Can international law save itself from Donald Trump?

Since Election Night 2016, that question has haunted me across many issue areas. Professor Craig Martin and the Washburn Law Journal editors generously invited me to offer an initial answer in their recently published symposium issue in an article entitled “The Trump Administration and International Law.” As I prepare my book-length answer for publication this fall by Oxford University Press, I am deeply grateful to my friends who took the time to make incisive contributions both to the initial symposium—Margaret McGuinness, Clare Frances Moran, and David Sloss—and this virtual one—Laura Dickinson, Bill Dodge, Kevin Jon Heller, and Frederic Sourgens. I especially thank Craig Martin for moderating both symposia and for his astute opening and closing essays, and to the editors of Opinio Juris for hosting this important on-line discussion.

A full-fledged response to these various thoughtful comments will have to await my book. But broadly speaking, I am gratified that all five commentators see the lens of transnational legal process as a useful way to unpack how international law responded to the new Trump Administration in 2017. The commentators seem to agree that transnational actors outside the U.S. government have responded to various Trump initiatives by employing the “outside strategy” of provoking interactions—e.g., the lawsuits in the Travel Ban case—to generate legal interpretations (often by courts), that government actors have been forced to internalize, thereby promoting the “stickiness: of
international law. They also acknowledge that, even in the face of intense political pressure, governmental actors have furthered that stickiness by using an “inside strategy” of bureaucratic resistance to adhere to previously embedded, internalized norms of international law. At a strategic level, the commentators seem to agree that a strategy of “international law as smart power”—connecting with like-minded countries through engagement around values, translating new norms of international behavior from extant norms of international law to address novel situations and technologies (e.g., drones, cyberconflict), and leveraging that law-based cooperation into enduring diplomatic solutions will far more likely strengthen international law in the long run than the Trump Administration’s repeated resigning from global leadership through disengagement, focus on national interests, and going it alone.

At the same time, each commentator registers a thoughtful caution against painting too rosy a picture going forward for transnational legal process. Professor Dodge wisely notes that litigation against the United States Government is always a double-edged sword. Litigation may harden the executive’s resolve to defend and continue negative behavior and can trigger normatively undesirable litigation positions, an argument that Rebecca Ingber persuasively laid out in her important explanation of how “interpretation catalysts” can entrench defensive anti-international law executive branch decisions. But Dodge’s argument does not so much cut against invoking transnational legal process during the Trump Administration, as it calls for smart litigators to be thoughtful about their litigation strategy. On some issues—for example, when the new Administration issues a thinly disguised Muslim Ban one week in—Trump’s subordinates threw down the gauntlet by publicly declaring that the President’s authority “may not be questioned.” Under such circumstances, thoughtful resistance through litigation becomes both a challenge and the best available option. Rule of law litigators have little choice but to generate interactions and interpretations in the smartest possible way: to choose the right cases and the most advantageous fora, making arguments sensitive to the range of positions the U.S. Government has taken in the past in an effort to advance better interpretations of international law. Whatever the ultimate outcome, such litigation serves an important signaling and public education function. The Travel Ban case, for example, has signaled government litigators that there are limits to the arguments they can make and

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reminded beleaguered public servants that the legal interpretations they were fighting for within the bureaucracy resonate with the courts and the public at large. Especially when combined with street demonstrations, injunctions remind policymakers that they cannot unilaterally change the status quo while the whole world—including courts—is watching. Perhaps most important, prudent persistent litigation reminds Muslim-American communities that they are not alone and teaches the public that resistance is not futile.

Professors Dickinson and Sourgens usefully ask how law and policy differ as tools to promote the stickiness of internalized international norms. Professor Dickinson uses the 2013 Presidential Policy Guidance on Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities to enumerate the advantages and disadvantages of adopting certain norms as voluntary government policy, as opposed to conceding that they are legally required. She correctly notes that there “may be certain path dependencies that cause policies to be ‘sticky’ once adopted, [but] there is little doubt that Executive Branch policies usually do not bind future administrations in the same way as Executive Branch determinations about the applicability of international legal rules.” Yet elsewhere in her post, she offers what may be the best response to her own concern: that one reason not to focus overly “on the law/policy distinction [is] because … norms articulated as a policy matter impact legal rulings and over time may ‘harden’ into law. Indeed, such seepage seems to be at the core of transnational legal process.”

This is precisely what has happened, for example, with a little-noticed March 2011 Obama Administration announcement of support for two important components of the international legal framework that covers armed conflicts: Additional Protocol II and Article 75 of Additional Protocol I to the 1949 Geneva Conventions. Additional Protocol II, which contains detailed humane treatment standards and fair trial guarantees that apply in the context of non-international armed conflicts, was originally submitted to the Senate for approval by President Reagan in 1987. The Administration urges the Senate to act as soon as practicable on this Protocol, to which 165 States are a party. An
extensive interagency review concluded that United States military practice is already consistent with the Protocol’s provisions. Joining the treaty would not only assist us in continuing to exercise leadership in the international community in developing the law of armed conflict, but would also allow us to reaffirm our commitment to humane treatment in, and compliance with legal standards for, the conduct of armed conflict. Article 75 of Additional Protocol I, which sets forth fundamental guarantees for persons in the hands of opposing forces in an international armed conflict, is similarly important to the international legal framework. Although the Administration continues to have significant concerns with Additional Protocol I, Article 75 is a provision of the treaty that is consistent with our current policies and practice and is one that the United States has historically supported. Our adherence to these principles is also an important safeguard against the mistreatment of captured U.S. military personnel. The U.S. Government will therefore choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict, and expects all other nations to adhere to these principles as well (emphasis added).

While in 2011, the Obama Administration could not bring itself to say outright that these provisions were customary international law, as time has passed, these convictions have hardened from policy into law, advancing the U.S. government’s lengthy struggle to decide whether and to what extent it is bound—not just as a matter of policy, but of law—to comply with the two additional protocols to the 1949 Geneva Conventions.

One of my core claims is that it is both unrealistic and counterproductive artificially to split off legal from policy and political constraints when discussing the impact of transnational legal process on government behavior. In real life, these three kinds of constraints are usually intertwined and are often used in combination to check action destructive of legal stability. Although international lawyers often say, “let’s carefully distinguish between law and policy,” in real life, it is rarely so clear-cut. Law, policy, and politics pose interconnected constraints in foreign affairs decisionmaking. Some policy options may not be available as a matter of law. Some lawful options may not be wise as a matter of policy (what we used to call “lawful, but awful.”) Some
options might be desirable as a matter of both law and policy, but when tried, just prove not to be politically available (as they famously say in *Hamilton*, “you don’t have the votes”).

My lecture’s detailed discussion of Trump’s difficulties in extricating the United States from the Paris Climate Accord and the Iran Nuclear Deal vividly illustrates the unexpected ways in which these legal, policy and political constraints have interacted together to create a web of guardrails obstructing Trump’s threatened disengagements. For example, in the Paris Accords, Trump is for now legally sticking to the 4-year term of withdrawal set forth in the treaty, while also facing a set of policy and political constraints that have blunted his goal of exit. This bundle of constraints has led to a broader phenomenon that my book calls “resigning without leaving:” the *de facto* outcome of all of Trump’s blustering has not been exit from existing international regimes, but the United States’ staying in as an announced lame duck, with predictably reduced influence. The wide-ranging counter-strategy of damage control across many issue areas has created a *de facto* path of least resistance: a default whereby the United States under Trump rarely leaves, but rather, *stays in and underperforms* within existing international regimes. While that is a suboptimal state of affairs, at least it has the virtue of being curable, at a future time when Trump and his party no longer control both the White House and both houses of Congress.

Professor Sourgens usefully points to two broader dangers of Trump. The first is that his relentless disdain for international law may outlast “stickiness,” by “ungluing” the elements of the administrative state that maintain obedience to international rules. Second, viewed in the broader light of Brexit and the global resurgence of Orwellian authoritarianism, Trump is plainly not so much a one-off as a symptom of a much broader counter-assault on the postwar Kantian global order that can flow through the same channels of transnational legal process that foster compliance: enabling a “transnational transference of lawlessness, or photonegative of ...transnational legal process” My article tried to capture Sourgens’ insights in adopting the analogy of Muhammad Ali’s “rope-a-dope” as a counter-strategy to George Foreman’s offensive pummeling. In the game of “rope-a-dope,” both sides pay a fearful cost, and even while the nominal winner, Ali, may win the fight, in the process he may

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endure the kind of battering that weakens his fabric and leaves him unglued in the long run.

While these concerns are real and serious, as yet, I hope they are premature. The “tally so far,” chronicled in my article, suggest that transnational process is working so far, although harder times clearly lie ahead. Sourgens correctly notes that “the great ungluing precisely seeks to impeach the reflex to coordinate domestic and international legal processes.” But that is precisely why our counterstrategy should be to strengthen that connection: other American climate actors—states and localities, private companies and NGOs, the bureaucracy—should make clear to the international actors seeking to preserve the Paris accords that Donald Trump does not own the process or speak entirely for America. Norm-internalization goes all the way down. Street-level demonstrators in San Francisco or farmers in Vermont well understand the negative impact that global climate change is having on the level of their local coastline or the local temperature in the winter-time. Trump’s anti-globalist rhetoric may seek to sever the link between the domestic and the international, but in a modern age of globalization, the interactive link between domestic and global law is just as deeply intertwined as the link between local cause and global effect. The United States can no more resign from today’s global system than an individual can resign from the human race. Because transnational legal process is much bigger than Trump, he does not and cannot own it; we all do.

My good friend Kevin Heller makes two basic objections, which are part of a broader left critique of my approach. The first is that I am too praising of Obama. Like all administrations, the Obama Administration was far from perfect, and my goal has never been to whitewash its blemishes. My point is not that Obama always succeeded –and I agree with Kevin that the lack of accountability for torture was a glaring, continuing failure–but that Obama articulated a better general strategy of “international law as smart power:” when in doubt, engage-translate-leverage, rather than follow Trump’s destructive approach of “disengage-cite national interests only-and go it alone.”

Professor Heller secondly objects at length to what he calls my support for the legality of “unilateral humanitarian intervention;” when in fact I have argued
that humanitarian intervention is *not always unlawful under all circumstances* under both domestic and international law, particularly when UN Security Council resolution has been persistently blocked by twelve Russian vetoes (the “never/never rule”). We need not recapitulate this lengthy debate, as I have already fully laid out my position [here](http://opiniojuris.org/2018/03/05/international-law-vs-donald-trump-a-reply/) and [here](http://opiniojuris.org/2018/03/05/international-law-vs-donald-trump-a-reply/). Suffice it to say that I have not broadly endorsed unilateral humanitarian intervention as a matter of either law or policy. To the contrary, my claim has been that, twenty years after Kosovo, it is long past time for the United States government lawyers and legal academics to engage with their foreign counterparts—particularly in United Nations and nations like the United Kingdom, France, Belgium and Denmark—to determine whether and under what narrow circumstances limited intervention for humanitarian purposes may be lawful. After Kosovo, the international legal community went some distance to define a legal standard to govern the lawfulness of Responsibility to Protect or R2P. I simply argue that it is time to finish the job.

Because Kevin offers no alternative to the notion that humanitarian intervention is always illegal or to the status quo that I have called the “never-never rule,” he offers no suggestion as for how we should stop the continuing horrible *slaughter in Syria, which is only intensifying as ISIL retreats*. Moving away from his original absolutist reading, Kevin notes that “[a]lthough as a lawyer I would feel better about humanitarian intervention in Syria if it was authorised by the General Assembly, I am skeptical that such intervention would actually *work*.” On both scores, I feel the opposite. As recent UNGA votes on various electoral matters have shown, as a practical matter, the Chinese and the Russians have shown far more capacity to influence a General Assembly resolution with non-humanitarian based threats and financial inducements than do NATO countries that over the years have shown far more respect for the use of force provisions of the U.N. Charter. So a reliance on the UNGA or the Uniting for Peace Resolution would make more Russian and Chinese-led “humanitarian interventions” far more likely than ones measured by the carefully defined rule that I set forth in my earlier writings on this subject. And while Kevin questions whether “such intervention would actually work,” he does not fully address the likelihood that the threat of humanitarian intervention could “work” as a critical element finally to galvanize an enduring diplomatic solution.
As someone who lived through the Balkans, I learned long ago that a Richard Holbrooke-ian smart power exercise of diplomacy backed by force can sometimes get warring factions to the table, as it did at Dayton even to stop the most intractable conflict. To be clear: I have not advocated use of force in Syria for its own sake, or to engage in broader regime change; I have simply argued that international lawyers should not take the smart power policy option of diplomacy backed by force off the table by artificially claiming that a collective exercise of the Responsibility to Protect is always legally unavailable. It is a fiction to assert an absolutist norm against intervention as a prevailing governing norm, at a time when all the world seems to have intervened in Syria. It is even worse when sticking with that anti-interventionist legal fiction becomes a de facto pro-slaughter position as a matter of policy. In the end, my debate with the admirable Professor Heller shows once again why it is a mistake to try to think (and teach) international law analysis solely within its own bubble, entirely distinct from policy. In the international realm, law and policy are inevitably and inextricably intertwined. Most transnational players use policy arguments to try to change international law, or make international law claims to force governments to change their policies. Academics will miss half the picture if they constantly insist on artificially separating the two.

Finally, Craig Martin’s closing piece correctly notes the limits of transnational legal process: “interpretation and internalization will only result in compliance with international law if the interpretation itself is at least within a range of reasonable interpretations consistent with established principles of international law.” Professor Martin expresses some surprise at what he calls “the move from the descriptive to the normative;” he had always thought of transnational legal process as a descriptive theory, not a call to arms or a prescriptive counter-strategy. But in fact, the normative component has been a key part of transnational legal process theory from the beginning. My original lecture sketching the theory 22 years ago closed by saying:

“It is sometimes said that someone who, by acquiring medical training, comes to understand the human body acquires as well a moral duty not just to observe disease, but to try to cure it. In the same way, I would argue, a lawyer who acquires knowledge of the body politic acquires a
Some might chide me for proposing an “elite project” of transnational lawyering in response to a populist rejection of just such elite policymaking. To be clear, I do not mean to be offering a complete account of the forms of political response required to deal with Trump and the new authoritarian populists. Nothing I say should be read to suggest that concerned citizens around the world should not be in the streets demonstrating or that grassroots efforts should not be trying to win back the state houses and institutions of formal government power. Lawyers are never going to relieve us of the burdens of politics, but they certainly can—and I believe should—constantly create acts of political pressure through law that promote the rule of law through training and techniques that simply are not available to others.

If believing this, as Professor Sourgens charges, makes me “a perennial optimist,” I humbly plead guilty. But I don’t simply bet “that the stickiness of transnational legal process is stronger than the force seeking to unglue it,” as Sourgens says. Instead, I believe that our job as lawyers is to make sure that it is stronger. To be clear, as a predictive matter, I am not claiming that Trump will inevitably be checked by some kind of self-correcting synopticon of distributed checks and balances. Rather, as a normative matter, I think that committed international lawyers have to fight to preserve the imperfect world we have inherited. As Dr. King memorably put it, “the arc of the moral universe is long, but it bends toward justice.” But it certainly does not bend by itself. If Trump and those of his ilk are pushing hard to bend that arc in one direction, isn’t it the job of all of us who care about international law to push it even harder in the other?