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Has President Trump Committed a War Crime by Pardoning War Criminals?

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HAS PRESIDENT TRUMP COMMITTED A WAR CRIME BY PARDONING WAR CRIMINALS?

STUART FORD*

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I. INTRODUCTION

In 2019, President Trump pardoned four members of the U.S. military (Major Golsteyn, Chief Gallagher, and Lieutenants Behenna and Lorance) who had either been accused of or convicted of serious violations of international criminal law.¹ These pardons were widely criticized on various grounds.² Among other things, it was alleged that they undermined the morale and effectiveness of the U.S. military, undermined the rule of law in the United States, and increased the risks for other members of the military.³ But most commentators conceded that the pardons were a valid exercise of the President's authority over the military and his pardon power, and therefore not a violation of U.S. law.⁴

This article approaches the pardons from an international perspective and asks whether the President's actions violate international law. Specifically, this article looks at whether the President of the United States committed a war crime by granting these pardons. Commanders have an affirmative obligation to ensure that their subordinates comply with the rules of international humanitarian law (IHL) and commanders who fail in this obligation can be held criminally liable for their subordinates' actions.⁵ This concept is known as command responsibility.⁶

Command responsibility includes both a duty to prevent violations of IHL and a duty to punish violations.⁷ This Article explores in detail whether the pardons granted by President Trump constitute a violation of the duty to punish. If President Trump's actions do constitute such a violation, then the President could be guilty of committing a war crime by issuing the pardons. The analysis suggests that President Trump has probably committed at least one war crime and possibly several. The pardon of Major Mathew Golsteyn, which occurred prior to his trial, made his punishment impossible.⁸ As a result of the pardon,

1. *See infra* Sections II, IV.A.

2. *See infra* Section III.

3. *See id.*

4. *See id.*

5. *See infra* Section IV.

6. *See id.*

7. *See infra* Section IV.D.

8. *See id.*

Major Golsteyn can never be prosecuted in the United States for his actions, which include murdering a prisoner.⁹ The issuance of the pardon by President Trump was a violation of the President's duty to punish Golsteyn's war crimes. Pardons such as this one expose President Trump to criminal liability under the doctrine of command responsibility.¹⁰

It is also possible that President Trump could be criminally liable for the pardons of Lieutenants Behenna and Lorange, although the question is more difficult. In the latter two cases, the President pardoned the men after they had served a significant portion of their sentences.¹¹ Accordingly, the pardons did not make their punishments impossible but they did lessen the severity of the punishments. It is not clear that the reduction in their penalty is so disproportionate as to entail criminal liability for the President.¹²

Finally, it is unlikely that the pardon of Chief Gallagher could result in criminal liability for the President. Gallagher was tried and acquitted of serious violations of IHL prior to the pardon.¹³ Accordingly, his pardon probably could not constitute a violation of the duty to punish because the acquittal acts as an implicit finding that he did not violate IHL. If Gallagher did not violate IHL, then there is no underlying crime that can form the basis for command responsibility.¹⁴

The article proceeds as follows. The pardons and the events giving rise to them are discussed in Section II.¹⁵ The President's authority under domestic law and the relationship between domestic and international law are discussed in Section III.¹⁶ Section IV describes command responsibility and applies the law of command responsibility to President Trump's pardons.¹⁷ Some other issues, including motive, successor liability, the status of pardons under

9. See discussion *infra* Sections II.B, IV.D.

10. See discussion *infra* Section IV.D.

11. See *infra* Sections II.A, II.C.

12. See discussion *infra* Section IV.D.

13. See *infra* Section II.D.

14. See discussion *infra* Section IV.A.

15. See *infra* Section II.

16. See *infra* Section III.

17. See *infra* Section IV.

international law, and the prospect of adjudication of President Trump's potential war crimes are covered in Section V.¹⁸ Section VI summarizes this article's conclusions.¹⁹

II. THE PARDONS

A. FIRST LIEUTENANT MICHAEL BEHENNA

In April 2008, First Lieutenant Michael Behenna and his platoon were struck by a bomb while on patrol in Iraq, resulting in the deaths of two platoon members.²⁰ Lieutenant Behenna believed that an Iraqi man named Ali Mansur was involved in the bombing and requested that he be interrogated about the bombing.²¹ Mansur was interrogated twice but was ultimately released because of a lack of evidence.²² Lieutenant Behenna was then tasked with returning Mansur to his home.²³ But rather than returning the prisoner to his home, Lieutenant Behenna took Mansur out into the desert.²⁴ Lieutenant Behenna stripped Mansur naked except for his sandals, held a gun to his head, and threatened to kill him if he did not confess to involvement in the bombing.²⁵ What happened next is contested. Lieutenant Behenna claimed that Mansur stood up from a seated position and reached for Lieutenant Behenna's gun.²⁶ A translator, who was present, testified

18. See *infra* Section V.

19. See *infra* Section VI.

20. See Kali Borkoski, *The Story of Michael Behenna and Mad Dog 5: "Self-Defense" in War*, SCOTUSBLOG (May 29, 2013), <https://www.scotusblog.com/2013/05/the-story-of-michael-behenna-and-mad-dog-5-self-defense-in-war/> (detailing the bombing of First Lieutenant Behenna's platoon).

21. See *id.* (describing the events leading up to Mansur's detainment by First Lieutenant Behenna's platoon, Mad Dog 5).

22. See *generally id.* (describing the events of Mansur's first and second detainment).

23. *Id.* (noting that Behenna's platoon was assigned to return Mansur, among other detainees, to their home).

24. *Id.* (stating that Behenna's platoon took Mansur into the desert after dropping off the other detainees).

25. *Id.* (stating that Behenna was blindfolded, stripped, and threatened with a pistol).

26. See *id.* (detailing Behenna's point of view of the circumstances surrounding Mansur's death).

that Mansur remained seated and made no sudden movements.²⁷ It is undisputed, however, that Lieutenant Behenna shot Mansur twice, which killed him²⁸ Behenna was charged with premeditated murder and ultimately convicted of unpremeditated murder and sentenced to twenty-five years in prison.²⁹ That conviction was upheld by a divided panel of the U.S. Court of Appeals for the Armed Forces.³⁰ In May 2019, President Trump granted a full pardon to Lieutenant Behenna.³¹ In a statement, the White House said that Lieutenant Behenna had been pardoned, in part, because his case had attracted broad support “from the military, Oklahoma elected officials, and the public” and because he had been a “model prisoner.”³²

B. MAJOR MATHEW GOLSTEYN

In February 2010, two Marines who had been working with Major Golsteyn’s unit in Afghanistan were killed by a roadside bomb.³³ Major Golsteyn’s unit then began to search nearby homes to find the source of the bomb.³⁴ The unit arrested an Afghan man and took him back to their base.³⁵ At the base, the man was identified by an Afghan tribal leader as a Taliban member.³⁶ Major Golsteyn was concerned that the man, if released, would either attack more American troops or

27. *See id.* (describing the translator’s account of the events leading to Mansur’s death).

28. *Id.*

29. *Id.*

30. *See id.* (noting that the court ruled against Lieutenant Behenna in part because Behenna created the circumstances allowing the event to happen).

31. *See* Mihir Zaveri, *Trump Pardons Ex-Army Soldier Convicted of Killing Iraqi Man*, N.Y. TIMES (May 6, 2019), <https://www.nytimes.com/2019/05/06/us/trump-pardon-michael-behenna.html> (describing Behenna’s full pardon granted by President Trump).

32. *Id.*

33. *See* Helene Cooper et al., *Twist in Green Beret’s Extraordinary Story: Trump’s Intervention After Murder Charges*, N.Y. TIMES (Dec. 16, 2018), <https://www.nytimes.com/2018/12/16/us/politics/major-matt-golsteyn-trump.html> (describing the beginning of the chain of events leading to Golsteyn’s murder of a suspected bomb maker).

34. *See id.* (detailing the strategies that, according to army documents, Major Golsteyn and his team used to find the alleged perpetrator of the bombing).

35. *See id.* (stating that Golsteyn’s search led to the discovery of explosive materials and the subsequent arrest of a suspected bomb maker).

36. *Id.*

report that the Afghan tribal leader was working with the Americans.³⁷ So, Major Golsteyn and another American soldier took the suspected bomb maker off the base and intentionally killed him.³⁸ Major Golsteyn and the soldier then buried the body in a shallow grave.³⁹ Major Golsteyn admitted both that he killed the man and that the killing was not permitted by the rules of engagement.⁴⁰

In part due to Major Golsteyn's own admissions, he was charged with premeditated murder.⁴¹ In December 2018, President Trump announced that he was "reviewing the case of a U.S. military hero, Major Mathew Golsteyn, who is charged with murder."⁴² President Trump went on to say that "[Major Golsteyn] could face the death penalty from our own government after he admitted killing a Terrorist bomb maker while overseas."⁴³ In November 2019, the President pardoned Major Golsteyn.⁴⁴ Major Golsteyn had been scheduled to go to trial in February 2020.⁴⁵

C. FIRST LIEUTENANT CLINT LORANCE

In July 2012, First Lieutenant Clint Lorange took over command of a platoon of soldiers in Afghanistan.⁴⁶ Soldiers who served under

37. *Id.*

38. *Id.* (describing the suspected bomber's off-base execution and subsequent burial).

39. *Id.*

40. *See id.* (explaining that in a polygraph with the C.I.A. for a job interview, Golsteyn admitted to the murder and that it was not in compliance with the rules of engagement).

41. *See id.* (citing one Defense Department official as stating that Major Golsteyn's admission of guilt had forced the Army to reopen the case, leading to Golsteyn being charged with premeditated murder).

42. *Id.* (quoting President Trump).

43. *Id.*

44. Darlene Superville, *Trump Intervenes in Military Justice Cases, Grants Pardons*, AP NEWS (Nov. 15, 2019), <https://apnews.com/257e4b17a3c7476ea3007c0861fa97e8> (stating that President Trump pardoned Major Golsteyn).

45. *See id.* (noting that Major Golsteyn's trial has been scheduled for Feb. 19, 2020).

46. Dave Philipps, *Cause Célèbre, Scorned by Troops*, N.Y. TIMES (Feb. 24, 2015) [hereinafter Philipps, *Cause Célèbre, Scorned by Troops*], <https://www.nytimes.com/2015/02/25/us/jailed-ex-army-officer-has-support-but-not-from-his-platoon.html> (stating that in July 2012, First Lieutenant Clint Lorange

Lieutenant Lorange reported that he was set on using harsh tactics: “One of the first things he said to us was, we are going to go in Gestapo-style with night raids, pull people out of houses, make them afraid of us.”⁴⁷ He started by ordering a sharpshooter in his team to fire inches away from civilians, including women and children.⁴⁸ The next day, he told his soldiers that the rules of engagement had been changed and that they could fire on any motorcycle they saw.⁴⁹ This was not true; the rules of engagement had not changed.⁵⁰ It is not clear whether Lieutenant Lorange knowingly lied to his men about the rules of engagement or was simply incorrect.⁵¹ A few minutes into a patrol that same morning, soldiers spotted a motorcycle carrying three men.⁵² Without asking for more information, Lieutenant Lorange ordered his men to open fire.⁵³ While his soldiers were initially reluctant to open fire, they eventually did and killed two men.⁵⁴ A search of the bodies found no evidence that the dead men were combatants.⁵⁵ Lieutenant Lorange subsequently filed a false report saying the bodies had been carried away before they could be identified.⁵⁶

At trial, the question of whether the men on the motorcycle were a threat to the soldiers was central to the case. Lieutenant Lorange argued that he had to make a split second decision to protect his men from an imminent threat.⁵⁷ The soldiers he commanded, many of

took command of a platoon of soldiers in southern Afghanistan).

47. *Id.* (quoting Sergeant Williams).

48. *See id.*

49. *Id.*

50. *See id.* (stating that the prosecutors in the case demonstrated that the rules of engagement in fact had not changed).

51. *See id.* (noting that Army prosecutors argued that that First Lieutenant Lorange deliberately lied, as he should have known about any changes to the rules of engagement).

52. *See id.*

53. *See id.*

54. *See id.* (stating that the platoon, after failing to obey the initial order to fire their weapons, eventually shot and killed the men after First Lieutenant Lorange asked why nobody was firing).

55. *See id.* (explaining that a search of the bodies revealed only a pair of scissors, an identification card, some pens, and three cucumbers).

56. *See id.* (revealing that First Lieutenant Lorange sent his commanders a false report that the bodies of the men on the motorcycle had been carried away by villagers).

57. *Id.*

whom testified against him, agreed that the men on the motorcycle did not represent a threat to the platoon at the time they were killed.⁵⁸ Lieutenant Lorange was subsequently found guilty of second-degree murder and sentenced to nineteen years.⁵⁹ Several of the soldiers Lieutenant Lorange commanded, as well as his immediate commander, have subsequently described Lieutenant Lorange's actions as murder.⁶⁰ In November 2019, President Trump pardoned Lieutenant Lorange, and he was released from a military prison at Fort Leavenworth where he had been serving his sentence.⁶¹

D. SPECIAL OPERATIONS CHIEF EDWARD GALLAGHER

Special Operations Chief Gallagher was a platoon leader with the SEALs.⁶² In 2017, he and his soldiers participated in an operation to retake Mosul, Iraq, from Islamic State fighters.⁶³ During that operation, he allegedly fired indiscriminately at civilian neighborhoods and shot at apparent civilians.⁶⁴ In one incident, Chief

58. *See id.* (stating that nine members of Lorange's platoon came forward to testify against him and said the motobike was several hundred yards from the platoon and not in a position to threaten the soldiers).

59. *Id.*

60. *See id.* (quoting Staff Sergeant Daniel Williams as saying, "War is hard, there is collateral damage. I get that . . . that's not what this was; this was straight murder."); *see also* The Editorial Board, *The Moral Injury of Pardoning War Crimes*, N.Y. TIMES (Nov. 22, 2019), <https://www.nytimes.com/2019/11/22/opinion/editorials/trump-gallagher-pardon-war-crimes.html> (quoting Lorange's company commander in Afghanistan as saying "The tragedy is that people will hail him as a hero, and he is not a hero. He ordered those murders. He lied about them.").

61. *See* Dave Philipps, *Trump Clears Three Service Members in War Crimes Cases*, N.Y. TIMES (Nov. 15, 2019) [hereinafter Philipps, *Trump Clears Three Service Members in War Crimes Cases*], <https://www.nytimes.com/2019/11/15/us/trump-pardons.html> (asserting that President Trump ordered a full pardon for First Lieutenant Lorange).

62. *See* Dave Philipps, *Navy SEALs Were Warned Against Reporting Their Chief for War Crimes*, N.Y. TIMES (Apr. 23, 2019) [hereinafter Philipps, *Navy SEALs Were Warned Against Reporting Their Chief for War Crimes*], <https://www.nytimes.com/2019/04/23/us/navy-seals-crimes-of-war.html> (stating that Special Operations Chief Gallagher was a platoon leader with the Navy SEALs).

63. *See generally id.* (describing how some of the members of Gallagher's platoon felt when they were deployed to Iraq to help retake Mosul with Gallagher as their leader).

64. *See generally id.* (discussing Chief Gallagher's multiple actions against civilians during the operation in Mosul, Iraq).

Gallagher allegedly shot a girl wearing a flower-print hijab as she walked along a riverbank with other girls.⁶⁵ In another incident, he allegedly shot an unarmed civilian.⁶⁶ In yet another incident, Chief Gallagher allegedly killed a captured Islamic state fighter by stabbing him repeatedly in the neck and chest before posing for pictures with the body.⁶⁷ He was eventually arrested and charged with more than a dozen crimes, including premeditated murder and attempted murder.⁶⁸

Special Operations Chief Gallagher was subsequently acquitted of most of the charges when a key witness for the prosecution changed his pre-trial testimony and claimed at trial that he had killed the captive that Gallagher was charged with murdering.⁶⁹ Gallagher was only found guilty of bringing discredit to the armed forces by posing for pictures with a dead body.⁷⁰ He was ultimately demoted one rank to Special Operator First Class.⁷¹ In November 2019, President Trump ordered a promotion for Gallagher, overturning the earlier decision to reduce his rank as a consequence of his conviction.⁷² The Navy subsequently began the process of expelling Gallagher from the SEALs, but President Trump once again intervened to stop that process and ordered the Navy to permit Chief Gallagher to remain a

65. *Id.*

66. *Id.*

67. *Id.*

68. *See id.* (explaining that Gallagher was finally charged with multiple crimes after some of his former soldiers succeeded in convincing their commanders to report the killings).

69. *See* Dave Philipps, *Navy SEAL Chief Accused of War Crimes Is Found Not Guilty of Murder*, N.Y. TIMES (July 2, 2019) [hereinafter Philipps, *Navy SEAL Chief Accused of War Crimes Is Found Not Guilty of Murder*], <https://www.nytimes.com/2019/07/02/us/navy-seal-trial-verdict.html> (asserting that Gallagher was found not guilty on many of his counts after a witness, who had been given immunity, testified that he rather than Gallagher, had killed a captive by covering his breathing tube).

70. *See id.* (stating that Gallagher was convicted of only one of his many charges).

71. *See* Dave Philipps, *Navy Reduces Punishment for SEAL in War Crimes Case*, N.Y. TIMES (Oct. 29, 2019) [hereinafter Philipps, *Navy Reduces Punishment for SEAL in War Crimes Case*], <https://www.nytimes.com/2019/10/29/us/navy-seal-gallagher-clemency.html> (describing Gallagher's punishment for posing for pictures with a dead body).

72. *See* Philipps, *Trump Clears Three Service Members in War Crimes Cases*, *supra* note 61 (quoting a White House document stating that it is justifiable to promote Gallagher back to the rank and pay grade of Chief Petty Officer).

SEAL.⁷³

III. DOMESTIC VS. INTERNATIONAL LAW

President Trump is commander in chief of the United States military, a position that is conferred on him by the U.S. Constitution.⁷⁴ This gives him largely unfettered decision-making authority within the U.S. military.⁷⁵ There may be limits on the President's ability to use armed force without Congressional approval⁷⁶ or to seize private property to supply the military,⁷⁷ but the President has broad authority

73. See Dave Philipps, *Trump Reverses Navy Decision to Oust Edward Gallagher From SEALs*, N.Y. TIMES (Nov. 21, 2019) [hereinafter Philipps, *Trump Reverses Navy Decision to Oust Edward Gallagher From SEALs*], <https://www.nytimes.com/2019/11/21/us/trump-seals-eddie-gallagher.html> (stating that Rear Admiral Collin Green made an effort to remove Chief Gallagher's status as a SEAL, but President Trump would not allow it); see also Helene Cooper et al., *Trump Says He Intervened in War Crimes Cases to Protect 'Warriors'*, N.Y. TIMES (Nov. 25, 2019), <https://www.nytimes.com/2019/11/25/us/politics/mark-esper-seal-navy-secretary.html> (stating that after President Trump issued his formal order not to remove Gallagher's Trident pin and membership as a Navy SEAL, the Pentagon halted all efforts to do so).

74. U.S. CONST. art. II, § 2, cl.1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States. . . .").

75. Cf. Michael Stokes Paulsen, *Drone On: The Commander in Chief Power to Target and Kill Americans*, 38 HARV. J.L. & PUB. POL'Y 43, 51 (2015) (stating that while the Commander in Chief Clause does not grant the President the power to declare or initiate war, it does effectively grant him control over almost every other aspect of how the United States conducts war).

76. The War Powers Act was an attempt to impose congressional authority over Presidential uses of force. War Powers Act, 50 U.S.C. §§ 1541–1548, 1541(a) (1973) ("It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities. . . ."). But see Douglas Kriner, *Congress, Public Opinion, and an Informal Constraint on the Commander-in-Chief*, 20 BRITISH J. OF POL. & INT'L REL. 52, 53 (2018) (noting that Congress has routinely struggled to reign in the Commander in Chief despite enacting the War Powers Resolution); ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 295–96 (5th ed. 2015) (discussing the tension between Congress and the Commander in Chief with regard to the power to "declare war" and "raise and support the army," as well as the role of the War Powers Resolution in that tension).

77. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) ("[W]e cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take

to make decisions about the internal functioning of the military.⁷⁸ He even has the authority to make decisions about whether an individual soldier receives a specific promotion or remains in a particular unit.⁷⁹ In addition, he has broad and virtually unlimited power to grant pardons.⁸⁰

Of course, that does not mean his decision to grant the pardons described in this article are normal or wise. Indeed, President Trump's actions are extremely unusual,⁸¹ and there are good reasons to believe

possession of private property in order to keep labor disputes from stopping production.”).

78. See David Lapan, *President Trump is Damaging Our Military: War Crimes Cases are the Latest Example*, JUST SECURITY (Nov. 18, 2019), <https://www.justsecurity.org/67310/president-trump-is-damaging-our-military-war-crimes-cases-are-the-latest-example> (stating that the Commander in Chief Clause of the Constitution grants the President of the United States “wide latitude in his authority to make decisions and order” the actions of the armed forces of the United States so long as his orders are legal).

79. See, e.g., Cooper et al., *Trump Says He Intervened in War Crimes Cases to Protect ‘Warriors’*, *supra* note 73 (discussing President Trump’s formal order to the Defense Department not to remove Chief Gallagher’s Trident pin, and thereby his status as a Navy SEAL, as well as the Pentagon’s subsequent halt to any review of Chief Gallagher’s status); see also Philipps, *Trump Reverses Navy Decision to Oust Edward Gallagher From SEALs*, *supra* note 73 (Rear Admiral Charlie Brown, the Navy’s chief of information, noted that “[t]he Navy follows the lawful orders of the President . . . [w]e will do so in case of an order to stop the administrative review of S.O.C. Gallagher’s professional qualification.”).

80. See Chris Jenks, *Sticking It To Yourself: Preemptive Pardons for Battlefield Crimes Undercut Military Justice and Military Effectiveness*, JUST SECURITY (May 20, 2019), <https://www.justsecurity.org/64185/sticking-it-to-yourself-preemptive-pardons-for-battlefield-crimes-undercut-military-justice-and-military-effectiveness/> (stating that the President possesses the power to pardon individuals such as Major Golsteyn and Chief Gallagher regardless of the appropriateness of the pardon); see also U.S. CONST. art. II, § 2, cl. 1 (“[The President] shall have Power to grant Reprieves and Pardons for Offenses against the United States. . . .”); *United States v. Klein*, 80 U.S. 128, 147 (1871) (“To the executive alone is entrusted [sic] the power of pardon; and it is granted without limit.”).

81. See, e.g., Donald J. Guter et al., *The American Way of War Includes Fidelity to Law: Preemptive Pardons Break that Code*, JUST SECURITY (May 24, 2019), <https://www.justsecurity.org/64260/the-american-way-of-war-includes-fidelity-to-law-preemptive-pardons-break-that-code/> (arguing that President Trump’s pardoning of active-duty servicemembers who have yet to be convicted of accused violent crimes would be unprecedented and “unlike conduct by any President in modern history. . . .”); see also *Frequently Asked Questions*, U.S. DEPT. OF JUSTICE: OFFICE OF THE PARDON ATTORNEY, <https://www.justice.gov/pardon/frequently-asked-questions> (last visited Mar. 8, 2020) (stating that the pardon of a person who

they are also unwise.⁸² For example, President Trump's decisions may be bad for the morale and effectiveness of the U.S. military,⁸³ particularly the military's criminal justice system.⁸⁴ President Trump's decisions may undermine the rule of law in the United States⁸⁵ and diminish public support for the military.⁸⁶ His decisions may expose members of the U.S. military to criminal prosecution in foreign countries⁸⁷ and additional risk on the battlefield.⁸⁸ President Trump's

has not been indicted, convicted, or sentenced for a federal offense would be highly unusual).

82. See Dan Maurer, *Should There Be a War Crime Pardon Exception?*, LAWFARE (Dec. 3, 2019, 9:31AM), <https://www.lawfareblog.com/should-there-be-war-crime-pardon-exception> (discussing various potential consequences of the President's decision to pardon war criminals).

83. See Resignation Letter from Richard Spencer, former Secretary of the Navy, to President Donald Trump (Nov. 24, 2019) (noting that President Trump's grant of these pardons goes against the principles of good order and discipline, which the former Secretary of the Navy believed was one of his most important responsibilities); see also Richard J. Danzig & Sean O'Keefe, *We Led the Navy. Trump Does Not Share the Military's Values.*, N.Y. TIMES (Nov. 25, 2019), <https://www.nytimes.com/2019/11/25/opinion/trump-navy.html> (arguing that the pardons were done for political ends rather than military ends, and that the military should be trusted to handle its own affairs and utilize its own procedures for establishing order and discipline within its ranks when it comes to the demands of combat, law, and ethics for military members).

84. See Jenks, *supra* note 80 (maintaining that a pardon granted to a service member who has not yet been court-martialed undermines the military's ability to carry out justice within its own system).

85. See Guter et al., *supra* note 81 (stating that the disregard of the legal process, which "enables military efficacy, protects our military members' moral integrity, and reduces suffering in war" poses a danger to the rule of law of the United States).

86. Joseph Kristol & Stephen Petraeus, *Trump's Ill-Advised Pardons will Damage Americans' View of the Military*, WASH. POST (Nov. 21, 2019, 10:45 PM), https://www.washingtonpost.com/opinions/trumps-ill-advised-pardons-will-damage-americans-view-of-the-military/2019/11/21/5c356fda-0c9a-11ea-97ac-a7ccc8dd1ebc_story.html (describing how President Trump's pardon of two military officers in war crimes cases might risk damaging many Americans' perception of the military).

87. See David Lapan, *supra* note 78 (arguing that if the U.S. no longer holds its service members accountable for violations of the laws of war, other countries may be more likely to try and prosecute U.S. soldiers for those violations in their own courts).

88. See Benjamin Haas, *Trump Betrays the Military*, N.Y. TIMES (Nov. 15, 2019), <https://www.nytimes.com/2019/11/15/opinion/trump-war-crimes-pardons-gallagher.html> (arguing that President Trump's decision could incite violence that jeopardizes the safety of both service members and civilians).

decisions may even be questionable as a matter of domestic politics,⁸⁹ but there is little ground for arguing that they constitute a violation of U.S. law.⁹⁰

But President Trump is not subject just to domestic law. He is also subject to international law, specifically international criminal law. International criminal law exists separately from domestic criminal law,⁹¹ and it is irrelevant to President Trump's liability under international law whether his acts are permitted under U.S. law.⁹² While most international law imposes obligations on states,⁹³ international criminal law is somewhat unique in that it imposes obligations directly on individuals.⁹⁴ Individuals who violate international criminal law incur individual criminal responsibility for their actions and may be subject to penalties, including

89. See Anna Palmer & Jake Sherman, *POLITICO Playbook: Biden's latest pitch: 'Commander in Chief'*, POLITICO (Nov. 26, 2019), <https://www.politico.com/newsletters/playbook/2019/11/26/bidens-latest-pitch-commander-in-chief-487761> (describing an ad campaign by Joe Biden, the Democratic presidential candidate, attacking President Trump's ability as commander in chief).

90. Dave Philipps, *Trump Reverses Navy Decision to Oust Edward Gallagher From SEALs*, *supra* note 73 ("As commander in chief, the president has authority to intervene in military matters of all kinds, whether momentous or minute, experts say. . . .").

91. Indeed, international criminal law can be defined as that body of offences that are "created by international law itself, without requiring the intervention of domestic law." ROBERT CRYER ET AL., *AN INTRODUCTION TO CRIMINAL LAW AND PROCEDURE* 7 (4th ed. 2019).

92. See *id.* at 512–17 (noting that it is now widely accepted that a person cannot have immunity from prosecution for serious violations of international criminal law on the grounds that they were acting in an official capacity or acting according to domestic law, and that many people have been prosecuted for violations of international law despite such claims); see also Rome Statute of the International Criminal Court art. 27(1), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (noting that "official capacity as a Head of State or Government . . . or a government official shall in no case exempt a person from criminal responsibility" under international criminal law).

93. See, e.g., JAMES R. CRAWFORD, *STATE RESPONSIBILITY 2* (Cambridge Univ. Press, 2013) (stating that the state is the main entity that bears international obligations).

94. See CRYER ET AL., *supra* note 91, at 3 (noting that the "development of a body of international criminal law which imposes responsibilities directly on individuals" began relatively recently and coalesced beginning in the early 1990s).

imprisonment.⁹⁵ In the famous words of the International Military Tribunal at Nuremberg:

Crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced. . . . [I]ndividuals have international duties which transcend the national obligations of obedience imposed by the individual state.⁹⁶

Thus, it is possible that the President could be guilty of a violation of international criminal law even though he did not violate domestic law in issuing the pardons.⁹⁷ This Article explores that question.

IV. COMMAND RESPONSIBILITY

The most direct way to violate international criminal law is to personally commit a violation.⁹⁸ Thus, a soldier that shoots and kills a prisoner of war is guilty of a war crime.⁹⁹ But direct perpetration is not the only way for an individual to be liable for a war crime. An officer that orders a soldier to kill a prisoner is guilty of the same war crime as the soldier that carries out that order.¹⁰⁰ And those who willingly assist in the commission of a war crime are also criminally responsible for that crime.¹⁰¹ The ways in which a person can be criminally liable for violations of international criminal law are collectively known as the modes of liability.¹⁰²

Most of the modes of liability are inapplicable to President Trump. He did not directly kill anyone. Nor did he order the deaths that were

95. *Id.* at 7 (noting that international criminal law “imposes criminal liability directly on individuals”).

96. *International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT'L L. 172, 221 (1947).

97. See Gabor Rona, *Can a Pardon be a War Crime?: When Pardons Themselves Violate the Laws of War*, JUST SECURITY (May 25, 2019), <https://www.justsecurity.org/64288/> (invoking the principle of command responsibility and arguing that even the limitless pardon power cannot override such responsibility).

98. See CRYER ET AL., *supra* note 91, at 342.

99. *Id.*

100. See *id.* at 359–60.

101. See *id.*, at 355–59.

102. See *id.*

committed by First Lieutenant Behenna, Major Golsteyn, First Lieutenant Lorance and Special Operations Chief Gallagher. In fact, most of them took place before he became President.¹⁰³ So, how might President Trump be liable for war crimes that were committed before he became President? The obvious answer is command responsibility.¹⁰⁴

Command responsibility is a mode of liability that is largely unique to international criminal law.¹⁰⁵ It is not itself a crime. Rather, it is a means by which a commander can be criminally liable for acts committed by subordinates.¹⁰⁶ Command responsibility has a long history in the laws of war.¹⁰⁷ For example, Charles VII of France ordered the following in 1439:

The King orders that each captain or lieutenant be held responsible for the abuses, ills, and offences committed by members of his company, and that as soon as he receives any complaint concerning any such misdeed or abuse, he bring the offender to justice. . . . If he fails to do so or covers up the misdeed or delays taking action, or if because of his negligence or otherwise, the offender escapes and thus evades punishment, the captain shall be deemed responsible for the offence as if he had committed it himself. . . .¹⁰⁸

This language is nearly six hundred years old, but it is strikingly similar to our modern understanding of command responsibility.¹⁰⁹ First, it acknowledges that a commander has a responsibility to punish wrongs done by his subordinates.¹¹⁰ Second, it holds the commander liable for the underlying offence committed by the subordinate if the

103. See discussion *supra* Section II.

104. See Gabor Rona, *supra* note 97 (stating that President Trump could be guilty for committing war crimes by issuing the pardons under a theory of command responsibility).

105. See CRYER ET AL., *supra* note 91, at 368 (explaining that command responsibility is a concept specific to international criminal law and there is no equivalent mode of liability in most domestic criminal systems).

106. See *id.* at 368–78.

107. See *id.* at 368 (noting that there is evidence for some form of command responsibility dating back at least 2,500 years).

108. *Id.*

109. See *infra* text accompanying notes 112–124.

110. CRYER ET AL., *supra* note 91, at 368 (“[A]s soon as he receives any complaint concerning such misdeed or abuse, he [must] bring the offender to justice. . . .”).

commander fails in his duty to punish that wrongdoing.¹¹¹

While the idea of command responsibility has a long history, its modern form first took shape in the aftermath of WWI. The Report of the Commission of Inquiry on the Responsibility of the Authors of the War¹¹² urged the prosecution of individuals, “civil or military” who “with knowledge thereof and with power to intervene, abstained from putting an end to or repressing violations of the laws or customs of war.”¹¹³ However, due to political differences between the victorious nations, no international prosecutions took place.¹¹⁴

The next major developments came as a result of WWII. In the aftermath of WWII, there were prosecutions based on command responsibility.¹¹⁵ For example, General Yamashita was prosecuted for failing to prevent violations of the laws of war committed by soldiers under his command.¹¹⁶ Many militaries incorporated command responsibility into their military manuals in the years following WWII.¹¹⁷ For example, in its 1956 manual on land warfare, the United States imposed liability on commanders who either knew or should have known about the commission of war crimes but failed to either prevent or punish them.¹¹⁸ The U.S. military still recognizes command

111. *Id.* (“[I]f he fails to do so. . . the captain shall be deemed responsible for the offence. . .”).

112. See Stuart Ford, *Crimes Against Humanity at the Extraordinary Chambers in the Courts of Cambodia: Is a Connection with Armed Conflict Required?*, 24 UCLA PAC. BASIN L.J. 125, 136 (2007) (explaining that the Commission was created by the victors of WWI to consider how to hold accountable those who were responsible for violations of the laws and customs of war that were committed during WWI).

113. Mineitcero Adatci, *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, 14 AM. J. INT'L L. 95, 121 (1920).

114. See Ford, *supra* note 112, at 137-138 (pointing to American representatives' refusal to endorse the Commission's report as one of the factors that prevented international prosecutions from taking place).

115. See CRYER ET AL., *supra* note 91, at 368 (noting WWII set the foundation of command responsibility in modern law).

116. See *In re Yamashita*, 327 U.S. 1, 16 (1946) (holding that the laws of war imposed on General Yamashita an “affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population”).

117. CRYER ET AL., *supra* note 91, at 369 (“Command responsibility was included in military manuals after the Second World War. . .”).

118. DEPARTMENT OF THE ARMY, *THE LAW OF LAND WARFARE* ¶ 501 (Howard

responsibility as a mode of liability that can give rise to individual criminal responsibility for the acts of subordinates.¹¹⁹ Criminal liability extends to commanders that fail to take adequate steps to punish violations by subordinates.¹²⁰

Command responsibility has also been incorporated into numerous international instruments, including Additional Protocol I to the Geneva Conventions¹²¹ and the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY).¹²² As a result of its progressive development over the last century, it is now widely recognized that command responsibility is part of customary international law.¹²³ Command responsibility applies in both international and non-international armed conflicts.¹²⁴ This means that

S. Levie ed., 1956) (“The commander is also responsible if he has actual knowledge or should have knowledge . . . that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.”).

119. OFFICE OF GENERAL COUNSEL, DEPARTMENT OF DEFENSE LAW OF WAR MANUAL § 18.23.3 (rev. 2016) (“Commanders have duties to take necessary and reasonable measures to ensure that their subordinates do not commit violations of the law of war. Failures by commanders [to take such measures] can result in criminal responsibility.”).

120. *See, e.g.*, 10 U.S.C.S. § 950q (2009).

121. Int’l Comm. of the Red Cross, Protocols Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, arts. 86–87 (June 8, 1977) (“[A]ny commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol [shall] initiate such steps as are necessary to prevent such violations . . . , and where appropriate to initiate disciplinary or penal action against violators thereof.”).

122. *See* Statute of the International Criminal Tribunal for the Former Yugoslavia art. 7(3), U.N. SCOR, 48th Sess., 3217th mtg. at 1–2 (May 25, 1993) [hereinafter ICTY Statute] (imposing criminal liability on commanders who fail “to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof”).

123. *See* Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶ 333-43 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998), https://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf. (discussing the history of the development of command responsibility during the 20th century and concluding that “the principle of individual criminal responsibility of superiors for failure to prevent or repress the crimes committed by subordinates forms part of customary international law”).

124. *See* Christopher Greenwood, *Command Responsibility and the Hadzihasanovic Decision*, 2 J. INT’L CRIM. JUST. 598, 600–01 (2004) (analyzing the

a superior can be guilty of an international crime committed by a subordinate even if the domestic law of the country where the crime took place does not recognize the superior's liability for the underlying crime.

Command responsibility, under customary international law, has three elements: 1) the existence of a superior-subordinate relationship; 2) that the superior either knew or had reason to know that the criminal act was about to be or had been committed; and 3) the superior failed to take necessary and reasonable measures to prevent or punish those acts.¹²⁵ Of course, command responsibility is only a mode of liability—a means of attributing some underlying crime committed by a subordinate to the superior.¹²⁶ So, it also requires the existence of one or more underlying crimes that are being attributed to the commander. Each of those elements will be discussed in more detail below.

A. THE UNDERLYING WAR CRIMES

For a superior to be liable under a theory of command responsibility, there must first be a violation of international criminal law. If there is no underlying violation, then there is no crime that can be attributed to the superior.¹²⁷ Consequently, the starting point of the analysis is to determine whether the acts of First Lieutenant Behenna, Major Golsteyn, First Lieutenant Lorange, and Special Operations Chief Gallagher constituted violations of international criminal law. If not, then there can be no command responsibility.¹²⁸ The following paragraphs assume that the facts described above in Section II are correct.

The first thing to note is that all of the relevant acts took place in either Iraq or Afghanistan.¹²⁹ This is important because war crimes can

reasoning of the Appeals Chamber's opinion that imposed a duty of responsible command in both international and non-international conflicts).

125. Prosecutor v. Delalić, *supra* note 123, ¶ 346.

126. See CRYER ET AL., *supra* note 91, at 368-378.

127. See Prosecutor v. Orić, Case No. IT-03-68-T, Judgement, ¶ 295 (Int'l Crim. Trib. for the Former Yugoslavia June 30, 2006), <https://www.icty.org/x/cases/oric/acjug/en/080703.pdf> (stressing that the commission of a violation of international criminal law by the subordinate is a prerequisite to command responsibility for the superior).

128. *Id.*

129. See *supra* Section II. (demonstrating that the incidents involving Behenna

only take place in the context of an armed conflict.¹³⁰ The existence of an armed conflict is determined objectively.¹³¹ In other words, whether or not there is an armed conflict is determined by examining how much armed force is used rather than by how the participants classify the conflict.¹³² The situations in both Afghanistan¹³³ and Iraq¹³⁴ are widely understood to meet the definition of an armed conflict.¹³⁵ Consequently, acts committed in both countries by members of the U.S. military could be war crimes.

As noted above, command responsibility applies in both international and non-international armed conflicts and thus would apply to war crimes committed in both Iraq and Afghanistan, irrespective of how those conflicts are categorized.¹³⁶ In addition, while there is not a perfect overlap of the war crimes that can be committed in international and non-international conflicts, the violations of ICL at issue here, principally the intentional killing of prisoners and civilians, are crimes in both international and non-international conflicts.¹³⁷ Thus, while there might be interesting

and Gallagher took place in Iraq, while the incidents involving Golsteyn and Lorance took place in Afghanistan).

130. See CRYER ET AL., *supra* note 91, at 270.

131. *Id.*

132. *Id.*

133. OFFICE OF THE PROSECUTOR OF THE INT'L CRIMINAL COURT, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2013, ¶ 39 (Nov. 2013), <https://www.icc-cpi.int/OTP%20Reports/otp-report-2013.aspx> (“The situation in Afghanistan is usually considered as an armed conflict of a non-international character between the Afghan Government, supported by the ISAF and US forces on the one hand, and non-state armed groups, particularly the Taliban, on the other.”).

134. See OFFICE OF THE PROSECUTOR OF THE INT'L CRIMINAL COURT, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2017, ¶ 192 (Dec. 4, 2017), https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf (concluding that the conflict in Iraq is understood to have been an international armed conflict until 2004 and a non-international armed conflict thereafter).

135. See Gertrude C. Chelimo, *Defining Armed Conflict in International Humanitarian Law*, 3 INQUIRES J. 1 (2011) <http://www.inquiriesjournal.com/articles/1697/defining-armed-conflict-in-international-humanitarian-law> (explaining how armed conflicts are defined in the context of international humanitarian law).

136. See *supra* text accompanying note 124.

137. See, e.g., Rome Statute *supra* note 92, art. 8(2)(a)(i) (willful killing a protected person in an international armed conflict); art. 8(2)(b)(i) (intentionally directing attacks against civilians during an international armed conflict); art.

debates about whether and when to categorize the conflicts in Iraq and Afghanistan as international or non-international, those debates do not affect the analysis in this Article.

Lieutenant Behenna was convicted of murdering a prisoner.¹³⁸ Intentionally killing a prisoner is a violation of international criminal law.¹³⁹ In addition, he pointed a weapon at and threatened to kill a prisoner if the prisoner did not confess.¹⁴⁰ This would also be an international crime, specifically torture.¹⁴¹ Major Golsteyn also intentionally killed a prisoner under his control.¹⁴² As with Lieutenant Behenna, this is a violation of international criminal law.¹⁴³

Lieutenant Lorance ordered his men to fire on civilians, killing two of them.¹⁴⁴ While not all killings of civilians are war crimes,¹⁴⁵ the intentional targeting and killing of civilians is a war crime.¹⁴⁶ At his

8(2)(c)(i) (murder in a non-international armed conflict); art. 8(2)(e)(i) (intentionally directing attacks against civilians during a non-international armed conflict).

138. See *supra* Section II.A.

139. See CRYER ET AL., *supra* note 91, at 279 (stating that willfully killing a protected person is widely recognized as a war crime, and civilian and prisoners of war are both entitled to protected status); see also Rome Statute *supra* note 92, art. 8(2)(a)(i) (noting that the willful killing of protected persons is a war crime); art. 8(2)(c)(i) (noting that the murder of “persons taking no active part in the hostilities, including members of armed forces who have laid down their arms” is a war crime).

140. See *supra* Section II.A.

141. Torture is generally understood to be the intentional infliction of pain or suffering, whether physical or mental, upon a person. Torture as a war crime has the added requirement that it be done for a particular purpose, such as to obtain information or a confession. See CRYER ET AL., *supra* note 91, at 247, 279; see also Rome Statute *supra* note 92, arts. 8(2)(a)(ii), 8(2)(c)(i) (noting respectively that the torture of protected persons is a war crime and that torture is a war crime in non-international armed conflicts).

142. See *supra* Section II.B.

143. See *supra* text accompanying notes 138-139 (noting that the intentional killing of prisoners during an armed conflict is a war crime).

144. See *supra* Section II.C.

145. See CRYER ET AL., *supra* note 91, at 285-88 (discussing the principle of proportionality and the possibility of collateral civilian casualties); see also Rome Statute *supra* note 92, art. 8(2)(b)(iv) (noting that it is a war crime to intentionally launch an attack if the “incidental loss of life or injury to civilians” would be “clearly excessive in relation to the concrete and direct military advantage anticipated”).

146. See CRYER ET AL., *supra* note 91, at 283-84 (discussing the principle of distinction and the requirement that soldiers distinguish between military and civilian objects and not deliberately target civilians or civilian objects, making the intentional targeting of civilians or civilian objects war crime); Rome Statute *supra*

trial, Lieutenant Lorange argued that the killings were justified because he believed they might be combatants who posed a threat to his soldiers.¹⁴⁷ His subsequent conviction for murder constitutes a rejection of that argument. Accordingly, this too would constitute a violation of international criminal law.

Finally, Chief Gallagher was accused of both intentionally killing civilians and of intentionally killing a prisoner.¹⁴⁸ Both would constitute violations of international criminal law.¹⁴⁹ Chief Gallagher however, was acquitted of those charges at trial.¹⁵⁰ The acquittal constitutes a finding that there was insufficient evidence that the charged offenses occurred. Accordingly, this Article will assume that there would also have been insufficient evidence to convict Chief Gallagher of the analogous international crimes. This means that the events involving Chief Gallagher could not form the foundation for a charge against President Trump.¹⁵¹

At least for Lieutenant Behenna, Lieutenant Lorange, and Major Golsteyn however, the evidence suggests that their actions did constitute violations of international criminal law. Thus, they could form the basis for attributing liability to a superior. The rest of the Article will focus on the question of whether President Trump could be liable, under a theory of command responsibility, for the war crimes of Lieutenant Behenna, Lieutenant Lorange, and Major Golsteyn. The actions of Chief Gallagher will not be considered further.

B. THE SUPERIOR-SUBORDINATE RELATIONSHIP

The first requirement of liability under command responsibility is

note 92, art 8(2)(b)(i) (noting that the intentional targeting of civilians is a war crime); art. 8(2)(e)(1) (noting that intentionally attacking civilians is also a war crime in non-international armed conflicts).

147. *See supra* Section II.C.

148. *See supra* Section II.D.

149. *See supra* text accompanying notes 138-147.

150. *See supra* Section II.D. (explaining how he was convicted of discrediting the armed forces by posing for pictures with a corpse, but acquitted on the more serious charges of intentionally killing civilians and prisoners).

151. *See supra* text accompanying note 127 (noting that there cannot be command responsibility in the absence of an underlying violation of international criminal law).

the existence of a superior-subordinate relationship.¹⁵² This requires that the commander have “effective control” over the subordinate such that the commander has the ability to prevent or punish criminal conduct.¹⁵³ The commander can be either a military leader or a political leader so long as the leader has the ability to control the conduct of his or her subordinates.¹⁵⁴ Effective control is determined objectively. Thus, a person’s *de jure* position is not dispositive.¹⁵⁵ The court must also consider the individual’s *de facto* power, including the individual’s ability to prevent or punish violations.¹⁵⁶

Here, it is clear that President Trump meets the definition of a superior. He has *de jure* power, granted by the Constitution, over the military.¹⁵⁷ But more than that, he also has enormous *de facto* power over the U.S. military.¹⁵⁸ This *de facto* power is demonstrated by President Trump’s decisions with respect to Lieutenant Behenna, Lieutenant Lorange, Major Golsteyn, and Chief Gallagher.¹⁵⁹ He not only has the power to pardon Lieutenant Behenna and Lieutenant Lorange for the crimes they were convicted of committing, but he has the power to preemptively pardon Major Golsteyn prior to trial. He even has the power to determine what rank Chief Gallagher has as well as whether he should remain a member of a particular military unit.¹⁶⁰ So, whether looking at the President’s *de jure* power or his *de facto* power, he clearly has the power to control the U.S. military, including the power to punish (or fail to punish) violations of international criminal law. As such, President Trump qualifies as a superior. It is irrelevant that President Trump is an elected political leader rather than a formal member of the armed forces.¹⁶¹

152. See CRYER ET AL., *supra* note 91, at 370–72 (describing the requirement of a superior/subordinate relationship).

153. Prosecutor v. Delalić, *supra* note 123, ¶ 354.

154. *Id.* ¶¶ 356–63.

155. See CRYER ET AL., *supra* note 91, at 370 (stating that it is not the *de jure* position of a commander but the commander’s factual capacity to prevent and punish that is most important).

156. See *id.* at 371 (emphasizing the existence of evidence that shows the superior’s actual and effective control).

157. See *supra* note 76 and accompanying text.

158. See *supra* notes 75–79 and accompanying text.

159. See *supra* Section II.

160. See *id.*

161. See CRYER ET AL., *supra* note 91, at 371 (“It is clear that superior

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The required mental state for command responsibility is that the commander knew or had reason to know that the crimes were or had been committed.¹⁶² There has been some debate about whether a commander could be responsible for acts that he or she should have known were going to occur.¹⁶³ But that debate is irrelevant here. There is plenty of evidence that President Trump had actual knowledge that the underlying crimes had been committed.¹⁶⁴ The most direct evidence of that is the convictions of Lieutenant Behenna and Lieutenant Lorange and the charging of Major Golsteyn.¹⁶⁵ The fact that Lieutenant Behenna and Lieutenant Lorange were convicted by a military court of serious crimes demonstrates that those crimes did in fact occur.¹⁶⁶ Similarly, the fact that Major Golsteyn was charged with premeditated murder by a military court, bolstered by his own admissions that he deliberately killed a prisoner, constitutes credible evidence that a war crime was committed.¹⁶⁷

Moreover, Trump was aware of these facts. Before granting pardons to Major Golsteyn, Chief Gallagher and Lieutenant Lorange, President Trump met with officials from the Department of Defense, including Defense Secretary Mark Esper.¹⁶⁸ Secretary Esper said, at the time, that he had a “robust discussion” with the President about the cases and provided recommendations, although he declined to state his recommendations.¹⁶⁹ Sources within the military however, have reported that top defense department officials were opposed to the pardons and that the President disregarded that advice when issuing

responsibility also attaches to civilian superiors.”).

162. Prosecutor v. Delalić, *supra* note 123, ¶ 346.

163. See CRYER ET AL., *supra* note 91, at 373 (noting differences between ICTR opinions and the ICC statute on mens rea); see also Darryl Robinson, *A Justification of Command Responsibility*, 28 CRIM. L. F. 633, 633–34 (describing the debates about whether command responsibility should encompass a “should have known” standard).

164. See *supra* Section II.

165. See *id.*

166. See *id.*

167. See *id.*; see also Rome Statute *supra* note 92, art. 8, ¶¶ 2(b)(i), 2(e)(i).

168. Superville, *supra* note 44.

169. *Id.*

the pardons.¹⁷⁰ Thus, President Trump had actual knowledge of the underlying crimes at the time of the pardons. This is more than sufficient to meet the mens rea requirement of command responsibility.¹⁷¹

D. FAILURE TO PREVENT OR PUNISH

The final element of command responsibility is the commander's failure to take "necessary and reasonable" steps to prevent or punish the underlying crimes.¹⁷² Prevention and punishment are separate obligations, and a commander can be liable for failing to punish a crime even when he or she could not have been liable for failing to prevent that crime.¹⁷³ However, a commander is not required to take

170. Dave Philipps, *Trump's Pardons for Servicemen Raise Fears that Laws of War Are History*, N.Y. TIMES (Nov. 22, 2019) [hereinafter Philipps, *Trump's Pardons for Servicemen Raise Fears that Laws of War Are History*], <https://nyti.ms/2QmYqKt> ("But many in the military, especially in military legal circles are not celebrating. Mr. Trump's reprieves, issued against the advice of top defense officials, were seen as a sign of disregard not only for the decisions of military juries, but for the judicial process itself."); Philipps, *Trump Clears Three Service Members in War Crimes Cases*, *supra* note 61 ("Top military leaders have pushed back hard against clearing the three men. Defense Secretary Mark Esper and Army Secretary Ryan McCarthy have argued that such a move would undermine the military code of justice, and would serve as a bad example to other troops in the field, administration officials said."); *see also* David S. Cloud, *Senior Military Officers Rebel Against Trump Plan to Pardon Troops Accused of War Crimes*, L.A. TIMES (May 22, 2019), <https://www.latimes.com/politics/la-na-pol-pentagon-oppose-trump-pardon-murder-warcrimes-20190522-story.html> (noting that many current "senior officers" were opposed to the pardons).

171. *See* Prosecutor v. Bagilishema, Case No. ICTR-95-1A-A, Judgment, ¶ 28 (July 3, 2002), <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-95-1a/appeals-chamber-judgements/en/020703.pdf> (stating that a commander need not know the details of the crime but is only required to have general knowledge of the crime); *see also* GUÉNAËL METTRAUX, *THE LAW OF COMMAND RESPONSIBILITY* 199 (Oxford Univ. Press 2009) ("It is sufficient . . . that the accused had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates.").

172. Prosecutor v. Delalić, *supra* note 123, ¶ 346.

173. CRYER ET AL., *supra* note 91, at 374 ("There is no necessity that a person knew or should have known of the offences before they occurred for failure to punish liability to arise."); Prosecutor v. Orić, *supra* note 127, ¶ 326 ("[T]he failure to prevent or punish constitutes two distinct, but related aspects of superior responsibility. . . ."); CASE MATRIX NETWORK, *INTERNATIONAL CRIMINAL LAW GUIDELINES: COMMAND RESPONSIBILITY* 99–100 (2d ed. 2016) ("[T]he duty to prevent concerns future crimes whereas the duty to punish concerns past crimes of

every possible action to prevent or punish--only those that are necessary and reasonable.¹⁷⁴ While commanders have some discretion about what steps to take to punish violations, they are required to at least submit the matter “to the competent authorities for investigation and prosecution.”¹⁷⁵

President Trump could not be liable under the “failure to prevent” prong of command responsibility. The “failure to prevent” prong arises with respect to crimes that are being or are about to be committed.¹⁷⁶ In contrast, the “failure to punish duty” prong concerns past crimes.¹⁷⁷ The underlying crimes of Lieutenant Behenna, Lieutenant Lorange, and Major Golsteyn occurred before Mr. Trump became President,¹⁷⁸ and thus before he held a position where he could have prevented them from occurring.¹⁷⁹ If President Trump is liable

subordinates.”).

174. *SEE* CRYER ET AL., *supra* note 91, at 374–75 (stating a commander does not have to “take each and every possible measure,” but rather only “what is necessary and reasonable under the circumstances.”).

175. Rome Statute, *supra* note 92, art. 28, ¶ b(iii) (stating “fail[ure] to submit the matter to the competent authorities for investigation and prosecution” is a condition for a superior’s responsibility for the crimes of his subordinates); *see also* Prosecutor v. Kordić et al., Case No. IT-95-14/2-T, Judgment, ¶ 446 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001), https://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf. (stating a commander has an obligation “to investigate the crimes [in order] to establish the facts and to report them to the competent authorities”); Orić, Case No. IT-03-68-T, Judgment, ¶ 336 (noting a commander must “at least conduct an investigation and establish the facts” and ensure that the matter is referred to “competent authorities for further investigation and sanction”).

176. CASE MATRIX NETWORK, *supra* note 173, at 100 (stating there is a duty to prevent if a superior has “knowledge or [] reasonable grounds to suspect that a crime is being or is about to be committed,” and a duty to punish “after the commission of the crime.”).

177. *Id.*

178. Peter Baker et al., *Donald Trump Is Sworn In as President, Capping His Swift Ascent*, N.Y. TIMES (Jan. 20, 2017) (reporting, “Donald John Trump was inaugurated . . . on Friday [Jan. 20, 2017]”); *see also supra* Sections II.A–C (noting Behenna’s, Golsteyn’s, and Lorange’s crimes occurred before President Trump was in office).

179. *See* Baker, *supra* note 178; *supra* Section II.D (noting that President Trump was President at the time of the killings attributed to Chief Gallagher). *But see supra* notes 147–50 and accompanying text (explaining that Chief Gallagher’s subsequent acquittal means those killings probably cannot form the basis for a charge of war crimes against President Trump).

under a theory of command responsibility it would be for his failure to punish their crimes, rather than his failure to prevent them.

Although this issue is contested,¹⁸⁰ it is not necessary that the superior has been in command of the subordinates at both the time that the crimes were committed and the time when the superior failed to punish those crimes.¹⁸¹ It is enough that the commander was in effective control at the time of the failure to punish.¹⁸² And President Trump was clearly in effective control of the military at the time that the pardons were issued.¹⁸³ This issue is addressed further below in Section V(B).¹⁸⁴

Individuals are usually prosecuted for their failure to investigate and report violations to the appropriate authorities,¹⁸⁵ but that is not the issue in these cases. The crimes of Lieutenant Behenna, Lieutenant Lorance, and Major Golsteyn were reported to the appropriate authorities, and those authorities both investigated those allegations and began formal judicial proceedings against all of them.¹⁸⁶ The question presented here is whether the President's pardons constitute a violation of his affirmative duty to ensure that violations of

180. See CASE MATRIX NETWORK, *supra* note 173, at 100 (noting the ICTY Appeals Chamber's stance that a new commander cannot be held responsible for crimes committed by his subordinates before he took command); Greenwood, *supra* note 124, at 602–05 (“[T]here was no record of . . . prosecut[ions]” for failure to punish a subordinate for prior offenses, “or statements in national legislation or military manuals,” suggesting that liability existed in such a case).

181. Kordić et al., Case No. IT-95-14/2-T, Judgment, ¶ 446 (“[t]he duty to punish naturally arises after a crime has been committed. Persons who assume command after the commission are under the same duty to punish.”); Orić, Case No. IT-03-68-T, Judgment, ¶ 335 (“[t]he new commander in such a case . . . for the sake of prevention and control, should not let them go unpunished.”).

182. Prosecutor v. Sesay et al., Case No. SCSL-04-15-T, Judgment, ¶ 306 (Spec. Ct. Sierra Leone Mar. 2, 2009), <http://www.rscsl.org/Documents/Decisions/RUF/1234/SCSL-04-15-T-1234-searchable.pdf>. (“[I]t is not necessary that effective control also existed at the time of the criminal act.”).

183. See *supra* Section IV.B.

184. See *infra* Section V.B.

185. See, e.g., Delalić, Case No. IT-96-21-T, Judgment, ¶¶ 776–78. (discussing how Halim Delić, former commander of a prison camp at Celebici, was prosecuted for failing to take measures to prevent and punish the abuse and mistreatment of prisoners by guards under his control).

186. See *supra* Part II.

international criminal law are punished.¹⁸⁷

This appears to be a question of first impression for international criminal courts.¹⁸⁸ The most similar cases involve commanders who undertake sham investigations for the purpose of shielding their subordinates from responsibility, which is a violation of the duty to punish.¹⁸⁹ But the author has not been able to find any examples of individuals who have been prosecuted before an international tribunal for granting a pardon to a war criminal. Of course, the absence of a prior conviction for a pardon does not mean that pardons cannot violate the duty to punish.¹⁹⁰

At the most fundamental level, a commander is required to take “necessary” and “reasonable” steps to punish war crimes committed by subordinates.¹⁹¹ The duty to punish is an affirmative obligation on commanders: “The superior has an obligation to take active steps to ensure that the offender will be punished.”¹⁹² What is necessary and

187. *U.N. Troubled by Trump Pardons of Officers Accused of War Crimes*, REUTERS (Nov. 19, 2019), <https://www.reuters.com/article/us-usa-trump-warcrimes-pardon/un-troubled-by-trump-pardons-of-officers-accused-of-war-crimes-idUSKBN1XT1LA> (quoting the U.N. High Commissioner’s spokesman Rupert Colville, “the failure to investigate and prosecute war crimes was itself a violation of international humanitarian law.”); See also Fred Kaplan, *No, Our Boys Are Not “Killing Machines”*, SLATE (Nov. 18, 2019), <https://slate.com/news-and-politics/2019/11/trump-war-crimes-pardons-iraq-afghanistan.html> (outlining Eugene Fidell and Geoffrey Corn’s arguments that President Trump could be criminally liable for the pardons under international law).

188. See *infra* Section V.C (addressing the lack of evidence of criminal prosecution for pardoning people who committed war crimes).

189. See *Prosecutor v. Strugar*, Case No. IT-01-42-T, Judgment, ¶¶ 172–75, 435–39, 446 (Int’l Crim Trib. for the Former Yugoslavia Jan. 31, 2005), <https://www.icty.org/x/cases/strugar/tjug/en/str-tj050131e.pdf> (holding that Admiral Jokic violated the duty to punish by undertaking a sham investigation of war crimes committed by soldiers under his command to deflect international concern and avoid punishing those responsible).

190. See *infra* Section V.C (discussing the legality of pardoning individuals accused of serious international law violations).

191. See METTRAUX, *supra* note 171, at 235 (explaining that superior responsibility depends on “failure . . . to take ‘necessary and reasonable measures to prevent or punish the crimes of his subordinates’ . . .”).

192. *Prosecutor v. Fofana*, Case No. SCSL-04-14-T, Judgment, ¶ 250 (Spec. Ct. Sierra Leone Aug. 2, 2007), http://www.worldcourts.com/scsl/eng/decisions/2007.08.02_Prosecutor_v_Fofana_Kondewal.pdf

reasonable however, often depends on the facts of the case and must be evaluated individually.¹⁹³ This is true for at least two reasons. First, international law does not specify the exact steps that a commander must take in any particular situation,¹⁹⁴ and second, the incorporation of “reasonableness” into the obligation is designed to give commanders flexibility in deciding how to prevent or punish violations.¹⁹⁵ Thus, evaluating whether a commander has violated the duty to punish is a fact specific inquiry.

Nevertheless, there are some guidelines that can be used to evaluate whether President Trump’s actions were necessary and reasonable. For example, the cases make it clear that a commander is not required to take steps that he did not have the authority or capacity to implement.¹⁹⁶ Similarly, a commander is not required to undertake actions that are disproportionately costly or that duplicate actions that are being undertaken by others.¹⁹⁷

More importantly for our purposes however, a commander is required to take steps to “preserve the possibility of punishment of those responsible.”¹⁹⁸ Even though a commander has some flexibility in determining how to prevent and punish violations, the existence of that discretion is not meant to undermine the “fundamental obligation to prevent and punish crimes.”¹⁹⁹ Ultimately, whatever decision the commander makes, it cannot make the punishment of his subordinates’ actions impossible.²⁰⁰

With these guidelines in mind, it is possible to evaluate President

193. See METTRAUX, *supra* note 171, at 235 (clarifying that necessary and reasonable largely depend “on the circumstances of that case . . .”).

194. *Id.* at 243–44 (noting international law lacks “a check-list of measures which a commander is expected or required to adopt . . . to prevent or punish crimes.”).

195. *Id.* at 196 (explaining the reasonable principle “ensure[s] a necessary degree of flexibility . . . to prevent or punish [subordinates’] crimes . . .”).

196. *Id.* at 53, 235–36 (“What is ‘necessary and reasonable’ . . . will depend . . . on the extent of the commander’s *actual* and *proven* material ability to act. . . .”) (emphasis in original).

197. *Id.* at 245 (stating a commander’s duty to act is limited by his freedom to avoid “unnecessarily duplicat[ing] matters or entangl[ing] an investigation in the knots of competing agencies”).

198. *Id.* at 238.

199. *Id.* at 239.

200. *Id.* at 242 (concluding that a superior’s decision must not make it impossible to prevent or punish crimes).

Trump's pardons. It is necessary however, to treat Lieutenants Behenna and Lorance separately from Major Golsteyn. Lieutenants Behenna and Lorance were both convicted and sentenced to lengthy prison sentences.²⁰¹ Both, in fact, served a considerable portion of that sentence.²⁰² Lieutenant Behenna served five years of his twenty-five year sentence prior to the pardon.²⁰³ Lieutenant Lorance served six years of his nineteen year sentence.²⁰⁴ In that sense, both Lieutenants Behenna and Lorance were punished for their crimes.

Nevertheless, their pardons had the effect of "blotting out of existence [their] guilt" such that they are "as innocent as if [they] had never committed the offence."²⁰⁵ As a result, they were immediately released from prison and will not serve the rest of their sentences.²⁰⁶ In fact, they no longer have criminal records.²⁰⁷ The abolition of their previous convictions had other significant benefits for the recipients, including the restoration of various civil rights that were impaired by their prior convictions.²⁰⁸

The situation of Major Golsteyn is a little different. He admitted to the deliberate execution of a prisoner under his control and was charged with premeditated murder as a result.²⁰⁹ Major Golsteyn

201. See *supra* Section II.

202. See Zaveri, *supra* note 31 (noting that Lieutenant Behenna served five years in prison); see also Philipps, *Trump's Pardons for Servicemen Raise Fears that Laws of War Are History*, *supra* note 170 (noting that Lieutenant Lorance served six years in prison).

203. Zaveri, *supra* note 31.

204. Philipps, *Trump's Pardons for Servicemen Raise Fears that Laws of War Are History*, *supra* note 170.

205. See *Ex Parte Garland*, 71 U.S. 333, 371 (1866).

206. See Zaveri, *supra* note 31 (noting that Lieutenant Behenna received a full pardon and was released); see also Philipps, *Trump's Pardons for Servicemen Raise Fears that Laws of War Are History*, *supra* note 170 (stating that Lieutenant Lorance received a full pardon and was released).

207. *Ex Parte Garland*, 71 U.S. at 380 ("When the pardon is full . . . [and] granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man . . .") (emphasis added).

208. See Zaveri, *supra* note 31 (noting that without a pardon, Lieutenant Behenna would have been barred from voting, owning firearms, or holding certain jobs); *Ex Parte Garland*, 71 U.S. at 380 ("the pardon . . . removes the penalties and disabilities" of a conviction, and "restores [to the recipient] all his civil rights. . .").

209. See *supra* Section II.B.

however, was pardoned before his trial.²¹⁰ As a result, he is now innocent of the charges and need not stand trial.²¹¹ In his case, the pardon has the effect of preventing him from being punished at all for his war crime.

Numerous commentators have noted that the pardon of Major Golsteyn was particularly problematic because it occurred before the trial.²¹² For example, the Office of the High Commissioner for Human Rights at the United Nations criticized the pardons as a whole as being contrary to “the letter and spirit of international law which requires accountability” for violations of international law.²¹³ The “pardon terminating pending criminal proceedings in the case of Major Mathew Golsteyn” however, was described as “particularly troubling” because it “cuts short the regular judicial process.”²¹⁴

And indeed, there is a strong argument that the pardon of Major Golsteyn does constitute a failure to punish.²¹⁵ As noted above, while a commander has discretion in determining which steps to take to prevent or punish violations, that discretion is not unlimited.²¹⁶ In particular, his or her actions cannot render the possibility of punishment impossible.²¹⁷ The pardon of Major Golsteyn rendered

210. *Id.*

211. *Ex Parte Garland*, 71 U.S. at 380 (“If granted before conviction, [a pardon] prevents any of the penalties and disabilities consequent upon conviction from attaching.”).

212. See, e.g., Aaron Rugar, *Trump’s Interest in Pardoning Troops accused of War Crimes, Explained*, VOX (May 24, 2019), <https://www.vox.com/policy-and-politics/2019/5/24/18637360/trump-war-crimes-pardons-gallagher-golsteyn-fox-news-hegseth> (quoting U.S. military policy expert Nora Bensahel, “I find it very concerning that these pardons may be given before trials are conducted to determine guilt or innocence”); see also Guter, *supra* note 81 (explaining the unprecedented nature of President Trump’s threat to pardon military servicepeople charged with crimes before they stand trial).

213. Press Briefing, U.N. High Commissioner for Human Rights, Press Briefing on the United States, U.N. Press Briefing (Nov. 19, 2019), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25314&LangID=E>.

214. *Id.*

215. E.g. Rona, *supra* note 97 (“As the commander of these soldiers . . . the President has a responsibility to punish, if not prevent, violations of the laws of war committed by his subordinates.”).

216. See *supra* notes 189–98 and accompanying text.

217. See *id.*

punishment impossible. He was pardoned before the trial could take place and now it can never take place because the pardon renders him innocent.²¹⁸ Thus, the pardon did violate the duty to punish.

The pardons of Lieutenants Behenna and Lorange are more difficult to analyze. While the pardons did eliminate their prior convictions and render them not guilty, this occurred after both men had spent a considerable period of time in prison.²¹⁹ Thus, the pardons did not make punishment impossible. Rather, they reduced the amount of punishment that each man received. Commanders have considerable discretion in determining an appropriate sanction for violations of international criminal law.²²⁰ While disciplinary (as opposed to criminal) sanctions are generally insufficient for serious violations of international law,²²¹ no specific amount of criminal punishment is required.²²² The punishment should however, be proportionate to the offense.²²³ Thus, if President Trump is guilty of a war crime for pardoning Lieutenants Behenna and Lorange it would have to be because his pardon rendered their punishments disproportionate when compared to the crimes they committed.

It is not clear however, whether that is true. Lieutenants Behenna and Lorange were relatively low-ranking and committed discrete war crimes that did not seem to be part of a broader pattern of criminality.²²⁴ The sentences they actually served do not appear to be meaningfully different from the sentences that similar crimes would have received at an international court.²²⁵ In that sense, the amount of

218. Superville, *supra* note 44 (detailing Major Golsteyn's pardon); see *Ex Parte Garland*, 71 U.S. at 380-81 ("The pardon . . . removes the penalties and disabilities" of a conviction, and "restores [to the recipient] all his civil rights. . .").

219. See Zaveri, *supra* note 31 (Lieutenant Behenna served five years in prison); Philipps, *Trump's Pardons for Servicemen Raise Fears that Laws of War Are History*, *supra* note 170 (Lieutenant Lorange served six years in prison).

220. See METTRAUX, *supra* note 171, at 246-48 ("It is well established [a commander's] measures may 'vary from case to case' . . .").

221. *Id.* at 253-54 (noting the likelihood that disciplinary sanctions are insufficient remedies for serious crimes such as murder).

222. *Id.* at 254 (noting that specific sanctions for war crimes are largely determined by domestic law).

223. *Id.* at 254 (legally sufficient disciplinary measures must be "capable of sanctioning [the] 'crime' committed by [the] subordinat[e]").

224. See *supra* Section II.

225. See, e.g., Mark B. Harmon & Fergal Gaynor, *Ordinary Sentences for*

punishment they received is not obviously disproportionate to their crimes. On the other hand, each received a very significant reduction in the sentence they received from military courts in the United States.²²⁶ Lieutenants Behenna served only five of a twenty-five year sentence, while Lieutenant Lorange served six of a nineteen year sentence.²²⁷ Relative to the sentences that the relevant courts thought were appropriate for their conduct, the sentences they actually served do seem disproportionately short. Ultimately, it is difficult to predict whether a court would conclude that the pardons resulted in disproportionately short sentences for Lieutenant Behenna and Lieutenant Lorange.

E. CONCLUSION

There is good reason to believe that President Trump has committed one or more war crimes by pardoning Lieutenant Behenna, Lieutenant Lorange and Major Golsteyn. Their acts were violations of international criminal law.²²⁸ President Trump was both their *de jure* and *de facto* superior and had effective control over them at the time of the pardons.²²⁹ President Trump was aware of their criminal acts, yet he chose to use pardons to absolve them of any responsibility.²³⁰ And at least with respect to Major Golsteyn, this appears to be a clear violation of the President's duty to punish violations of international criminal law because the pre-trial pardon rendered any punishment of Major Golsteyn impossible.²³¹

Extraordinary Crimes, 5 J. INT'L CRIM. JUST. 683, 684 n.7(2007) (noting that 35% of people convicted of international crimes by the ICTY were sentenced to less than ten years and that several ICTY defendants, including Dragoljub Prcać and Milojević Kos, received sentences in the 5 to 6-year range for serious violations of international law).

226. See *id.* at 686 (highlighting international courts' tendency to issue more lenient sentences than domestic courts, "[t]he contrast between ICTY sentencing and domestic sentencing is . . . stark").

227. Zaveri, *supra* note 31 (detailing that Lieutenant Behenna was granted parole in 2014); Philipps, *Trump's Pardons for Servicemen Raise Fears that Laws of War Are History*, *supra* note 170 (reporting that Lieutenant Lorange was released from the Fort Leavenworth military prison).

228. See *supra* Section IV.A.

229. See *supra* Section IV.B.

230. See *supra* Section IV.C.

231. See *supra* Section IV.D.

The pardons of Lieutenant Behenna and Lieutenant Lorange may also constitute war crimes if a court were to find that the pardons rendered their punishments disproportionate compared to the crimes they committed.²³² It is not clear that this is the case however, because while their sentences were much shorter than U.S. military courts thought were appropriate for their actions, they may not have been disproportionate compared to the sentences that international courts give for similar acts.²³³ There is a reasonable case against the President for the pardons of Lieutenants Behenna and Lorange, but it is by no means a certainty that it would result in a conviction. There does however, appear to be a strong case against the President for the pardon of Major Golsteyn.

V. OTHER ISSUES

While the analysis above suggests that President Trump has committed at least one and possibly several war crimes by pardoning Major Golsteyn, Lieutenant Behenna, and Lieutenant Lorange, there are some additional issues that need to be addressed. These include President Trump's motive in granting the pardons, whether there is successor liability for the failure to punish, the relationship of pardons and amnesties to international criminal law, and how President Trump's war crimes could be adjudicated. These questions will be addressed in the following sections.

A. MOTIVE

One question that will undoubtedly come up in any discussion of whether President Trump is guilty of war crimes is motive. The commander's failure to punish must have been intentional for there to be liability under command responsibility.²³⁴ But there is no doubt that President Trump's decision to grant the pardons was a deliberate and

232. *See id.*

233. *See id.*

234. *See* Prosecutor v. Bagilishema, Case No. ICTR-95-1A-A, Appeal Judgment, ¶ 35 (July 3, 2002), <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ict-95-1a/appeals-chamber-judgements/en/020703.pdf>; METTRAUX, *supra* note 171, at 219–23 (describing the intent element of command responsibility).

conscious act.²³⁵ His motive in granting the pardons (i.e., why he did it as opposed to whether he meant to do it) is legally irrelevant so long as his decision to do so was intentional.²³⁶ Having said that, in any trial, the question of why President Trump ordered the pardons is likely to be a central focus.

The official justifications for the pardons suggest a relatively innocuous motive. For example, the official statement accompanying the pardon of Lieutenant Behenna said that it was granted because of support from the public and the military and because Lieutenant Behenna had been a model prisoner.²³⁷ The official statement that accompanied the pardons of Lieutenant Lorance, Major Golsteyn and Chief Gallagher focused on the President's prerogative to grant "mercy" to those who have served the country.²³⁸ But, several commentators have suggested that the official statements mischaracterize the real reasons for the pardons.²³⁹ And the official reasons stand in sharp contrast to the personal statements of the President.²⁴⁰

235. Unlike the typical case where a commander has failed to take some action and it may be difficult to tell whether the failure to take the action was intentional, in President Trump's case the granting of the pardon is itself the failure to punish and there is no doubt that the decision to grant the pardons was a conscious and deliberate act. *See supra* notes 165–69 and accompanying text.

236. Intent is a requirement of most international crimes. *See, e.g.*, Rome Statute, Art. 30(1) (noting that "a person shall be criminally responsible and liable for punishment for a crime . . . only if the material elements are committed with intent and knowledge"). Intent is defined as "mean[ing] to engage in the conduct." *Id.* Art. 30(2)(a). But a particular motive is not generally required. *See* CRYER ET AL., *supra* note 91, at 225 ("The motive for which a crime is committed, as opposed to the intention with which it is committed, is ordinarily irrelevant to guilt in criminal law.").

237. *See supra* note 32 and accompanying text.

238. *See* Superville, *supra* note 44 (quoting White House press secretary Stephanie Grisham, "For more than 200 years, presidents have used their authority to offer second chances to deserving individuals, including those in uniform who have served our country . . .").

239. *See, e.g.*, Maurer, *supra* note 82 ("President Trump's most recent pardons were not meant to provide compassionate relief for unjust prosecutions.").

240. There is often a sense with President Trump that his unscripted comments shed much more light on his thoughts than the carefully vetted official statements, which often seem to be intended as a form of damage control for those unscripted remarks. Mary Newman, *What Happens When Trump Goes Off Script?*, POLITICO (Jan. 31, 2019), <https://www.politico.com/video/2019/01/31/what-happens-when->

The President's statements show a deep misunderstanding of and hostility towards the laws of war. For example, he has described Major Golsteyn as a "hero" for his actions²⁴¹ and described the men he pardoned as "warriors" who did not deserve to go to jail.²⁴² In October 2019, President Trump said about Major Golsteyn: "We train our boys to be killing machines, then prosecute them when they kill!"²⁴³ He has also said that "[w]hen our soldiers have to fight for our country, I want to give them the confidence to fight."²⁴⁴ And on another occasion President suggested that prosecuting soldiers for killing people is unfair.²⁴⁵

These statements demonstrate a deep misunderstanding about international humanitarian law. Soldiers are taught to kill, and do kill

trump-goes-off-script-067658; N.Y. Times, *A Tale of Two Trumps: Scripted vs. Unscripted*, YOUTUBE (Aug. 24, 2017), <https://www.youtube.com/watch?v=lzhPcQsj3dk&list=PL4CGYNsoW2iBfrlL3yv nqQqCMdiBQol1D&index=132> (showing alternatively times that President Trump spoke according to a script and times which he did not).

241. Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 16, 2018, 3:03 PM), <https://twitter.com/realdonaldtrump/status/1074319076766433280?lang=en> ("At the request of many, I will be reviewing the case of a "U.S. Military hero," Major Matt Golsteyn, who is charged with murder. He could face the death penalty from our own government after he admitted to killing a Terrorist bomb maker while overseas. @PeteHegseth @FoxNews"); see Rupar, *supra* note 212 (describing the sympathetic treatment of the case by the Fox & Friends segment).

242. Cooper et al., *Trump Says He Intervened in War Crimes Cases to Protect 'Warriors'*, *supra* note 73 (reporting President Trump said he was "sticking up for 'warriors,' and not traitors").

243. Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 12, 2019, 9:49 AM), https://twitter.com/realdonaldtrump/status/1183016899589955584?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1183016899589955584&ref_url=https%3A%2F%2Fwww.nbcnews.com%2Fpolitics%2Fdonald-trump%2Ftrump-announces-review-green-beret-murder-case-we-train-our-n1065421; see *The Moral Injury of Pardoning War Crimes*, *supra* note 60 (discussing the injury in labeling military members as "killing machines").

244. Statement from the Press Secretary, National Security & Defense (Nov. 15, 2019) (on file at <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-97/>); see also *The Moral Injury of Pardoning War Crimes*, *supra* note 60 (stating that "[t]he president may think he's supporting men and women in uniform" by making statements such as these and pardoning these crimes).

245. See Superville, *supra* note 44 (quoting President Trump explaining why he was considering pardoning Golsteyn, Gallagher, and Lorange, "[they] have fought hard and long . . ." and "[y]ou know, we teach them how to be great fighters, and then when they fight sometimes they get really treated very unfairly.").

other combatants.²⁴⁶ But that use of force is strictly circumscribed.²⁴⁷ Contrary to President Trump's claim that soldiers are trained to be "killing machines," combatants are not permitted to kill indiscriminately.²⁴⁸ In fact, they are strictly prohibited from deliberately killing several classes of protected persons, including civilians and prisoners.²⁴⁹ None of the killings that are the subject of this Article were lawful.²⁵⁰ They all involved either the deliberate killing of civilians or the deliberate killing of prisoners.²⁵¹ Both are explicitly prohibited.²⁵² There is nothing heroic or admirable in killing unarmed civilians or prisoners. In fact, they are war crimes.

Moreover, this is not the only situation where President Trump has shown a misunderstanding of or contempt for IHL. He has repeatedly challenged the need to follow the rules of war.²⁵³ For example, President Trump complained that the United States fights "very politically correct" wars²⁵⁴ and argued that it was necessary for the

246. INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: RULES 3 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: RULES] ("Rule 1 . . . Attacks may only be directed against combatants.").

247. *See id.* at 3 (mandating Rule 1 be read in conjunction with rules proscribing attacks against persons *hors de combat* and civilians not directly engaged in hostilities).

248. *See id.* at 37 ("Indiscriminate attacks are prohibited.").

249. *See id.* at 3, 164, 311, 313 (prohibiting attacks "directed against civilians," and "persons who are recognized as *hors de combat*," including persons who are injured, shipwrecked, or "who clearly expres[s] an intention to surrender . . .").

250. *See supra* Section IV.A.

251. *The Moral Injury of Pardoning War Crimes*, *supra* note 60 (recalling that Lieutenant Lorance murdered two civilians, Major Golsteyn was accused of murdering an unarmed Afghan detainee, and Chief Gallagher was charged with "shooting indiscriminately at unarmed civilians and stabbing a prisoner," whose body he posed with for photos).

252. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: RULES, *supra* note 246, at 306, 311 ("Civilians and persons *hors de combat* must be treated humanely," and "[m]urder is prohibited"); *see also id.* at 311 ("Murder of civilians and prisoners of war was included as a war crime in the Charter of the International Military Tribunal at Nuremberg.").

253. *See* Tom LoBianco, *Donald Trump on Terrorists: 'Take Out Their Families'*, CNN (Dec. 3, 2015), <https://www.cnn.com/2015/12/02/politics/donald-trump-terrorists-families/index.html> (reporting President Trump said he would, "knock the hell out of" ISIS, and criticized the U.S. for "fighting a very politically correct war").

254. *Id.*

United States to use the same methods as ISIS: “We have to play the game the way they’re playing the game. You’re not going to win if we’re soft and . . . they have no rules.”²⁵⁵ He said such tactics were necessary to “beat the savages.”²⁵⁶ He has also described the rules that the United States follows as a source of weakness.²⁵⁷

In addition, President Trump has called for the United States to engage in other violations of IHL, including torture, collective punishment, pillage, and the intentional destruction of cultural heritage. For example in March 2016, candidate Trump proposed torturing terrorists, including using waterboarding.²⁵⁸ In 2017, President Trump said that torture “absolutely” works and that the United States had to “fight fire with fire.”²⁵⁹ In 2015, then-candidate Trump argued that the best way to deal with members of ISIS was to kill their families.²⁶⁰ In 2018, President Trump reportedly questioned

255. *Id.*

256. *Id.*

257. See Rebecca Savransky, *Trump: US has ‘become very weak and ineffective’*, THE HILL (Mar. 6, 2016, 11:22 AM), <https://thehill.com/blogs/ballot-box/presidential-races/271968-trump-us-has-become-very-weak-and-ineffective> (quoting Trump, “I think we’ve become very weak and ineffective. I think that’s why we’re not beating ISIS. It’s that mentality.”).

258. See Jeremy Diamond, *Trump on Torture: ‘We Have to Beat the Savages.’*, CNN (Mar. 6, 2016), <https://www.cnn.com/2016/03/06/politics/donald-trump-torture/index.html> (reporting Trump’s desire to “broaden” the law to allow torture “including but not limited to waterboarding.”). Torture is a war crime. See CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: RULES, *supra* note 246, at 315 (prohibiting “[t]orture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment . . .”).

259. Matthew Weaver & Spencer Ackerman, *Trump Claims Torture Works but Experts Warn of Its ‘Potentially Existential’ Costs*, THE GUARDIAN (Jan. 26, 2017), <https://www.theguardian.com/us-news/2017/jan/26/donald-trump-torture-absolutely-works-says-us-president-in-first-television-interview> (reporting Trump’s response to a question about the efficacy of waterboarding, “absolutely I feel it works.”);

260. LoBianco, *supra* note 253 (quoting Donald Trump, “[t]he other thing with the terrorists is you have to take out their families, when you get these terrorists, you have to take out their families.”). The next day, Trump was asked at a campaign rally about these statements. Ryan Lizza, *The Duel: The Trump and Cruz Campaigns Embody Opposite Views of Politics and the Future of the G.O.P.*, NEW YORKER (Jan. 25, 2016), <https://www.newyorker.com/magazine/2016/02/01/the-duel-faceoff-ryan-lizza> (responding to whether he would “put out hits on women and children,” Donald Trump said, “I would do pretty severe stuff . . .”); see also Emily Atkin, *Trump: I Would Intentionally Kill Families to Defeat ISIS*, THINKPROGRESS (Dec.

why a CIA drone strike in Syria was not also used to kill the target's family.²⁶¹ In 2019, he contemplated seizing Syria's oil once ISIS was defeated.²⁶² He also suggested something similar in 2011 with regard to Iraq's oil.²⁶³ In 2020, President Trump said that he would order the bombing of Iranian cultural heritage sites.²⁶⁴

Taken together, President Trump's statements show a misunderstanding of and contempt for the laws of war. He glorifies

16, 2015), <https://thinkprogress.org/trump-i-would-intentionally-kill-families-to-defeat-isis-b5484a36a7a2/> (reporting President Trump, when asked how intentionally killing civilians would distinguish the U.S. from ISIS, replied "we have to be much tougher and much stronger than we've been."). Intentionally targeting the family members of combatants would be a war crime. See CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: RULES, *supra* note 247, at 374 (noting that collective punishment is prohibited).

261. See Morgan Gstalter, *Trump Asked CIA Official Why Drone Strike Didn't Also Kill Target's Family: Report*, THE HILL (Apr. 6, 2018), <https://thehill.com/homenews/administration/381925-trump-asked-cia-official-why-drone-strike-didnt-also-kill-targets> (reporting President Trump's will to circumvent measures to limit civilian casualties).

262. See Robin Wright, *Trump's Baffling Plan to Pillage Syria's Oil*, NEW YORKER (Oct. 30, 2019), <https://www.newyorker.com/news/our-columnists/trumps-baffling-plan-to-pillage-syrias-oil>. (seizing Syrian property would be a violation of international humanitarian law). This would constitute the war crime of pillage. See CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: RULES, *supra* note 246, at 178, 182 (highlighting that "[p]illage is prohibited" and if the U.S. did invade and occupy Syria it would have to administer Syria's oil industry on behalf of Syria).

263. See Jill Ornitz et al., *This is What a Donald Trump Presidency Might Look Like*, ABC NEWS (June 16, 2015), <https://abcnews.go.com/Politics/donald-trump-presidency/story?id=31785651> (noting that President Trump planned to pay for U.S. military commitments in the Middle East by seizing Iraq's oil by stating "So, in the old days, you know when you had a war, to the victor belong the spoils. You go in. You win the war and you take it. . . . You're not stealing anything. You're taking – we're reimbursing ourselves – at least, at a minimum . . . We're taking back \$1.5 trillion to reimburse ourselves.").

264. See Lara Jakes, *Defenders of History Take Aim at Trump's Threat to Strike Iran's Cultural Sites*, N.Y. TIMES (Jan. 5, 2020), <https://www.nytimes.com/2020/01/05/world/middleeast/trump-cultural-sites.html?searchResultPosition=1> (quoting President Trump as saying "'They're allowed to use roadside bombs and blow up our people. And we're not allowed to touch their cultural site? It doesn't work that way.'"). Intentionally attacking cultural heritage sites is a war crime. See CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: RULES, *supra* note 246, at 127 (affirming that deliberate attacks on cultural property violate the IHL, "[e]ach party to the conflict must respect cultural property . . .").

violence and resents rules that are designed to minimize indiscriminate or unlawful violence.²⁶⁵ He also seems unable to distinguish between lawful objects of violence (combatants) and unlawful objects of violence (civilians, prisoners, and cultural heritage sites).²⁶⁶ More generally, he sees the rules of IHL as a source of weakness rather than a beneficial (and reciprocal) limit on the indiscriminate use of force.²⁶⁷ Viewed in this context, his pardoning of Lieutenant Behenna, Lieutenant Lorange, Major Golsteyn, and Chief Gallagher was not an isolated incident but is part of a pattern of hostility towards IHL.

But the pardons are also part of a broader pattern of contempt for the rule of law and a glorification of violence. For example, President Trump has advocated the use of violence in a number of domestic contexts.²⁶⁸ He has encouraged violence against protesters on several occasions. At a rally in Cedar Rapids, Iowa in February 2016, President Trump promised audiences he would pay their legal fees if they engaged in violence against protesters.²⁶⁹ Something similar happened in Warren, Michigan that same month.²⁷⁰ Later in February, he said that security guards were too gentle with a protester: “I’d like to punch him in the face, I’ll tell you.”²⁷¹

President Trump has also advocated violence against the press.²⁷² For example in 2017, Representative Greg Gianforte attacked a reporter who was asking him questions.²⁷³ Trump later praised the

265. See *supra* text accompanying notes 241-245.

266. See *supra* text accompanying notes 258-264.

267. See *supra* text accompanying notes 253-257.

268. See Meghan Keneally, *A Look Back at Trump Comments Perceived by Some as Encouraging Violence*, ABC NEWS (Oct. 19, 2018), <https://abcnews.go.com/Politics/back-trump-comments-perceived-encouraging-violence/story?id=48415766> (noting that President Trump told a crowd at a rally “If you see somebody getting ready to throw a tomato, knock the crap out of them, would you? Seriously, OK? Just know the hell . . . I promise you I will pay for the legal fees. I promise, I promise.”).

269. See *id.*

270. See *id.* (quoting President Trump as saying “Get [the protester] out. Try not to hurt him. If you do, I’ll defend you in court. Don’t worry about it”).

271. See *id.*

272. See Jonathan Chait, *Trump Isn’t Inciting Violence by Mistake, but on Purpose. He Just Told Us*, N.Y. MAG.: INTELLIGENCER (Nov. 5, 2018), <https://nymag.com/intelligencer/2018/11/trump-isnt-inciting-violence-by-mistake-he-just-told-us.html>.

273. See Keneally, *supra* note 268.

representative saying: “Any guy that can do a body slam, he is my type!”²⁷⁴ More generally, he has suggested that violence against the press is a logical and acceptable response to their critical coverage of him.²⁷⁵

He has suggested that police officers should use violence against suspects in police custody. In a speech to law enforcement officers in July 2017, the President said: “Please don’t be too nice. When you guys put somebody in the car and you’re protecting their head you know, the way you put their hand over [their head] . . . You can take the hand away, OK?”²⁷⁶ He also complained that the laws provided too little protection for police officers and too much protection for the rights of those accused of crimes.²⁷⁷

Finally, he has implied that it would be acceptable to use violence to keep him in power. For example, shortly before the 2016 presidential election, he suggested that his supporters (“the Second Amendment people”) might use violence if he did not win the presidency.²⁷⁸ In 2018, he claimed that those he deemed his supporters, including the military, police, border patrol officers, and “Bikers for Trump” would support him in a violent conflict with those who oppose him.²⁷⁹ He has also claimed that he could “stand in the middle of Fifth Avenue and shoot somebody” and not lose any voters because his “people” were so loyal.²⁸⁰

274. *See id.*

275. *See* Chait, *supra* note 272 (“What scares the crap out of me is that, when you’re saying ‘enemy of the people, enemy of the people,’ . . . what happens if all of a sudden someone gets shot, somebody shoots one of these reporters?” Vandehei pleads. Trump replies, “It is my only form of Fighting back.”).

276. *See* Keneally, *supra* note 268 (reporting Trump’s statements were during a speech largely focused on the threat of the MS-13 gang).

277. *See id.* (“I have to tell you, you know, the laws are so horrendously stacked against us, because for years and years, they’ve been made to protect the criminal . . . Not the officers. You do something wrong, you’re in more jeopardy than they are”).

278. *See* Nick Corasaniti & Maggie Haberman, *Trump Suggests Gun Owners Act Against Clinton*, N.Y. TIMES (Aug. 10, 2016), <https://www.nytimes.com/2016/08/10/us/politics/donald-trump-hillary-clinton.html> (“If she gets to pick her judges, nothing you can do, folks,” Mr. Trump said, as the crowd began to boo. He quickly added: “Although the Second Amendment people -- maybe there is, I don’t know.”).

279. *See* Chait, *supra* note 272 (reporting that Trump “lament[ed] the restraint his sentries have displayed”).

280. *See* Mary Troyan, *Trump: I Could Shoot a Person and Not Lose Votes*, USA

These statements by President Trump demonstrate both a deep antipathy towards the rule of law and a belief that violence is a desirable solution to problems. His pardons of Lieutenant Behenna, Lieutenant Lorange, Chief Gallagher, and Major Golsteyn have to be seen in light of these overarching beliefs. Thus, whatever the official reason given for the pardons, the evidence suggests quite strongly that he pardoned the men because he saw nothing wrong with their crimes and in fact saw their killings to be praiseworthy.²⁸¹

This motive is directly at odds with the purpose of command responsibility. Command responsibility imposes an obligation on commanders to prevent and punish crimes committed by their subordinates.²⁸² This duty is designed to foster an environment of respect for the rules that regulate armed conflicts.²⁸³ President Trump's statements suggest that he pardoned Lieutenant Behenna, Lieutenant Lorange, Chief Gallagher, and Major Golsteyn because he resents rules that prevent him from engaging in indiscriminate violence²⁸⁴ and valorizes violence itself.²⁸⁵ In that sense, his pardons are exactly the sort of decisions that command responsibility is designed to prevent

TODAY (Jan. 23, 2016), <https://www.usatoday.com/story/news/politics/onpolitics/2016/01/23/trump-could-shoot-person-and-not-lose-votes/79232258/> (reporting on Trump's actions at a campaign rally in Iowa).

281. After all, he called Major Golsteyn a "hero" and praised all of the men for the killings they committed. See *supra* notes 238-42 and accompanying text.

282. See *Prosecutor v. Orić*, Case No. IT-03-68-T, Judgement, ¶ 300 (Int'l Crim. Trib. for the Former Yugoslavia June 30, 2006), <https://www.icty.org/x/cases/oric/acjug/en/080703.pdf> (arguing that when determining the scope of command responsibility "decisive weight must be given to the purpose of superior criminal responsibility: it aims at obliging commanders to ensure that subordinates do not violate international humanitarian law, either by harmful acts or by omitting a protective duty").

283. See *id.* (noting that the duty to punish aims to prevent future crimes and is designed to create "an environment of discipline and respect for the law").

284. See generally LoBianco, *supra* note 253 (reporting of Trump's criticism of the U.S. for "fighting a very politically correct war").

285. See Diamond, *supra* note 258; Lizza, *supra* note 260; Keneally, *supra* note 268; Chait, *supra* note 272 (detailing occurrences of Trump's violent rhetoric); see also Jennifer Rubin, *The Worst Commander in Chief Ever*, WASH. POST (Nov. 25, 2019), <https://www.washingtonpost.com/opinions/2019/11/25/worst-commander-chief-ever/> (highlighting that "Trump seems to think that condoning war crimes (as he did during the campaign) and freeing those who violate the code of conduct for our armed forces make him a tough guy, one of the boys and a hero to the military").

because they erode respect for the laws of war.

B. SUCCESSOR LIABILITY

There is an important legal question that bears on President Trump's criminal responsibility for the pardons. It was noted earlier²⁸⁶ but deserves additional discussion. That question is whether an individual needs to have been commander at the time that the underlying crimes were committed to be liable for the failure to punish those crimes at a later point in time. The idea that a commander can be liable for a failure to punish subordinates who committed crimes before he or she assumed command will be described in this Article as "successor liability." Whether successor liability exists is an important question because President Trump was not in a position of command at the time the underlying crimes were committed.²⁸⁷ So, if it is necessary for the commander to have been in command at the time of commission of the crimes before that commander can be liable for the failure to punish those crimes at a later time, then President Trump cannot be criminally liable for the pardons he granted.

Unfortunately, whether successor liability exists is an unresolved question. Initially, the ICTY took the position that it was enough that the accused was in command at the time of the failure to punish.²⁸⁸ Then, in 2003, the ICTY Appeals Chamber decided in the *Hadžihasanović*²⁸⁹ interlocutory decision that a commander had to have been in command at the time the crimes were committed to be under an obligation to punish those crimes.²⁹⁰ However, the Chamber

286. See *supra* notes 180–81 and accompanying text.

287. See discussion *supra* Sections II.A-C (explaining President Trump was in office at the time of the killings attributed to Gallagher, but those killings probably cannot form the basis for a war crimes charge against the President because of Gallagher's acquittal).

288. Prosecutor v. Kordić et al., Case No. IT-95-14/2-T, Judgment, ¶ 446 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001), https://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf (arguing "the duty to punish naturally arises after a crime has been committed. Persons who assume command after the commission are under the same duty to punish").

289. Prosecutor v. Hadzihasanović, Case No. IT-01-47, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶ 1 (Int'l Crim. Trib. for the Former Yugoslavia July 16, 2003).

290. See *id.* ¶¶ 16, 18.

was deeply divided over this outcome, with two of the five judges writing sharply-worded dissents criticizing the majority decision.²⁹¹ Subsequent ICTY decisions have cast doubt on the persuasiveness of the *Hadžihasanović* decision,²⁹² including three judges in the *Orić*²⁹³ appeals judgment,²⁹⁴ and other international courts have not always followed it.²⁹⁵ Even the Appeals Chamber in *Hadžihasanović*

291. See *Prosecutor v. Hadžihasanović*, Case No. IT-01-47, Separate and Partially Dissenting Opinion of Judge Hunt Command Responsibility Appeal (Int'l Crim. Trib. for the Former Yugoslavia July 16, 2003); *Prosecutor v. Hadžihasanović*, Case No. IT-01-47, Separate and Partially Dissenting Opinion of Judge Shahabuddeen (Int'l Crim. Trib. for the Former Yugoslavia July 16, 2003).

292. See *Prosecutor v. Orić*, Case No. IT-03-68-T, Judgement, ¶ 335 (Int'l Crim. Trib. for the Former Yugoslavia June 30, 2006), <https://www.icty.org/x/cases/oric/acjug/en/080703.pdf> (arguing “[I]t only seems logical that [the duty to punish] would also extend to the situation wherein there has been a change of command following the commission of a crime by a subordinate. The new commander in such a case, now exercising power over his or her subordinates and being made aware of their crimes committed prior to the change of command, for the sake of prevention and control, should not let them go unpunished.” The Orić court went on to say that it would follow the *Hadžihasanović* decision even though it did not find it persuasive. “Since the Appeals Chamber, however, has taken a different view for reasons which will not be questioned here, the Trial Chamber finds itself bound” to follow the *Hadžihasanović* decision).

293. See *id.*

294. The *Hadžihasanović* decision was the subject of several dissents in the *Orić* Appeals Judgment. See *Prosecutor v. Orić*, Case No. IT-03-68-A, Declaration of Judge Shahabuddeen, ¶¶ 2–3 (Int'l Crim. Trib. for the Former Yugoslavia July 3, 2008), <https://www.icty.org/x/cases/oric/acjug/en/080703.pdf>; *Prosecutor v. Orić*, Case No. IT-03-68-A, Partially Dissenting Opinion and Declaration of Judge Liu ¶¶ 1–4, 6–8, 11 (Int'l Crim. Trib. for the Former Yugoslavia July 3, 2008), <https://www.icty.org/x/cases/oric/acjug/en/080703.pdf>; *Prosecutor v. Orić*, Case No. IT-03-68-A, Separate and Partially Dissenting Opinion of Judge Schomburg ¶¶ 1–3 (Int'l Crim. Trib. for the Former Yugoslavia July 3, 2008), <https://www.icty.org/x/cases/oric/acjug/en/080703.pdf>.

295. For example, the SCSL initially concluded that there was successor liability. See *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Judgment, ¶ 306 (Spec. Ct. Sierra Leone Mar. 2, 2009), <http://www.rscsl.org/Documents/Decisions/RUF/1234/SCSL-04-15-T-1234-searchable.pdf> (“[T]his Chamber is satisfied that the principle of superior responsibility as it exists in customary international law does include the situation in which a Commander can be held liable for a failure to punish subordinates for a crime that occurred before he assumed effective control. While it must be clearly established that the superior exercised effective control over the subordinate . . . at the time that there was an alleged failure to punish, it is not necessary that effective control also existed at the time of the criminal act.”).

acknowledged that successor liability was a “difficult legal question” about which “reasonable minds” might disagree.²⁹⁶

Ultimately, the availability of successor liability cannot be resolved simply by counting the number of courts that have sided one way or the other. Rather, it should be resolved by looking at the arguments made by those courts. The majority in *Hadžihasanović* focused on the wording of two documents in particular: 1) Article 86(2) of Additional Protocol I; and 2) Article 28 of the Rome Statute.²⁹⁷ However, the analysis of those documents is not nearly as straightforward as the majority argued.

Article 86 of Additional Protocol I says that a commander is liable if he or she “knew or had information which should have enabled them to conclude in the circumstances at the time, that [a subordinate] was committing or going to commit” a crime and failed to take measures to prevent or repress it.²⁹⁸ The *Hadžihasanović* decision argues that this language means that the commander had to have been in command at the time the crimes took place or were about to take place for there to be command responsibility.²⁹⁹ And, indeed, it does make sense in the context of the duty to prevent that the commander must have been aware that subordinates were about to or were committing crimes to be liable for a failure to prevent. After all, a commander cannot be expected to prevent crimes that he or she had no reason to expect would occur.³⁰⁰ But it makes much less sense to require that a commander have been aware of the crimes at the time they were

296. See *Prosecutor v. Hadžihasanović*, Case No. IT-01-47, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶ 52 (Int'l Crim. Trib. for the Former Yugoslavia July 16, 2003) (“The Appeals Chamber is aware that view on this issue may differ.”); see also *Sesay et al.*, Case No. SCSL-04-15-T, Judgment, ¶ 51 (highlighting “the Appeals Chamber is aware that view on this issue may differ”).

297. See *Hadžihasanović*, Case No. IT-01-47, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶¶ 42–51.

298. *Id.* ¶ 47 (citing Article 86(2) of Additional Protocol I).

299. See *id.* (“[B]reaches committed before the superior assumed command over the perpetrator are not included within its scope.”).

300. See *METTRAUX*, *supra* note 171, at 197–98 (noting that the commander’s knowledge that crimes were about to be committed or had been committed is central to liability for a failure to prevent because it would be unjust to hold a commander liable for the failure to prevent crimes committed by subordinates that he or she was not aware of and had no reason to be aware of).

committed before the commander can be responsible for a failure to punish.³⁰¹

Part of the problem, as the dissent of Judge Shahabuddeen points out, is that it is a mistake to focus only on Article 86 of the Additional Protocol. Rather, it should be read in conjunction with Article 87, which also addresses command responsibility.³⁰² Moreover, while Article 86 focuses on the prevention of crimes by subordinates, Article 87 specifically deals with the duty to punish.³⁰³ And Article 87 refers to the duty to punish subordinates who “have committed” a violation of IHL.³⁰⁴ The past tense in Article 87 makes sense. A commander may not have been aware of the crimes when they were committed, but once the commander does become aware of them, he or she has a duty to punish them.³⁰⁵ One reasonable interpretation of Article 87 is that by obliging commanders to punish subordinates who “have committed” a crime, it imposes an obligation on successor

301. As noted above, the duty to punish is separate from and in addition to the duty to prevent. *See supra* text accompanying note 162. As a number of cases have noted, if a commander only becomes aware of the crimes after they have been committed and thus could not have prevented them, that commander still has an obligation to punish them. *See, e.g.*, Prosecutor v. Orić, Case No. IT-03-68-T, Judgement, ¶ 326 (Int’l Crim. Trib. for the Former Yugoslavia June 30, 2006), <https://www.icty.org/x/cases/oric/acjug/en/080703.pdf> (arguing the “superior’s obligations are consecutive: it is his primary duty to intervene as soon as he becomes aware of crimes about to be committed, while taking measures to punish may only suffice, as a substitute, if the superior became aware of these crimes only after their commission.”); *see also* Prosecutor v. Kordić et al., Case No. IT-95-14/2-T, Judgment, ¶¶ 444, 446 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001), https://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf (highlighting if a commander only becomes aware of the crimes after they have been committed and thus could not have prevented them, that commander still has an obligation to punish them).

302. *See* Prosecutor v. Hadžihasanović, Case No. IT-01-47, Separate and Partially Dissenting Opinion of Judge Shahabuddeen, ¶ 21-23 (Int’l Crim. Trib. for the Former Yugoslavia July 16, 2003); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) arts. 86–88, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

303. Protocol II, *supra* note 304, arts. 87–88 (noting that while Article 86 describes the duty to prevent violations, only Article 87 addresses the duty to “initiate disciplinary or penal action against violators”).

304. *See id.*

305. *See* Kordić, Case No. IT-95-14/2-T, Judgement ¶¶ 444, 446 (“The duty to punish naturally arises after a crime has been committed.”).

commanders to initiate punishment when they become aware that subordinates committed crimes under a previous commander.³⁰⁶

The *Hadžihasanović* decision also relies on the text of Article 28 of the Rome Statute.³⁰⁷ It argues that the wording of Article 28, particularly the “and” that connects subparts (a)(i) and (a)(ii) and the use of “the circumstances at the time” in subpart (a)(i), means that for a superior to be liable for the failure to punish, that superior must also have been in command when the “forces [under his or her command] were committing or about to commit” the crimes.³⁰⁸ There is a problem with this interpretation that is similar to the problem with the *Hadžihasanović* majority’s interpretation of Additional Protocol I. It appears to require that before a commander can be liable for the failure to punish, he or she must have known or had reason to know that the crimes were going to be committed.³⁰⁹ That outcome is at odds with customary international law.

The duty to prevent and punish are separate obligations and a commander can be liable for failing to punish even if he or she did not know or have reason to know about the crimes when they were committed (and thus could not be liable for a failure to prevent).³¹⁰ To the extent that the *Hadžihasanović* court’s interpretation of Article 28

306. See Prosecutor v. Hadžihasanović, Case No. IT-01-47, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶ 23 (Int’l Crim. Trib. for the Former Yugoslavia July 16, 2003); Hadžihasanović, Case No. IT-01-47, Separate and Partially Dissenting Opinion of Judge Shahabuddeen, ¶ 23; see also Prosecutor v. Hadžihasanović, Case No. IT-01-47, Separate and Partially Dissenting Opinion of Judge Hunt Command Responsibility Appeal, ¶ 21 (Int’l Crim. Trib. for the Former Yugoslavia July 16, 2003).

307. See Hadžihasanović, Case No. IT-01-47, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶¶ 42, 46, 53; see also Rome Statute, *supra* note 92, art. 28.

308. See Hadžihasanović, Case No. IT-01-47, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶ 46; see also Rome Statute, *supra* note 92, art. 28(a).

309. This flows logically from the majority’s argument. If subpart (a)(i) of Article 28 of the Rome Statute is a prerequisite to liability for failure to punish in subpart (a)(ii), then before a commander can be liable for a failure to punish, he or she must have also known or had reason to know that the crimes were about to be committed at the time that they were about to be committed. See Rome Statute, *supra* note 92, art. 28(a).

310. See *supra* note 173.

suggests that a failure to prevent is a prerequisite to a failure to punish, the formulation of command responsibility in Article 28 is not consistent with customary international law.³¹¹ Accordingly, Article 28 of the Rome Statute does not shed much light on the availability of successor liability under customary international law.

The most surprising aspect of the *Hadžihasanović* majority decision, however, is that it never mentions the text of Article 7(3) of the ICTY Statute, despite the fact that the defendant in *Hadžihasanović* was charged under that article.³¹² Article 7(3) of the ICTY Statute – the provision that directly addresses command responsibility at the ICTY – states that a commander is liable for the acts of subordinates “if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”³¹³ The key phrase here is “or had done so.”³¹⁴ If you remove the language relating to the duty to prevent and focus on the duty to punish, Article 7(3) reads as follows: a commander is liable “if he knew or had reason to know that the subordinate . . . had [committed a violation of IHL] and the superior failed to take the necessary and reasonable measures . . .

311. See *Prosecutor v. Hadžihasanović*, Case No. IT-01-47, Separate and Partially Dissenting Opinion of Judge Shahabuddeen, ¶ 20 (Int’l Crim. Trib. for the Former Yugoslavia July 16, 2003) (noting that the interpretation of Article 28 adopted by the majority does not capture everything that is criminalized by customary international law); *Prosecutor v. Hadžihasanović*, Case No. IT-01-47, Separate and Partially Dissenting Opinion of Judge Hunt Command Responsibility Appeal, ¶ 32 (Int’l Crim. Trib. for the Former Yugoslavia July 16, 2003) (arguing that Article 28 of the Rome Statute does not represent the extent of customary international law on command responsibility).

312. The *Hadžihasanović* decision notes that Kubura was charged under Article 7(3). *Hadžihasanović*, Case No. IT-01-47, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶¶ 41–42, 44–46. The majority then claims that it is the practice of the court “not to rely merely on a construction of the Statute.” But rather than relying solely on a construction of the text of Article 7(3), the majority opts not to cite or discuss the text at all and switches immediately to a discussion of Article 28 of the Rome Statute. While the court may not want to rely only on the text of Article 7(3) to decide the contours of command responsibility, it is strange that the court does not discuss that text at all.

313. Statute of the International Criminal Tribunal for the Former Yugoslavia, *supra* note 122, art. 7(3).

314. *Id.*

to punish the perpetrators.”³¹⁵

A plain language interpretation of this provision indicates that a commander is liable for crimes committed by a subordinate in the past (thus the language “or had done so”) if the commander discovers those crimes in the present and fails to take steps to punish them.³¹⁶ While this language does not unambiguously adopt successor liability, it is broad enough to cover it.³¹⁷ Judge Shahabuddeen, in dissent in *Hadžihasanović*, further noted that the ICTR Statute contained the exact same language on command responsibility and that the Security Council, when it adopted the statutes for the ICTY and ICTR, believed them to accurately represent customary international law with regard to command responsibility.³¹⁸ Very similar language was also incorporated into the constitutive documents of the SCSL³¹⁹ and the ECCC.³²⁰

Ultimately, the majority approach in *Hadžihasanović* is not persuasive. Its failure to consider Article 87 of Additional Protocol I as well as its questionable conclusion that Article 28 of the Rome Statute represents customary international law are problematic. The failure to acknowledge the text of Article 7(3) of the ICTY Statute (as well as nearly identical language in the constitutive documents of the ICTR, SCSL, and ECCC) also undermines its position. The reality is that the formulations of command responsibility in various treaties and military manuals are not completely consistent.³²¹ But most of those

315. *Id.*

316. *See* Hadžihasanović, Case No. IT-01-47, Separate and Partially Dissenting Opinion of Judge Shahabuddeen, ¶¶ 28–30.

317. *See id.*

318. *Id.* ¶¶ 30–31.

319. *See generally* Statute of the Special Court for Sierra Leone, art. 6(3), (Aug. 14, 2000), <http://www.rscsl.org/Documents/scsl-statute.pdf>.

320. *See generally* Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, art. 29, (Oct. 27, 2004), https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf.

321. *Compare* Prosecutor v. Hadžihasanović, Case No. IT-01-47, Separate and Partially Dissenting Opinion of Judge Hunt Command Responsibility Appeal, ¶ 12 (Int'l Crim. Trib. for the Former Yugoslavia July 16, 2003) (noting on the issue of military manuals, the dissenting judges noted several military manuals that described the duty to punish as applying to both crimes that were about to be committed and crimes that had been committed), *with* Prosecutor v. Hadžihasanović, Case No. IT-

formulations, including the text of Additional Protocol I³²² and the constitutive documents of many (but not all) of the international criminal courts,³²³ suggest that command responsibility for failure to punish can attach to crimes committed by subordinates in the past, even if the commander was not aware of them when they occurred. This conclusion is also consistent with the case law of the international tribunals.³²⁴ Consequently, the better answer is that the duty to punish is not dependent on the commander having been aware of the crimes at the time that they were committed by his or her subordinates.

However, this does not definitively answer the question of whether there is successor liability. None of the documents or treaties that have been cited explicitly resolve this question. The most likely explanation for this lacuna is the one suggested by Judge Hunt; none of the drafters of these documents ever specifically considered the question of successor liability.³²⁵ The ambiguities in the documents probably stem from a failure to consider successor liability, not a conscious choice to include or exclude it.³²⁶ The formulation of command responsibility in Additional Protocol I and the statutes of the *ad hoc* tribunals (as well as in the case law of the various international tribunals) is certainly broad enough to encompass successor liability.³²⁷ But should it?

This question is best answered by looking at the purpose of command responsibility.³²⁸ States have an obligation to ensure that

01-47, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶ 53 (Int'l Crim. Trib. for the Former Yugoslavia July 16, 2003) (replying to the dissent, the majority cited several military manuals that appear to cover only crimes that were presently occurring or about to occur).

322. See *supra* text accompanying notes 295–303.

323. See *supra* text accompanying notes 309–317.

324. See, e.g., Prosecutor v. Sesay et al., Case No. SCSL-04-15-T, Judgment, ¶ 306 (Spec. Ct. Sierra Leone Mar. 2, 2009), <http://www.rscsl.org/Documents/Decisions/RUF/1234/SCSL-04-15-T-1234-searchable.pdf>.

325. See Hadžihasanović, Case No. IT-01-47, Separate and Partially Dissenting Opinion of Judge Hunt, ¶ 12.

326. This failure is understandable. Successor liability is only very rarely relevant and the text of legal documents cannot be expected to anticipate every eventuality, particularly very rare ones. See *generally id.*

327. See *supra* notes 321–324 and accompanying text.

328. See Prosecutor v. Orić, Case No. IT-03-68-T, Judgement, ¶ 300 (Int'l Crim. Trib. for the Former Yugoslavia June 30, 2006), <https://www.icty.org/x/cases/oric/acjug/en/080703.pdf> (arguing that when

their armed forces comply with the requirements of IHL.³²⁹ One key way in which this obligation is enforced is through command responsibility. Command responsibility imposes a duty on commanders to both ensure that their soldiers do not violate IHL and to punish those soldiers that do.³³⁰ Command responsibility is designed to create a culture of discipline and respect for the law within each military.³³¹ The *Hadžihasanović* decision undermines those duties in two ways.

First, it undermines the independence of the duty to punish by linking it to the duty to prevent.³³² The availability of liability for failure to punish is not meant to be dependent on an earlier failure to prevent.³³³ It is an independent obligation of commanders to punish violations when they learn about them, even if they were not aware of them when they occurred.³³⁴ Second, it creates a gap in the protection

determining the scope of command responsibility “decisive weight must be given to the purpose of superior criminal responsibility: it aims at obliging commanders to ensure that subordinates do not violate international humanitarian law, either by harmful acts or by omitting a protective duty”).

329. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol I), art. 1(1), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I] (“The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.”). Nearly identical language appears in Article 1 of all the Geneva Conventions as well. *See, e.g.*, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 1, Oct. 21, 1950, 75 U.N.T.S. 31 (“The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”).

330. Protocol I, *supra* note 329, art. 87(1) (“High Contracting Parties and the Parties to the conflict shall require military commanders . . . to prevent and, where necessary, to suppress and report” violations of IHL).

331. *See* Prosecutor v. Orić, Case No. IT-03-68-T, Judgement, ¶ 336 (Int’l Crim. Trib. for the Former Yugoslavia June 30, 2006), <https://www.icty.org/x/cases/oric/acjug/en/080703.pdf> (the duty to punish aims to prevent future crimes and is designed to create “an environment of discipline and respect for the law”).

332. *See* Prosecutor v. Hadžihasanović, Case No. IT-01-47, Separate and Partially Dissenting Opinion of Judge Hunt Command Responsibility Appeal, ¶ 23 (Int’l Crim. Trib. for the Former Yugoslavia July 16, 2003).

333. *See* Orić, Case No. IT-03-68-T, Judgment, ¶ 335 (“The cohesive interlinking of preventing and punishing would be disrupted if the latter were made dependent on the superior’s control at the time of commission.”).

334. *See* Prosecutor v. Sesay et al., Case No. SCSL-04-15-T, Judgment, ¶ 306 (Spec. Ct. Sierra Leone Mar. 2, 2009),

of IHL.³³⁵ Under the reasoning of *Hadžihasanović*, if a commander is replaced after crimes have been committed, but before that first commander has become aware of them, then neither the first commander nor the second commander can be held liable for the failure to prevent or the failure to punish those violations.³³⁶ This gap in protection is antithetical to the purposes of command responsibility.³³⁷

For both of these reasons, a commander should be under a duty to punish violations committed by subordinates in the past as soon as the commander becomes aware of them, irrespective of when he or she took command. There is no good reason to conclude that a commander can simply ignore past atrocities committed by his or her troops because he or she was not in command at the time they were committed. Consequently, the most persuasive answer is that command responsibility does incorporate successor liability. This outcome is consistent with both the language of the majority of the legal texts that describe command responsibility and its underlying purpose. Thus, President Trump could be liable for the failure to punish Major Golsteyn, Lieutenant Behenna, and Lieutenant Lorange, even though he was not their commander at the time the underlying crimes took place.

C. PARDONS AND AMNESTIES UNDER INTERNATIONAL LAW

As noted above, the author has been unable to find any examples of individuals being convicted of a war crime for issuing a pardon to another war criminal.³³⁸ One possible explanation for the lack of prior international prosecutions for pardoning war criminals is that such pardons are not criminal. After all, pardons are a common feature of criminal justice systems, and “when used judiciously, they are an

<http://www.rscsl.org/Documents/Decisions/RUF/1234/SCSL-04-15-T-1234-searchable.pdf>.

335. See *Prosecutor v. Hadžihasanović*, Case No. IT-01-47, Separate and Partially Dissenting Opinion of Judge Shahabuddeen, ¶ 14 (Int’l Crim. Trib. for the Former Yugoslavia July 16, 2003).

336. See *Hadžihasanović*, Case No. IT-01-47, Separate and Partially Dissenting Opinion of Judge Hunt, ¶ 22.

337. See *Hadžihasanović*, Case No. IT-01-47, Separate and Partially Dissenting Opinion of Judge Shahabuddeen, ¶ 14.

338. See *supra* note 188 and accompanying text.

important and legitimate component of legal systems throughout the world.”³³⁹ Thus, one possibility is that the lack of prior examples of prosecutions for pardons of war criminals is evidence that such pardons are not themselves a violation of international criminal law.³⁴⁰

The first problem is one of terminology. While pardons are not discussed extensively in the international law literature, amnesties are.³⁴¹ An amnesty is defined as an official legal act that prospectively bars criminal prosecution.³⁴² In contrast, a pardon refers to an official act that exempts a convicted criminal from serving their sentence.³⁴³ The crucial difference is that an amnesty is granted before a conviction while a pardon is granted after a conviction.³⁴⁴ This means that President Trump’s decision to grant a pardon for Major Golsteyn

339. *ICRC Explainer: What Does International Law say about Pardons for War Crimes?*, INT’L COMM. OF THE RED CROSS (May 24, 2019), <https://www.icrc.org/en/document/icrc-explainer-what-does-international-law-say-about-pardons-war-crimes>; see also *Press briefing on the United States*, *supra* note 213 (noting that “pardons exist in international law, and can properly address issues of injustice or unfairness”).

340. *But see What Does International Law Say About Pardons for War Crimes?*, *supra* note 339 (“States may not provide amnesties for war crimes”); *Press briefing on the United States*, *supra* note 213 (arguing that the pardons issued by President Trump violated both the “letter and spirit of international law, which requires accountability for such violations”).

341. See generally INT’L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME II: PRACTICE 4021, 4023–4024, 4027 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME II: PRACTICE] (detailing various states’ amnesty laws but not pardons).

342. See OFF. OF THE HIGH COMMISSIONER FOR HUM. RTS, RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES: AMNESTIES, at 5, U.N. Doc. HR/PUB/09/1, U.N. Sales No. E.09.XIV.1 (2009) [hereinafter RULE-OF-LAW TOOLS].

343. See *id.*

344. See *Pardon*, NOLO, <https://www.nolo.com/dictionary/pardon-term.html> (last visited on Mar. 22, 2020) (“To use the executive power of a governor or president to forgive a person charged with a crime or convicted of a crime, thus preventing any prosecution and removing any remaining penalties or punishments. A pardon is distinguished from ‘a commutation of sentence,’ which cuts short the term; ‘a reprieve,’ which is a temporary halt to punishment, particularly the death penalty, pending appeal or determination of whether the penalty should be reduced; ‘amnesty,’ which is a blanket forgiving of possible criminal charges due to a change in public circumstances (such as the end of a war or the draft system); or a ‘reduction in sentence,’ which shortens a sentence and can be granted by a judge or an executive. Sometimes called a commutation.”).

before his trial is actually an amnesty under international law, even if it is treated as a pardon under U.S. law.

This may seem like a minor distinction, but there is an extensive body of practice about the legality of granting amnesties for serious violations of international criminal law. That practice sheds light on President Trump's actions. Blanket amnesties that prevented prosecution for all crimes, including serious violations of international criminal law, were common up until the 1990s.³⁴⁵ So, for example, Argentina's Amnesty Law (1973) and Self-Amnesty Law (1983) both contained blanket amnesties.³⁴⁶ Plenty of other examples exist from the 1970s and 1980s.³⁴⁷ But in the last twenty years or so, it has become unlawful to grant amnesties that cover serious violations of international criminal law such as war crimes, crimes against humanity, and genocide.³⁴⁸

The legality of amnesties for war crimes changed in the mid to late 1990s.³⁴⁹ At least since then, the United Nations has consistently taken the position that amnesties cannot cover serious violations of international criminal law.³⁵⁰ For example in 2000, during the discussions over the establishment of the Special Court for Sierra Leone, the Secretary-General stressed that amnesties could not cover war crimes, crimes against humanity, or genocide.³⁵¹ In 2002, the U.N.

345. *But cf.* Ronald C. Slye, *The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law*, 43 VA. J. INT'L L. 173, 175 (2002) (claiming that generally, amnesty was less common than today "because there was little acceptance of the notion that state officials could be held accountable for such acts").

346. *See* CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME II: PRACTICE, *supra* note 341, at 4021.

347. *See id.* at 4023, 4024, 4027 (describing a blanket amnesty issued by Chile in 1978, El Salvador's 1987 blanket amnesty, and Uruguay's 1985 amnesty law).

348. *Cf.* Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L.J. 507, 514 (1999) ("In a few narrowly defined situations, there is an international legal obligation to prosecute regardless of the underlying practical considerations.").

349. *See* CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME II: PRACTICE, *supra* note 341, at 4033–38 (recounting the United Nations' responses to amnesties that cover serious violations of international criminal law).

350. *See id.* (discussing the practice of the U.N. with respect to amnesties that cover serious violations of international criminal law).

351. *See* U.N. Secretary-General, *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, ¶ 22, UN Doc. S/2000/915 (Oct.

Commission on Human Rights took a similar position.³⁵² Other U.N. bodies, including the Office of the High Commissioner for Human Rights, have similarly condemned amnesties that cover serious violations of international criminal law.³⁵³

Many of the regional human rights bodies have taken similar positions. For example, the Human Rights Committee has taken the position that pardons and amnesties “may not relieve perpetrators from personal responsibility” for violations of international law, including crimes against humanity.³⁵⁴ The Inter-American Commission on Human Rights has repeatedly held that amnesties that attempt to cover international crimes are violations of international law.³⁵⁵ Similarly, the Inter-American Court of Human Rights has held that amnesties that purport to cover the violation of non-derogable international human rights are “inadmissible,” “prohibited,” and “lack legal effect.”³⁵⁶

International criminal courts have also rejected such amnesties.³⁵⁷ The Statute of the Special Court for Sierra Leone specifically stated that amnesties granted to persons who had committed serious

4, 2000) (“[T]he United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.”).

352. See Off. of the High Comm’r for Hum. Rts., *Impunity: Commission on Human Rights Res. 2002/79*, ¶ 2 (Apr. 25, 2002) (emphasizing the importance of combating impunity and concluding that “amnesties should not be granted to those who commit [serious] violations of international humanitarian” law).

353. See *RULE-OF-LAW TOOLS*, *supra* note 342, at 11 (noting that “amnesties are impermissible if they . . . prevent prosecution of individuals who may be criminally responsible for war crimes, genocide, [or] crimes against humanity. . .”).

354. U.N. Hum. Rts. Comm., General Comment No. 31, ¶ 18, CCPR/C/21/Rev. 1/Add. 13, (May 26, 2004); see also U.N. Hum. Rts. Comm., General Comment No. 20, Art. 7 (Prohibition of Torture, or other Cruel, Inhuman or Degrading Treatment or Punishment), ¶ 15, HRI/GEN/1/Rev.9 (Vol. I) (Mar. 10, 1992).

355. See, e.g., *Practice Relating to Rule 159*, INT’L COMM. OF THE RED CROSS, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule159 (last visited Feb. 26, 2020) (denouncing El Salvador’s various attempts at instituting blanket amnesties for war crimes and crimes against humanity in the 1990s).

356. *Barrios Altos v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 75, ¶¶ 41–44 (Mar. 14, 2001).

357. *E.g. Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, ¶ 155 (Int’l Crim. Trib. For the Former Yugoslavia Dec. 10, 1998) (refusing to acknowledge or enforce amnesties for torture).

violations of international criminal law would not be recognized by the court.³⁵⁸ The constitutive document of the Extraordinary Chambers in the Courts of Cambodia contains a provision that prevents the Cambodian government from issuing an amnesty or pardon for any person investigated or prosecuted by the ECCC.³⁵⁹ Similarly, Article 6 of the Special Tribunal for Lebanon states that amnesties are not a bar to prosecution before the court.³⁶⁰ And in *Furundžija*³⁶¹ an ICTY Trial Chamber argued that torture cannot be the subject of an amnesty or pardon and any such amnesty “would not be accorded international legal recognition.”³⁶²

The Rome Statute does not directly address the legality or effect of amnesties or pardons.³⁶³ Nevertheless, the ICC would not recognize an amnesty or pardon if it were granted for the purpose of shielding those responsible for violations from accountability.³⁶⁴ The ICC is required to defer to genuine domestic criminal justice efforts.³⁶⁵ Thus, under Article 17 of the Rome Statute, cases are presumptively inadmissible before the ICC if the “case has been investigated by a State” and the “State has decided not to prosecute the person concerned.”³⁶⁶ But the court will not defer to State decisions not to prosecute if those decisions were made “for the purpose of shielding the person concerned from criminal responsibility for crimes within the

358. Statute of the Special Court for Sierra Leone, *supra* note 319, art. 10.

359. Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, *supra* note 320, art. 40.

360. Statute of the Special Tribunal for Lebanon, art. 6, S/RES/1757 (2007), https://www.stl-tsl.org/sites/default/files/documents/legal-documents/statute/Statute_of_the_Special_Tribunal_for_Lebanon__English.pdf.

361. *Furundžija*, Case No. IT-95-17/1-T, ¶ 155.

362. *Id.*

363. See Rome Statute, *supra* note 92, art. 17(1) (leaving open the question as to whether cases granted amnesty are admissible at the ICC).

364. See Martha Minow, *Do Alternative Justice Mechanisms Deserve Recognition in International Criminal Law?: Truth Commissions, Amnesties, and Complementarity at the International Criminal Court*, 60 HARV. INT'L L.J. 1, 17–18 (2019) (“The Rome Statute implies that prosecution follows a successful investigation, so a successful national investigation followed by amnesties should not bar ICC action.”).

365. See *id.* at 5 (“The basic idea is that the ICC is to ‘complement’ domestic justice systems, not replace them.”).

366. Rome Statute, *supra* note 92, art. 17(1).

jurisdiction” of the ICC.³⁶⁷ As a result, the court would almost certainly refuse to recognize amnesties or pardons that were granted as a way to shield people from responsibility.³⁶⁸

State practice is consistent with the practice of these international bodies. At least since the mid-1990s, most amnesties that have been granted have specifically excluded serious violations of international criminal law.³⁶⁹ For example, the 1994 Quadripartite Agreement on Georgian Refugees excluded those who had committed war crimes and crimes against humanity from its amnesty.³⁷⁰ The 1995 Agreement on Refugees and Displaced Persons that was part of the Dayton Accords excluded individuals who had committed serious violations of international humanitarian law from its amnesty.³⁷¹ Bosnia and Herzegovina’s Law on Amnesty (1999) prohibits both amnesties and pardons for crimes against humanity.³⁷² Colombia’s 1991 amnesty law excludes pardons or amnesties for those who committed killings outside of combat.³⁷³ Argentina initially offered a blanket amnesty in the 1970s,³⁷⁴ but those amnesties were subsequently found to be unconstitutional,³⁷⁵ and Argentina’s military code now provides that no pardons or amnesties may be granted to those accused of serious

367. *Id.* art. 17(2); *see also id.* art. 20(3) (noting that the ICC cannot prosecute a person for crimes that were adjudicated in domestic courts unless those domestic court proceedings were undertaken “for the purpose of shielding the person concerned from criminal responsibility”).

368. *See* Minow, *supra* note 364, at 17–18 (“If the ICC personnel discern that the nation used the alternative justice mechanism as a device to shield people from criminal responsibility, or determine that the entire treatment of the matter domestically was a sham, then ICC jurisdiction remains an option under Article 17(2)(a).”); *id.* at 11–12 (noting that Prosecutors at the ICC have consistently taken the position that while transitional justice mechanisms are an important part of post-conflict reconciliation, they cannot be a substitute for criminal prosecutions).

369. *See* CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: RULES, *supra* note 246, at 612–614 (“Most amnesties specifically exclude from their scope persons who are suspected of having committed war crimes or other specifically listed crimes under international law.”).

370. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME II: PRACTICE, *supra* note 341, at 4017.

371. *Id.*

372. *Id.* at 4022.

373. *Id.* at 4023.

374. *Id.* at 4021–22.

375. *Id.* at 4027.

violations of international criminal law.³⁷⁶

Croatia's 1996 General Amnesty Law specifically excludes from its scope genocide and violations of the laws and customs of war.³⁷⁷ Ethiopia's 1994 Constitution specifically forbids amnesties or pardons with respect to crimes against humanity.³⁷⁸ Guatemala's National Reconciliation Law (1996) grants an amnesty but specifically excludes genocide and other violations of international law from its scope.³⁷⁹ Rwanda's 1996 Law on the Prosecution of the Crime of Genocide makes it clear that a grant of amnesty is not a bar to prosecution for genocide.³⁸⁰ The 2002 peace agreement in the Democratic Republic of the Congo includes an amnesty but specifically excludes from its scope war crimes, crimes against humanity, and genocide.³⁸¹ The 2003 Linas-Marcoussis agreement in Côte d'Ivoire provides for an amnesty, but excludes grave violations of human rights or international humanitarian law.³⁸² The 2007 Ouagadougou Political Agreement related to the conflict in Côte d'Ivoire reaffirmed that the amnesty did not include war crimes and crimes against humanity.³⁸³

The Central African Republic's 2008 Amnesty Law excludes from its scope those who have committed various international crimes, including rape, murder, pillage, torture, and the infliction of inhuman and degrading treatment.³⁸⁴ A 2007 amnesty in the Philippines excludes violations of international law from its scope.³⁸⁵ Poland's law on national remembrance specifies that prior amnesties do not apply to war crimes and crimes against humanity.³⁸⁶ Burundi's 2009 Penal

376. *Id.* at 4022.

377. *Id.* at 4023–24.

378. *Id.* at 4024.

379. *Id.* at 4024–25.

380. *Id.* at 4026.

381. *See Practice Relating to Rule 159, supra* note 355 (“To achieve national reconciliation, amnesty shall be granted for acts of war, political offences and opinion offences, with the exception of war crimes, crimes of genocide and crimes against humanity.”).

382. *Id.*

383. *Id.*

384. *Id.*

385. *Id.*

386. *Id.*

Code states that pardons and amnesties cannot apply to genocide, war crimes, and crimes against humanity.³⁸⁷ Venezuela's 2007 Special Amnesty Law specifically excludes war crimes and crimes against humanity from its scope.³⁸⁸ As this evidence shows, there are many examples of amnesties that have been granted since the mid-1990s, and the majority exclude serious violations of international criminal law.

Of course, state practice has not been uniform, and there have been examples of amnesties that did not specifically exclude violations of international criminal law. Thus, the amnesties granted in Liberia in 1993, Tajikistan in 1996, and Sudan in 1997 did not exclude violations of international law.³⁸⁹ In 2005, however, Liberia recognized that amnesties could not be granted for war crimes and crimes against humanity.³⁹⁰ Peru granted a blanket amnesty to former members of the military in 1996,³⁹¹ but has subsequently acknowledged that war crimes, crimes against humanity, and genocide "cannot be made the subject of an amnesty or pardon."³⁹² Uganda's 2000 Amnesty Act appears to contain a blanket amnesty.³⁹³ In 1994, Djibouti granted an "amnesty without exception."³⁹⁴ In addition, the 1999 Peace Agreement in Sierra Leone contained a blanket amnesty.³⁹⁵ The United Nations condemned this provision, however,³⁹⁶ and the Statute of the

387. *Id.*

388. *See id.* (reiterating this point in Venezuela's 2009 Constitution).

389. *See* CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME II: PRACTICE, *supra* note 341, at 4018–19 (quoting the amnesty instruments from each of these nations, none of which include explicit exclusions of international law violations).

390. *Practice Relating to Rule 159, supra* note 355 (limiting its Truth and Reconciliation Commission's power to grant amnesty as "not apply[ing] to violations of international humanitarian law and crimes against humanity . . .").

391. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME II: PRACTICE, *supra* note 341, at 4025.

392. *Id.* at 4042.

393. *See Practice Relating to Rule 159, supra* note 355 (removing from potential prosecution and punishment "any Ugandan" who committed a listed act during "the participation in the war or rebellion").

394. *Id.*

395. *See* CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME II: PRACTICE, *supra* note 341, at 4020 (describing its pardon for "all combatants and collaborators" as "absolute and free").

396. *See* U.N. Secretary-General, *supra* note 351, ¶ 22 ("[T]he United Nations

Special Court for Sierra Leone ultimately contained a provision repudiating the amnesty to the extent that it purported to cover serious violations of international criminal law.³⁹⁷ Senegal also offered a series of blanket amnesties in the late 1980s and early 1990s but has been repeatedly pressured by the international community to prosecute violations of international law despite the amnesty.³⁹⁸

On balance, state practice since the mid-1990s fairly consistently excludes serious violations of international criminal law from the scope of pardons and amnesties. Where states have passed amnesties that did not exclude violations of international criminal law, such states have often come under international pressure to repudiate such amnesties and have in some cases subsequently changed their laws to exclude international crimes from amnesties and pardons.³⁹⁹ Taken together, there is now consistent evidence from a number of sources, including the United Nations, regional human rights bodies, international criminal courts, and state practice, that “war crimes may not be the object of an amnesty.”⁴⁰⁰ Thus, President Trump’s grant of an amnesty to Major Golsteyn was both impermissible and a violation of international law. This is not conclusive proof that it is also a violation of international criminal law, but state practice does not support the position that such amnesties or pardons are normal or acceptable. They are not.

D. ENFORCEMENT

One obvious question relates to enforcement. If President Trump has committed a war crime, what happens next? The somewhat disappointing answer is not much. As noted above, President Trump has not violated U.S. law by pardoning war criminals.⁴⁰¹ In fact, he has

has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.”).

397. Statute of the Special Court for Sierra Leone, *supra* note 319, art.10.

398. See *Practice Relating to Rule 159*, *supra* note 355 (noting contentions between Senegal and the UN as to whether the Senegalese amnesty law violated the obligation to punish).

399. *Id.*

400. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME II: PRACTICE, *supra* note 341, at 4036–43.

401. See *supra* notes 78–79 and accompanying text (describing the wide

the authority to grant the pardons,⁴⁰² even if doing so is both a war crime⁴⁰³ and extremely unwise.⁴⁰⁴ So there is little prospect of him being charged or tried under domestic law.

There is a strong argument that he has violated international criminal law,⁴⁰⁵ and this raises the question of whether and how those international crimes might be adjudicated. The unfortunate reality is that they are not likely to be adjudicated. While the United States could prosecute President Trump for his violations of international criminal law in U.S. courts,⁴⁰⁶ the chances of such range somewhere between slim and none.⁴⁰⁷ And the United States is functionally immune to the jurisdiction of international criminal courts,⁴⁰⁸ even if one were interested in prosecuting these crimes.⁴⁰⁹ Nor is President Trump likely

discretion President Trump enjoys as commander-in-chief).

402. See *supra* notes 74–79 and accompanying text (contrasting the breadth of the President's military powers against Congress' struggle to constrain them).

403. See *infra* Section VI (attributing command responsibility for the war crimes committed by subordinate officers to Lieutenant Behenna, Lieutenant Lorange, and Major Golsteyn, including torture and intentionally targeting civilians, before considering President Trump's exposure to criminal liability).

404. See *supra* notes 81–90 and accompanying text (surveying the opinions of military leaders, law scholars, and others who believe that preemptively pardoning would be derogate the rule of law, disrupt order and discipline in the military, and put American armed forces at risk).

405. See *infra* Section VI (asserting that President Trump's pardons contravening his duty to prevent and punish subordinate officers' war crimes).

406. See CRYER ET AL., *supra* note 91, at 69-74 (noting that “[i]nternational crimes are primarily intended to be prosecuted at the domestic level”).

407. The U.S. has a poor track record of prosecuting former Presidents for crimes committed in office. President Ford pardoned President Nixon after the Watergate scandal to avoid just such a trial. See Laura M. Holson, ‘No One Could Believe It’: When Ford Pardoned Nixon Four Decades Ago, N.Y. TIMES (Sept. 8, 2018), <https://www.nytimes.com/2018/09/08/us/politics/nixon-ford-pardon-watergate.html> (detailing the precedent set by the pardon of President Nixon).

408. See Stuart Ford, *The ICC and the Security Council: How Much Support is There for Ending Impunity?*, 26 IND. INT'L & COMP. L. REV. 33, 62 (2016) (noting that even relatively weak states, like Sudan, are much more powerful than international courts and have been able to consistently and successfully stonewall and frustrate international courts, implying that if Sudan can stonewall the ICC, the United States can certainly do so as well).

409. Most international courts would not be interested in prosecuting a small number of war crimes arising out of a limited number of killings. See Rome Statute, *supra* note 92, art. 17(1)(d) (limiting the ICC's jurisdiction to the most serious international crimes). The ICC has typically opened investigations in situations that involve hundreds to thousands of murders, hundreds to thousands of rapes and other

to be tried and convicted by another State.⁴¹⁰

In addition, President Trump would likely claim head of state immunity if he were prosecuted outside the United States.⁴¹¹ While this form of immunity has been under attack in recent decades it is still widely accepted that a serving head of state has immunity from prosecution in other States.⁴¹² For example, the leading ICJ decision held that a sitting Minister of Foreign Affairs had immunity from prosecution before the courts of other states, even for violations of international criminal law.⁴¹³ This immunity is not absolute, however, and can be waived or stripped in certain circumstances.⁴¹⁴ For example, the Security Council can remove head of state immunity if it acts pursuant to Chapter VII of the United Nations Charter,⁴¹⁵ and ratification of the Rome Statute implicitly acts as a waiver by member states of head of state immunity before the International Criminal Court.⁴¹⁶ However, neither of these avenues is likely to lead to

sexual assaults, and hundreds of thousands to millions of forcible displacements. Stuart Ford, *What Investigative Resources Does the International Criminal Court Need to Succeed?: A Gravity-Based Approach*, 16 WASH. U. GLOBAL STUD. L. REV. 1, 31–36 (2017) (describing the scope of the typical ICC investigation).

410. Professor Rona suggests that President Trump might be prosecuted by a European state under a theory of universal jurisdiction. Rona, *supra* note 97. This seems extremely unlikely. Which European state would be willing to create a massive diplomatic incident over this? Even trying an ex-President would undoubtedly cause a major diplomatic incident.

411. See CRYER ET AL., *supra* note 91, at 517 (“A serving head of State has personal immunity, and ‘[t]he nature of the charge is irrelevant; his immunity is personal and absolute’. ‘He is not liable to be arrested or detained on any ground whatever.’”).

412. See *id.* (describing the debates and caselaw relating to the personal immunity of government officials).

413. See *Case Concerning the Arrest Warrant of 11 April 2000*, (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. No. 837, ¶¶ 56–61 (Feb. 14) (finding no customary international law exception to head of state immunity).

414. See *id.* at ¶ 61 (providing examples of circumstances under which the immunity might not be recognized).

415. See CRYER ET AL., *supra* note 91, at 521–22 (noting that the Security Council did exactly this in creating the ICTY and ICTR and that this gave them jurisdiction over sitting heads of state).

416. See *id.* at 522 (“ . . . States Parties accept that the immunities their officials may enjoy under interactional law will not bar prosecution before the ICC.”); Rome Statute, *supra* note 92, art. 27(2) (“[I]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a

prosecution in this case. The United States has veto power over Security Council decisions⁴¹⁷ and is not a member of the Rome Statute.⁴¹⁸ Consequently, it is likely that President Trump would be able to claim head of state immunity while in office.

Head of state immunity, however, only lasts for as long as the head of state holds office,⁴¹⁹ and there is no statute of limitations for war crimes.⁴²⁰ Since President Trump is limited to two terms as President,⁴²¹ he will eventually lose his head of state immunity and be subject to prosecution for violations of international criminal law. But, at least for now, he is probably immune to prosecution. For these reasons, it is unlikely that President Trump's responsibility for pardoning Major Golsteyn, Lieutenant Behenna, and Lieutenant Lorange will be adjudicated by any court—domestic or international—in the near future.

VI. CONCLUSION

The most important conclusion of this Article is that there is a good chance that President Trump committed a war crime by pardoning Major Golsteyn. He may also have committed war crimes by pardoning Lieutenants Behenna and Lorange, although that is a much more difficult question. But the analysis of Major Golsteyn's pardon

person.”).

417. U.N. Charter art. 23, ¶ 1 (listing the United States as a permanent member of the Security Council); *Id.* art. 27, ¶ 2 (detailing that votes on all non-procedural matters require the concurrence of all the permanent members to pass).

418. The United States is not likely to become a member of the ICC anytime soon. Ford, *The ICC and the Security Council*, *supra* note 408, at 51–53 (detailing the United States' hostility toward the ICC).

419. *See* CRYER ET AL., *supra* note 91, at 517 (implying that this immunity does not outlast one's tenure in office); Case Concerning the Arrest Warrant of 11 April 2000, *supra* note 413, ¶ 61 (“[A]fter a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States.”).

420. *See* CRYER ET AL., *supra* note 91, at 82–83 (“There is also some municipal and international case law to the effect that statutory limitations shall not apply to international crimes. . . .”); Rome Statute, *supra* note 92, art. 29 (“The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.”).

421. *See* U.S. CONST. amend. XXII § 1 (“No person shall be elected to the office of President more than twice. . . .”).

is quite straightforward. Major Golsteyn committed a war crime.⁴²² President Trump was his superior at the time of the pardon.⁴²³ The pardon was intentional, and the pardon made it impossible to punish Golsteyn for his violation of IHL and thus constitutes a violation of the duty to punish.⁴²⁴ All the elements of command responsibility appear to be met. Thus, President Trump could be criminally liable for pardoning Major Golsteyn.

The President might also be criminally liable for pardoning Lieutenants Behenna and Lorange. Their pardons did not render punishment impossible because they had already been convicted and served a significant portion of their sentences at the time of the pardons.⁴²⁵ Consequently, the pardons would only constitute a violation of the duty to punish if they rendered Lieutenants Behenna and Lorange's punishment disproportionately small.⁴²⁶ It is not clear whether that is true. Thus, while there is a possibility that the pardons of Lieutenants Behenna and Lorange could also constitute war crimes, it is a much more difficult question.

The pardon of Chief Gallagher probably could not form the basis for a war crimes charge against the President because Gallagher was tried and acquitted of the most serious charges prior to the pardon. The acquittal acts as a finding that the underlying war crimes were not committed by Gallagher. Since the existence of underlying war crimes

422. See *supra* section II.B (outlining Major Golsteyn's intentional killing of a suspected Afghan bomb maker against the rules of engagement); *supra* Section IV.A (arguing that Major Golsteyn's acts were a war crime). See also Rona, *supra* note 97 (describing Major Golsteyn's acts as war crimes).

423. See *supra* Section IV.B. See also Rona, *supra* note 97 ("As the commander of these soldiers, . . . the President, himself, has a responsibility to punish, if not prevent, violations of the laws of war committed by his subordinates.").

424. See *supra* Sections IV.C-D. See also Rona, *supra* note 97 ("There's a possible consequence to issuing these pardons that the President and his close advisors might not have considered. That to do so would itself be a war crime, related to the president's constitutional role as Commander in Chief of the armed forces.").

425. See *supra* section II.A (explaining that Lieutenant Behenna had already been convicted and sentenced before President Trump's pardons); *supra* section II.C (discussing Lieutenant Lorange's conviction and sentence before the pardon).

426. See *supra* section IV.D ("Thus, if President Trump is guilty of a war crime for pardoning Lieutenants Behenna and Lorange it would have to be because his pardon rendered their punishments disproportionate when compared to the crimes they committed.").

is a prerequisite to command responsibility, Chief Gallagher's acquittal means that President Trump did not commit a war crime by pardoning him.

While the application of command responsibility is, for the most part, fairly straightforward, there is one legal issue that could potentially insulate President Trump from liability. That issue is whether command responsibility includes successor liability.⁴²⁷ This is a contested question, with judges at the ICTY, ICTR and SCSL disagreeing about it. However, as this Article argues, the more persuasive position is that command responsibility imposes a duty to punish commanders that arises when they become aware of the commission of crimes by their subordinates, even if the underlying crimes were committed before they were in command.⁴²⁸

Of course, just because President Trump probably committed a war crime does not mean that he will be tried anytime soon. In the short term, he has immunity from prosecution as a head of state.⁴²⁹ Although term limits in the United States means that he will not be head of state forever, the reality is that there are few venues where his guilt or innocence could be adjudicated.⁴³⁰ It is extremely unlikely that he would be charged under international law in the domestic courts of the United States, particularly given that his acts do not violate domestic law. There is no international court that would currently have jurisdiction over his acts, and it is hard to imagine that another state might try to use universal jurisdiction to prosecute the President. Consequently, the prospects for adjudication are remote. Nevertheless, there is no statute of limitations for war crimes, so there is a possibility that his acts might be adjudicated someday.⁴³¹

427. See *supra* section V.B (discussing successor liability).

428. See *id.* (concluding that successor liability is available under customary international law).

429. Case Concerning the Arrest Warrant of 11 April 2000, *supra* note 413, ¶58.

430. See *supra* Section V.D (discussing the barriers to prosecuting President Trump). See also Rona, *supra* note 97.

431. See *supra* note 420.