to have inspired Vladimir Putin—we saw a substantial shift in U.S. attitudes toward the ICC during the second term of the George W. Bush Administration. Late in the George W. Bush Administration, we saw a good deal of cautious U.S. cooperation with the ICC, particularly over the indictment of Sudanese leader Omar al Bashir. When President Obama took office, the U.S. began to participate actively in the ICC, and played an increasingly active role also in providing intelligence support and other forms of assistance to the International Criminal Court.

I don't think that's likely to continue. While the ICC itself has not yet become the focus of President Trump's ire, people in his inner circle clearly do not like the International Criminal Court, do not like the United Nations, and do not like international law—not one little tiny bit. I think we can certainly expect to see a substantial waning—best case—of active U.S. support for international justice institutions, and quite possibly we will see a return to the period early in the first Bush Administration, one characterized by active hostility from the U.S. government toward international justice institutions.

Even more chilling, President Trump, while on the campaign trail, indicated his enthusiasm for certain actions that would constitute international crimes if actually carried them out. On the campaign trail, he commented that “waterboarding works” and “even if it doesn't,” terror suspects “deserve it anyway.” Thanks to solid opposition from General, now Secretary of Defense, James Mattis, President Trump seems—for the moment at least—to have walked back his commitment to restore the use of waterboarding and “a hell of a lot worse.” But who knows how long that will last?

Also on the campaign trail, President Trump, then candidate Trump, argued that the Obama Administration had been ineffective in combating ISIS because it was not aggressive enough. The only way to get “terrorists,” Trump argued, was to “go after their families,” as he put it: to start bombing the children of terrorists. When it was pointed out that targeting the families and children of U.S. adversaries would amount to a war crime under international law, which U.S. military personnel would be legally required to disobey, Trump was dismissive; “I'm a leader, if I say it they're going to do it.” Here too, Trump later backed away from this in the face of intense pressure. But I think that it's safe to say that President Trump's instincts are not friendly towards interna-

tional humanitarian law, international criminal law, or international law more generally. His attitude toward multilateral treaties, has also been quite hostile.

So what do we do about this, when we have seen fragile and uneven progress in international justice, but we now have a new U.S. administration that is both hostile to the project of international justice in general, and a President who seems to have no particular moral qualms about suggesting that he would cheerfully order grave violations of international criminal law? Trump has also, of course, spoken admiringly of Philippine President Rodrigo Duterte's death squads, and of Vladimir Putin, dismissing overwhelming evidence that Putin presides over a state in which numerous human rights advocates, dissenters, journalists, and others inconvenient to his regime have been imprisoned or assassinated. When Bill O'Reilly of Fox News put it to Trump that Putin was "a killer," Trump's offhand reaction was: "There are a lot of killers. You think our country's so innocent?"

There is some faint possibility that the U.S. Congress will serve to check Trump's worst instincts. Hearteningly, we've seen strong push-back from some prominent members of Congress—including Republican members of Congress—in response to Trump's comments on torture and the targeting of civilians. We've also seen many in Congress on the Republican side as well as on the Democratic side express commitment to pursuing some sort of international tribunal to look at war crimes and crimes against humanity in Syria. In general, it's possible that Congress will push back against Administration efforts to sabotage international justice institutions, and will also be a restraining influence on the President himself in terms of his own actions and policies. But I wouldn't count on it.

This brings me to my third point. Those of you who grew up in the United States may remember the media campaigns created by Mothers against Drunk Driving—MADD—which are often credited with greatly reducing fatal drunk driving accidents. MADD popularized the slogan, "Friends don't let friends drive drunk." The genius of this slogan was that it shifted the focus from the drinker to the drinker's friends. Instead of just saying, "Don't drink and drive," MADD launched a "designated driver" campaign, essentially saying to people, "This is not about *you* choosing to risk your life, this is about you taking good care of your friends. And if your friend is drunk and is likely to get into an accident, you've got to take away their car keys. You've got to take care of them when they can't take care of themselves."

For the duration of the Trump administration, at least, it will become more and more important to think about the potential role of U.S.

allies and partners in preventing the United States from harming ourselves or others. We need, in effect, a global campaign premised on the idea that Friends Don't Let Friends Drive Trump.

How can friends of the United States prevent us from driving Trump? (Or perhaps I should say, "while trumped"?) First, U.S. allies and partners can carry on supporting the international institutions that are so important to maintaining a reasonably just and stable international order. And second, U.S. allies and partners can make it clear that if the United States is hostile to those institutions there will be a cost—and a very high cost if the United States itself commits violations of international criminal law.

At a moment when the current U.S. presidential administration is retreating from its support for international justice, it is more important than ever for U.S. allies and partners around the world to redouble their support for international justice institutions and the principles that stand behind them. That means continuing their political and rhetorical support for these institutions and also continuing to provide economic support, intelligence cooperation and so forth to the ICC and other institutions, in addition to supporting new and emerging international justice institutions.

For instance: the silver lining to the African Union's request that states in Africa withdraw from the ICC is that the African Union has taken steps to create tribunals of its own. The African Union Tribunal in Senegal, which tried the former President of Chad, was widely viewed as a model of fair and successful regional prosecution for international crimes. The African Union seems likely to try to create some additional tribunals, and there is no reason for U.S. allies not to try to support those efforts. There is no particular reason that all international justice has to take place in The Hague, as opposed to closer to home, or as opposed to through regional institutions.

Most importantly, however, U.S. partners and allies need to hold our feet to the fire over the next few years. That means, for one thing, not pulling punches, and being critical when the United States deserves criticism. Ironically, the popularity of President Obama sometimes meant that our allies were a little *too* nice to us, when the U.S. deserved criticism rather than support. I'm thinking, in particular, of some U.S. practices in the war on terrorism, or the war against al-Qaeda and its associated forces, as we now like to call it, such as targeted killings. At times, our European allies would say privately, in non-attribution settings, "Obviously we're strongly opposed to what the United States is doing; we think it's a violation of international law." But put them in a room with President Obama, and they would soft-pedal those criticisms

because they saw President Obama as an ally and friend. Perhaps they didn't want to hurt his feelings. Who knows? But they weren't very tough in their criticism, creating an odd dissonance between their private statements, and indeed statements to their own publics, versus the level of pressure that they would put directly on U.S. senior officials.

With Trump in office, we're likely to see less deference from leaders of allied and partner states, and that's a good thing. The US—and the world—needs US allies and partners to stand up for the principles that the Trump administration may not be willing to stand up for. We need our allies and partners—and even our adversaries—to be willing to exert real pressure, not just rhetorical pressure, on the United States if the United States acts in a manner that violates international criminal law. No nation can go it alone today. We all need friends; we all need cooperation from other states. Even President Trump is likely to discover this.

Real pressure from other states can have a powerful impact on the behavior of the United States. Think back, for instance, to the administration of George W. Bush. During the first term of the Bush administration, the United States more or less went its own way on detainee policy, even though rights groups and many other states argued that U.S. detainee policies violated international law. By the second term of the Bush administration, this began to change—and in Afghanistan, one of the most significant reasons for the shift was the willingness of our European allies to put their collective feet down. After domestic and regional European courts made it clear that U.S. allies in Afghanistan had to comply with more stringent rules concerning detainee treatment than the United States had adopted, U.S. allies, including the United Kingdom, essentially said to the United States, “Our military personnel can't turn detainees over to U.S. forces anymore, because the way you handle detainees risks exposing *us* to domestic or regional prosecution or liability. We would be complicit in your violations of international law, so we can't turn over detainees to you.” When that happened, the United States changed its detainee policies quickly: when push came to shove, we needed our allies to be willing to work with us, cooperate with us, and turn detainees over to us.

As it embarks on its own international adventures, for good or for ill, even the Trump Administration is likely to find that the United States needs allies and parties. We need them to provide intelligence support and military cooperation; we need them to contribute funding to joint efforts, and so forth. And when allies say, “We won't do that anymore,” it starts to hit the United States where it hurts.

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Just as friends should not let friends drive drunk, friends in the international community should not let the United States get away with renegeing on our global commitments or violating international criminal law. The United States, like all states, should abide by international law. And let me be clear: U.S. patriots should demand nothing less of our allies. It is a hostile act for Russia to manipulate the U.S. election. It is not a hostile act for U.S. allies to say to us, “Yes, we expect you to comply with the letter and the spirit of international criminal law and international humanitarian law.” That’s what friends do for each other—they keep each other on the straight and narrow—for everyone’s sake.

The next few years will be a true test for U.S. partners and allies. And in this one respect, I think there is a silver lining to President Trump’s hostility to international legal norms. Trump will force many U.S. partners and allies to stand up and be counted—to take their place as spokespeople for, and sometimes enforcers of, the international norms from which the United States is retreating. In the long run, having a larger number of states play leadership roles as proponents and enforcers of international norms is something we all need—not, once again, for America’s sake, but for the world’s sake.