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Pardoning War Criminals. The Trump Administration, the Duty to Prosecute, and the Duty to Protect Human Rights

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IFHV Working Paper, Volume 12, No. 4

Bibliographic information:

Title:	Pardoning War Criminals. The Trump Administration, the Duty to Prosecute, and the Duty to Protect Human Rights
Author(s):	Paul Philipp Stewens
Source:	IFHV Working Papers, Vol. 12, No. 4
Date:	October 2022
DOI:	https://doi.org/10.17176/20220924-202930-0
ISSN:	2199-1367

Suggested citation:
Stewens, Paul Philipp (2022). Pardoning War Criminals. The Trump Administration, the Duty to Prosecute, and the Duty to Protect Human Rights. IFHV Working Paper 12(4).

ISSN: 2199-1367

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IFHV Working Paper Vol. 12, No. 4, October 2022

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IFHV *Working Paper Vol. 12, No. 4, October 2022*

URL: https://www.ifhv.de/publications/ifhv-working-papers/issues

Pardoning War Criminals

The Trump Administration, the Duty to Prosecute, and the Duty to Protect Human Rights

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Abstract

During former U.S. President Trump's last months in office, one rather prominent issue among the numerous controversies surrounding the presidency was the use of the presidential pardon. Especially the seven pardons for military service members and private contractors charged with or convicted of homicide during U.S. military operations in Iraq and Afghanistan sparked criticism. This paper assesses the pardon's conformity with the duty to prosecute grave violations of international humanitarian law, i.e., grave breaches of the Geneva Conventions and war crimes under customary international law. Besides, it considers whether the pardons were compatible with a duty to prosecute serious human rights violations as an emanation from the duty to protect human rights, particularly the right to life. The analysis finds that most of the pardons represent a failure to appropriately punish human rights offenders, while all of them undermine the deterrent effect of criminal prosecution and weaken respect for international humanitarian law. The U.S. hence violates its international legal obligations.

* This paper is based on a thesis submitted for the degree of Bachelor of Arts in International Relations at Technische Universität Dresden. The author wishes to express his gratitude to Prof. Dr. Dominik Steiger for his supervision of the thesis, and to Prof. Dr. Dr. Sabine von Schorlemer, Lisa Cohen, Jan-Phillip Graf, and the anonymous reviewers for their insightful review and comments.

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Pardoning War Criminals

The Trump Administration, the Duty to Prosecute, and the Duty to Protect Human Rights

Content

List of Acronyms

AJIL	American Journal of International Law
ACHR	American Convention on Human Rights
AP II	Second Protocol Additional to the Geneva Conventions
ARS	Articles on Responsibility of States for Internationally Wrongful Acts
CPA	Coalition Provisional Authority
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
GC I	First Geneva Convention
GC II	Second Geneva Convention
GC III	Third Geneva Convention
GC IV	Fourth Geneva Convention
HagueReg	Hague Regulations Concerning the Laws and Customs of War on Land
HRC	United Nations Human Rights Committee
IAC	International Armed Conflict
IACommHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
ISAF	International Security Assistance Force
NIAC	Non-International Armed Conflict
PMSC	Private Military and Security Company
OHCHR	Office of the High Commissioner for Human Rights
VCLT	Vienna Convention on the Law of Treaties

1. Introduction

The executive power to grant clemency in the form of pardons, reprieves, or commutations of sentence[1] seems like an institution fallen out of time: it was native to the earliest legal systems of antiquity, survived throughout millennia as a royal prerogative (Novak 2016), and still exists in the very present, where it is surprisingly widespread in constitutions around the world (Sebba 1977; Close 2015) in autocracies and democracies alike.

The United States (U.S.) is no exception; its constitution vests in the president the "Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment" (Art. 2, Sec. 2, Cl. 1). Former President Trump set a precedent for the U.S. in the use of the presidential pardon, granting it to "soldiers [...] *already convicted* of having committed offenses that violate the international law of war" (Maurer 2019). Seven of the individuals he pardoned were involved in U.S. military operations in Iraq and Afghanistan and convicted of or charged with homicide (Gramlich 2021). These decisions sparked swift and harsh criticism (AJIL 2021): UN experts considered them breaches of the duty to prosecute violations of international humanitarian law (IHL) (OHCHR 2020). A similar obligation has been suggested under international human rights law (IHRL) as well (Seibert-Fohr 2009). This paper follows up on this allegation, guided by the question: *Did the Trump Administration violate its duty to prosecute violations of international humanitarian law and serious human rights violations in its pardoning practice?*

After reviewing Trump's military-related pardons (2), this paper scrutinizes whether the pardons breach the duty to prosecute IHL violations (Section 3). Subsequently, Section 4 examines their conformity with the duty to prosecute serious human rights violations as an emanation of the duty to protect human rights, while Section 5 concludes the analysis.

2. President Trump's Military-Related Pardons

Trump's first three controversial pardons[2] were granted to U.S. service members. Mathew Golsteyn and Clint Lorance both served in Afghanistan, where Golsteyn intentionally killed a suspected Taliban bomb-maker after an unsuccessful interrogation. Lorance ordered his men to fire at any motorcycle in sight, causing two Afghan men's death without evidence that they were enemy fighters (Ford 2020). Golsteyn was charged with premeditated murder but pardoned before being tried by a court-martial. The same court found Lorance guilty of second-degree murder and sentenced him to 19 years' imprisonment (United States Army Court of Criminal Appeals 2017), of which he had served six when he was pardoned in 2019 (Ford 2020). The third pardoned service member is Michael Behenna, convicted in 2009 by a court-martial of the unpremeditated murder of an Iraqi prisoner and sentenced to 25 years' imprisonment (Court of Appeals of the Armed Forces 2012). After his release on parole in 2014 (Associated Press 2019), he received clemency in 2019 (Ford 2020).

[1] This analysis uses the terms "pardon" and "clemency" interchangeably; for a further discussion of terminology, see section 3.3.1.
[2] A detailed overview of the different pardonees, their offences, sentences, and time effectively served can be found in the Annex.

In 2020, Trump further pardoned four employees of the private military and security company (PMSC) Blackwater (hereinafter: 'the contractors'). Their unit had escorted a government convoy through Baghdad in 2007, when they opened fire virtually unprovoked (Arnpriester 2017), leaving 17 Iraqi civilians dead and 24 wounded (Whitten 2012). A U.S. court later found Nicholas Slatten, who had opened fire, guilty of first-degree murder and sentenced him to life in prison, while Dustin Heard, Evan Liberty, and Paul Slough were sentenced to twelve to 15 years' imprisonment for manslaughter. Lobbying efforts though media outlets (Hunter 2019) and an online petition started by the abovementioned Clint Lorance (n.d.), achieved a pardon for the contractors, which was granted when they had served little more than a year of their respective sentences.

3. The Duty to Prosecute Serious Violations of International Humanitarian Law

The focus of this analysis on pardons for offences committed in the context of U.S. military operations makes a consideration of their legality under IHL the most obvious point of departure. Accordingly, this section examines whether the U.S. violated its duty to prosecute or extradite persons guilty of grave breaches of the Geneva Conventions (hereinafter GC I, II, III, and IV, respectively) and its obligation under customary international law (CIL) to prosecute war criminals.

3.1. Applicability

3.1.1. Iraq in 2007/2008

IHL applies *ratione materiae* to international armed conflicts (IAC), non-international armed conflicts (NIAC), and situations of belligerent occupation (Kleffner 2021). The two principal views consider post-2004 Iraq to either be governed by the occupation regime or by the law of NIAC. Proponents of the former perspective stress the UN Security Council's mostly uncontested recognition of the coalition forces as "occupying powers under unified command" (United Nations Security Council 2003, preamb. para. 13) during the existence of the Coalition Provisional Authority (CPA) after the invasion of 2003 (equally undisputedly an IAC). They also underscore the continued strong presence of foreign troops (although upon invitation by the Iraqi Interim Government, Dörmann and Colassis 2004) after the CPA was dissolved in 2004. For instance, 160,000 U.S. troops were still serving in Iraq in 2008 (McCormack 2008). Due to the lack of autonomous effectiveness of the Iraqi government after the dissolution of the CPA (Kolb 2008), this view therefore rejects the notion that, with the end of the CPA, effective control of coalition forces over Iraqi territory and, by virtue thereof, the application of the occupation regime had ceased (Art. 42 of the Hague Regulations Concerning the Laws and Customs of War on Land, hereinafter HagueReg).

Others emphasize the transfer of "full sovereignty" (United Nations Security Council 2004, para. 1) to the Iraqi Interim Government in 2004 and assume its valid consent to persistent foreign military presence. In their view, there was a NIAC between the Iraqi government and the coalition forces on the one hand, and insurgent groups on the other hand (Dörmann and Colassis 2004).

Following the "robust approach" (Roberts 2005, 47) adopted by the UN Security Council (2004, premb. para. 17), which considered IHL to apply to the situation regardless of what the situation qualified as, a duty to prosecute in principle existed mostly independent of the situation's exact characterization. Under occupation, the grave breaches regime (Art. 49, 50 GC I; Art. 50, 51 GC II; Art. 129, 130 GC III; Art. 146, 147 GC IV) generally applies (Art. 146 GC IV in conjunction with common Article 2 GC)—unlike in NIAC (ICTY 1995; Gaeta 2015). Nevertheless, Kreß (2009) finds a tendency in the customary IHL of NIAC to gradually assimilate the grave breaches regime, with a customary obligation to prosecute certain IHL violations in NIAC as well possibly emerging. The International Committee of the Red Cross (ICRC) even goes beyond that and assumes a customary obligation for states to prosecute war crimes also in NIAC (Henckaerts, Doswald-Beck and Alvermann 2005, Rule 158). The customary and the conventional obligation are not fully identical (for instance, the grave breaches regime also obliges states to search for alleged war criminals, which is not required in NIAC); still, they are similar enough to be considered jointly, distinguishing them only where required.

Consequently, a duty to prosecute IHL offenders was incumbent on the U.S. for offences in Iraq in 2007/08 regardless of whether the situation was governed by the law of occupation or of NIAC. McCormack (2008) even asserts that the situation in Iraq in 2007 may qualify as an international armed conflict, since the presence of foreign fighters internationalised the otherwise internal conflict between the Iraqi government and insurgent groups. This view is convincingly questioned by Dörmann and Colassis (2004)—and even if McCormack were right, the grave breaches regime would apply to the situation pursuant to common Art. 2 GC.

3.1.2. Afghanistan in 2010/2012

The circumstances under which Golsteyn and Lorance committed their offences resemble those in Iraq. After a U.S. victory in an IAC, foreign forces remained present for counter-insurgency purposes—but in Afghanistan, a national government was established without an interim occupational authority like the CPA (Pejic 2011). Consequently, the situation is less ambiguous than that in Iraq, with the widely uncontested characterization as a NIAC and, in principle, a U.S. obligation to prosecute war criminals under CIL.

3.1.3. Parallel Application of Human Rights Law and International Humanitarian Law

Considering the significant body of scholarly works and international practice suggesting a duty to prosecute as an emanation from IHRL (see, for instance, Roht-Arriaza 1990; Orentlicher 1991; Seibert-Fohr 2009), confirming the application of IHL in the present cases raises the question as to the effect of this finding for the applicability of IHRL. The relationship between these two regimes is subject to extensive discussion (see Quentin Baxter 1985; Green 1999; Heintze 2004; Orakhelashvili 2008; Arnold and Quénivet 2008). However, IHRL application in armed conflict is generally assumed (Sivakumaran 2018) *inter alia* by the ICJ (2004, 2005). The Court also acknowledges that there are conflict-relevant rights exclusive to either branch of international law but notes that some rights may be relevant both under IHRL and IHL (ICJ 2005). In these cases, the more specific rule (*lex specialis*) shall prevail (ICJ 2004).

The right to life, which would provide the substantive basis for a human rights assessment in the present cases, is an example of the latter category. During hostilities, what "is to be considered an arbitrary deprivation of life [...] can only be decided by reference to the law applicable in armed conflict" (ICJ 1996, para. 25). This is not to say that any killing would be legal under IHL—murder is well prohibited under customary IHL (Henckaerts, Doswald-Beck and Alvermann 2005, Rule 89). Rather, IHL and IHRL apply different standards to determine what use of force is necessary, proportionate, and, ultimately, arbitrary. In armed conflict, the use of lethal force typically is not to be considered arbitrary if it conforms with IHL (HRC 2019). This in principle suggests a primacy of IHL in armed conflict. However, Trump's pardonees were exclusively convicted for killing civilians—members of a protected group under IHL (common Art. 3(1) lit. a GC). Consequently, these actions could have violated both the Geneva Conventions and the International Covenant on Civil and Political Rights (ICCPR). Thus, making recourse to the primacy rule of *lex specialis* is superfluous: both legal regimes apply simultaneously.

3.2. Scope of the Duty to Prosecute

3.2.1. Personal Scope: Jurisdiction Over the Offenders

A necessary precondition for prosecution is establishing jurisdiction over the offence. As regards the grave breaches regime, the Geneva Conventions mainly remain silent thereon (Gaeta 2015), but do entitle every contracting state to prosecute or extradite alleged offenders, precluding nationality as an obstacle to establishing jurisdiction (Art. 146(2) GC IV). Although this may be achieved through commonly accepted titles of jurisdiction (Crawford 2019), states must pass domestic legislation (Art. 146(1) GC IV) that enables universal jurisdiction, too (La Haye 2016).[3] Under CIL, there also is a right to establish universal jurisdiction over war crimes in IAC and NIAC (Henckaerts, Doswald-Beck and Alvermann 2005, Rule 157). An obligation to pass according legislation on the other hand does not exist: states only must prosecute offenders over which they have jurisdiction under their national laws (Henckaerts, Doswald-Beck and Alvermann 2005, Rule 158).

However, as regards the pardonees, recourse to universal jurisdiction, to which both the conventional and the customary duty to prosecute in principle entitle states, is not even necessary. For the incidents in Afghanistan, jurisdiction over military personnel was governed by section I, subsection 3 of Annex A to the ISAF-Afghan Military Technical Agreement. The treaty precluded Afghan jurisdiction over ISAF forces and supporting personnel, which would be exclusively left to their "respective national elements". Lorance and Golsteyn were hence under exclusive personal U.S. jurisdiction. The situation in Iraq in 2007/08 for Behenna and the contractors was rather similar: The territorial jurisdiction of the forum state (now: Iraq) was precluded for coalition personnel and contractors of the coalition forces regarding actions within the scope of their contract (CPA 2003, Section 2,

[3] For a general discussion see O'Keefe (2009). This compulsory universal jurisdiction under the Geneva Conventions warrants further discussion regarding illegal pardons and amnesties to determine whether a failure of one contracting state to prosecute or extradite as a result of a pardon or amnesty might obligate the remaining states parties to exert universal jurisdiction over the respective offenders. However, this discussion lies beyond the scope of the present study.

Clause 4 and Section 3, clause 2).[4] Instead, the 2000 Military Extraterritorial Jurisdiction Act enables U.S. authorities to prosecute offences committed by service members overseas; the Blackwater employees, although only contractors, were charged under the Act as well due to a close enough connection between their offence and Department of Defense operations (Arnpriester 2017). Exclusive U.S. jurisdiction based on the personality principle (mediated through bilateral agreements) over all present offenders was thus given, meeting the requirements of the personal scope of the duty to prosecute under IHL.

3.2.2. Material Scope

Not only the perpetrators, but also their offences must meet certain conditions to trigger the duty to prosecute. An examination of the precise features of extradition and prosecution seems required, too.

3.2.2.1. Preceding Offence

The pardonees' offences occurred in NIAC and eventually under occupation. The question of what crimes trigger a duty to prosecute or extradite hence depend on the source of the obligation. Under situations of occupation, such an offence would be a grave breach of the Geneva Conventions. All of them include wilful killing "if committed against persons [...] protected by the present Convention" in their according definitions.[5] This is a potential yardstick for the offences in Iraq. The notion of wilful killings in the Geneva Conventions comprises murder (common Art. 3(1) lit. a GC) (Dörmann and La Haye 2016), so the judgements of the U.S. courts affirm that Slatten and Behenna committed such offences. The remaining contractors' voluntary manslaughter convictions further indicate that they intentionally caused their victims' deaths and thereby satisfy the requirements of both the mental and the material elements of the notion of wilful killing (Dörmann und La Haye 2016).

Concerning the requirement that the victims be protected persons, the 17 deceased individuals of Nisour Square were all civilians, with at least 14 of them killed without cause (Fadhil Altamimi 2012). They came under the protection of the GC IV and common Art. 3 GC. Behenna's victim was held in custody by U.S. forces and did hence not take "active part in the hostilities", awarding him protected person status under GC IV, too. Consequently, when assuming that the Geneva Conventions apply to Iraq in 2007/08, Behenna and the contractors committed grave breaches of the Geneva Conventions.

The ICRC considers these offences to possess a customary character (Henckaerts, Doswald-Beck and Alvermann 2005, Rule 156) and to be relevant in NIAC as well.

[4] The Orders of the CPA were extended beyond its termination and thus apply unless explicitly revoked by the Iraqi government, see CPA (2004). The U.S.-Iraq Withdrawal Agreement granted Iraq "the primary right to exercise jurisdiction over members of the United States Forces" (Art. 12 (1)) and "over United States contractors" (Art. 12 (2)), but due to its entry into force on 1 January 2009 is not applicable *ratione temporis* to the incidents under scrutiny.

[5] The part of the definition of grave breaches which is uniform across the Geneva Conventions reads: "the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health". This list is supplemented in each Convention by further offences that are related to its respective scope of protection; see Art. 50 GC I; Art. 51 GC II; Art. 130 GC III; Art. 147 GC IV.

Therefore, the offences by Behenna and the contractors would still trigger the duty to prosecute if the controversy surrounding IHL application to post-2004 Iraq were resolved in a manner that considers it a NIAC. Here, the customary duty to prosecute is triggered by the customary counterparts of some violations of the Geneva Conventions (O'Keefe 2014), that is, war crimes under CIL. As regards the offences committed in Afghanistan, Lorance had ordered his platoon to shoot at individuals without any evidence that they were somehow related to the hostilities, even after searching the corpses. His subordinates testified that the victims had not been a threat to the platoon (Ford 2020). This suggests that Lorance had ordered them to direct lethal force against civilians, implicating criminal responsibility as a military superior (Henckaerts, Doswald-Beck and Alvermann 2005, Rule 152). Golsteyn's guilt, on the other hand, was not confirmed in court as he was pardoned before his trial.[6] Nonetheless, he was charged with premeditated murder and even publicly confessed to killing a suspected bomb-maker in an interview (AJIL 2020), which he himself considered a breach of the rules of engagement (Ford 2020). This does not unequivocally confirm his guilt but provides at least strong evidence for it. Thus, Lorance and Golsteyn most likely did commit the customary war crime (Henckaerts, Doswald-Beck and Alvermann 2005, Rule 156) of wilfully killing civilians.

This analysis reveals that the pardonees committed offences qualifying as grave breaches and war crimes under CIL under exclusive U.S. jurisdiction. Hence, the U.S. was under an obligation to prosecute their IHL violations.

3.2.2.2. Prosecution

Having established that the U.S. is under an obligation to prosecute, what conduct does this obligation require it to implement? In any case and under both the Geneva Conventions and CIL, one would misinterpret the duty as an absolute obligation to initiate criminal proceedings. Arguments against such a reading are based on the fair trial guarantees in customary IHL (Henckaerts, Doswald-Beck and Alvermann 2005, Rule 100), the reference to procedural safeguards in Art. 146(4) GC IV, and the common practice of a constitutional separation of powers between the executive and the judiciary (O'Keefe 2009). For the conventional duty to prosecute, which emanates from the grave breaches regime, the more convincing view therefore is that it comprises "a duty to investigate and, where so warranted, to prosecute and to convict" (Kreß 2009, 801). Accordingly, states must "submit the case to the prosecuting authorities" (ILC 2014, para. 21) which are then precluded from exercising prosecutorial discretion so as not to prosecute cases with sufficient evidence to bring charges (Gaeta 2015)—this would most likely constitute an act of bad faith (Art. 26 of the Vienna Convention on the Law of treaties, hereinafter VCLT[7]). The customary rule obliging states to prosecute even explicitly differentiates the duty to investigate and that to prosecute customary war crimes (Henckaerts, Doswald-Beck and Alvermann 2005, Rule 158). Although punishment is an explicit component neither in the conventional nor in the customary duty, an effective

[6] See Annex.

[7] Although the VCLT is not applicable *ratione temporis* to the Geneva Conventions pursuant to its Art. 4, but as the rules of the VCLT reflect CIL, they may guide an interpretation of the Geneva Conventions, too. Whether the rules enshrined in the VCLT also apply to the interpretation of CIL is disputed (see Ammann 2020), but high overlap between the conventional and the customary duty to prosecute seems to allow considering the VCLT rules in the present case.

interpretation in line with the *ut res magis valeat quam pereat* principle provides strong support for including it in both formulations of the duty. The duty to prosecute is hence best understood as a conditional temporal sequence entailing investigation, prosecution (*stricto sensu*), and punishment: If an investigation gathers enough evidence, the alleged war criminal must be tried, and if their guilt is confirmed in court, they must be punished. No reason is apparent to assume a difference of scope between the conventional and the customary duty to prosecute.

However, the obligations from the grave breaches regime are more diverse and comprehensive. They also require[8] states to "search for persons alleged to have committed, or to have ordered to be committed, such grave breaches", and as an alternative to prosecution, states may hand them over to another state party which makes a *prima facie* case (Article 146 (2) GC IV). This choice between prosecution and extradition, also known as *aut dedere aut iudicare*,[9] is not available to states under CIL—here, prosecution is mandatory. Also, for the Geneva Conventions, the extradition alternative is subsidiary to the overriding duty to prosecute (Kreß 2009; van Steenberghe 2011).[10] The fact that the U.S. chose prosecution leaves extradition beyond consideration from the outset for each of the situations under scrutiny.

3.3. Violation through Pardons

3.3.1. Pardons and Amnesties in International Law and U.S. Constitutional Law

Neither pardons nor amnesties are absolutely prohibited under international law. Amnesties are encouraged after non-international armed conflicts (Art. 6(5) of the Second Protocol Additional to the Geneva Conventions, hereinafter AP II; Henckaerts, Doswald-Beck and Alvermann 2005, Rule 159). Besides, Art. 6(4) ICCPR prescribes that death candidates may receive amnesty, pardon, or commutation. The statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and for Rwanda (ICTR) both contained a provision that allowed the tribunal to grant pardon or commutation of sentence when a convicted individual was eligible for either option in their state of imprisonment (Art. 28 ICTY Statute, Art. 27 ICTR Statute). The tribunal had to decide on this matter based on criteria defined in the Rules of Procedure and Evidence (Rule 125 for the ICTY, Rule 126 for the ICTR). In their practice, however, the criminal tribunals have been criticised for conflating pardons with the notion of parole under domestic law (Choi 2013). The statute of the International Criminal Court (ICC) is clearer in this regard. It demands that the court "review the sentence to determine whether it should be reduced" for individuals who have served two-thirds of their sentence or 25 years in case of life

[8] "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case." (Art. 49 (2) GC I, Art. 50 (2) GC II, Art. 129 (2) GC III, Art. 146 (2) GC IV)

[9] As many as 61 international instruments contain this principle in different versions (ILC 2010; Bassiouni and Wise 1995). However, these are so diverse in formulation, content, and scope (ILC 2014) that they offer little guidance for the present analysis.

[10] However, this is not necessarily the case for all treaties containing an *aut dedere aut iudicare* clause (ICJ 2012).

imprisonment (Art. 110(3) ICC Statute) based on criteria set forth in Art. 110(4) ICC Statute and Rule 223 of the Rules of Procedure and Evidence.

The distinction of pardons, commutations, amnesties etc. is less clear; neither of them are defined in international law, and substantial conceptual disarray surrounds them. While some find them "legally indistinct" due to their shared operative legal effect of shielding someone from criminal punishment (Ahmed and Quayle 2009, 16), others distinguish pardons for individuals and amnesties as collective measures (Roht-Arriaza 1995a). Yet another distinction in the literature emphasizes that pardons only lift a sentence, while amnesties prevent/extinguish a finding of guilt (Orentlicher 1991; Slye 2002), while a temporal differentiation has been advanced as well: in this view, amnesties are granted before conviction, while pardons are issued afterwards (ICRC 2019).

This plurality of understandings mirrors the great diversity of forms of executive clemency across jurisdictions: Sebba's (1977) survey of the pardoning power in a hundred different jurisdictions finds considerable heterogeneity in the terminology in domestic law, concerning in what institutions the competence to grant clemency is vested, and relating to the legal effects of being granted a pardon. However, autonomous, uniform definitions under international law are—at least for the purposes of this analysis—not necessarily required. A pardon in the U.S. may be deemed an amnesty elsewhere—but not the domestic classification of an act is decisive for its legality under international law, but the specific features characterizing it. These features allow examining their conformity with the duty to prosecute, definitory issues aside.

Under U.S. constitutional law, the presidential pardoning power allows granting clemency to individuals and groups alike at every stage of the criminal process and even before its initiation (Supreme Court of the United States 1925). This conception of pardons under U.S. constitutional law rejects many of the criteria distinguishing it from amnesties that were outlined above, providing support for an approach that is not primarily occupied with terminology, but with actual effects. The Supreme Court approaches the difference between pardons and amnesties similarly, deeming it "rather of philological interest than of legal importance" (1877, 152-153). A full pardon "releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence" (Supreme Court of the United States 1867, 380).[11]

The only instance of a pardon that received certain attention from international lawyers (Lopez 2018; Contesse 2019) was that of former Peruvian president Alberto Fujimori, who had been convicted of crimes against humanity but was granted a humanitarian pardon due to his weak health condition in 2017 (Cornejo Chavez, Pérez-León-Acevedo and García-Godos 2019). The Inter-American Court of Human Rights (IACtHR) ordered (2018) the Supreme Court of Peru to review the conformity of the pardon with IHRL, leading to the invalidation of the pardon by the latter court (Peruvian Supreme Court 2018)—only for this invalidation to be revoked by the Court in 2022 (Briceño 2022). However, the particularity of the humanitarian pardon and the fact that the legal basis for the IHRL assessment (the American Convention on Human Rights, hereinafter ACHR)

[11] The Court went on to state that a pardon, "[i]f granted before conviction, [...] prevents any of the penalties and disabilities consequent upon conviction from attaching; if 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, and gives him a new credit and capacity" (1867, 380).

does not bind the U.S., preventing the *causa* Fujimori from providing substantial guidance concerning the pardons under scrutiny.

3.3.2. Assessment of the Different Cases

Conceptualizing the duty to investigate, prosecute, and punish as a temporal conditional sequence suggests differentiating the seven pardons based on when clemency was granted: before conviction, or after it. This structure reflects the understanding suggested by the ICRC (2019).

Golsteyn's pardon represents the clearest case. He was investigated and should have been tried, but the pardon interfered with this process, obstructing the due cause of events by terminating criminal proceedings. It unequivocally prevented him from being brought to trial and represents a form of clemency that has been suggested to be inadmissible for war crimes.[12] Similarly, Colville finds Golsteyn's case "'particularly troubling,' considering Trump's failure to allow the judicial process to conclude before intervening" (cited in AJIL 2020, 312). The pardon for Golsteyn can hence be considered a violation by the U.S. of the duty to prosecute under customary IHL (Henckaerts, Doswald-Beck and Alvermann 2005, Rule 158).

The remaining pardonees were investigated, prosecuted, convicted, punished, and imprisoned. When interpreted with an exclusive focus on the ordinary meaning of prosecution (Art. 31(1) VCLT), the duty to prosecute under IHL does not seem to prohibit the pardons (apart from Golsteyn's). An interpretation of the obligation that takes into consideration its object and purpose as well might, however, lead to a different conclusion on the remaining pardons' compatibility with the duty to prosecute.

The abovementioned encouragement of amnesties after NIAC most likely entails pardons as well (Junod 1987), but extending it to clemency for grave breaches of the Conventions or war crimes would undercut the core objective of the duty to prosecute: combating impunity for serious IHL violations (La Haye 2016). After all, "[t]here is no evidence to suggest that the drafters of the Geneva Conventions meant to take away with one hand what they had given with the other" (Slye 2002, 178).

The merits of this approach to an improved IHL compliance lie in the "[f]ear of criminal or disciplinary sanctions, in addition to the deterrent effect of past convictions" (Vöneky 2021, 697). Establishing individual responsibility for serious crimes is crucial to ensuring IHL enforcement, and it has been the very idea of international criminal law since the International Military Tribunal of Nuremberg (1946). This preventive objective[13] is essentially countered by pardons. They restore the legal innocence of the offender (Supreme Court of the United States 1867) and evince the commander-in-chief's

[12] This was suggested by the Soviet Union in the *travaux préparatoires* of the AP II and is shared by the ICRC. Additionally, there is extensive state practice of domestic courts rejecting amnesties for war crimes in post-conflict situations (Henckaerts, Doswald-Beck and Alvermann 2005, Rule 159). Consider also the rejection of amnesty laws for the war crime of torture by the ICTY (1998).

[13] Prevention is of course but one theory of international criminal justice (for an overview see Werkmeister 2015). Nonetheless, it seems appropriate to regard it as the primary purpose of punishment in the context of IHL enforcement. It is, after all, highly disputed whether IHL (alongside objective duties for states) even confers subjective rights to individual victims at all (Hill 2017). Other theories of justice, like retributive and expressive conceptions, would be tied to them (Werkmeister 2015).

retroactive validation, excuse, or justification of illegal behaviour (Maurer 2019). Trump's rhetoric surrounding the pardons reinforces this effect. He called Golsteyn a "military hero" (Olmstead 2018) and declared that he sought to give U.S. soldiers the "confidence to fight" for their country (cited in The White House 2019b) – enough confidence, it seems, for service members to not even shy away from war crimes. This display of disregard of IHL by the head of state is indeed a "[b]ad message" and a "[b]ad precedent" (Dempsey 2019), both domestically and internationally (Colville, cited in AJIL 2020, 312).

Pardons contradict the object and purpose of both the conventional and the customary duty to prosecute IHL offenders. The deterrent effect of criminal sanctions, devised to foster IHL compliance through the elimination of impunity for serious violations, is undercut by the restoration of the innocence of those found guilty of war crimes and acquiescence to their offences. The lack of individual responsibility seems particularly lamentable concerning the contractors, with PMSCs prominently featured in debates around an accountability gap for private contractors (Cotton et. al 2010; Kelly 2012; Arnpriester 2017).

The fact that both the ICTR and especially the ICTY have made extensive use of their power to grant early release (Merrylees 2016) and that this option is available to the ICC as well does not take away from this assessment. First, the ICTY only considered convicts for early release who had served two-thirds of their sentence, and the ICTR went even further in applying a three-quarters threshold (Choi 2013). None of the sentences served by the pardonees come even close to such proportions. Second, what the tribunals granted is better described as parole instead pardon or commutation (ibid.): Like in many domestic systems, the tribunals considered a reduction of the sentence after a fixed share of the convict's prison time and based on criteria such as rehabilitation and cooperation with the court (see Rules of Procedure and Evidence). Also, the sentence was simply shortened instead of the complete revocation of guilt that a U.S. pardon effectuates. 'Pardons and commutations' by the ICTY and ICTR therefore represent a relatively clearly defined process of judicial review with considerable thresholds for early release. Although their effect on deterrence has been criticised, too (Merrylees 2016), it is in no way comparable to that of an executive pardon.

The Geneva Conventions, of course, do not in principle take away the states' sovereign right to grant amnesties or pardons, but they limit national discretion. States perform the obligations *erga omnes contractantes* of the Geneva Conventions on behalf of all parties (Kessler 2001). This is provided for in common Art. 1 GC which requires states parties to "respect and to ensure respect" for the Geneva Conventions "in all circumstances". Alongside the external dimension of this obligation vis-à-vis other parties to an armed conflict, common Art. 1 GC also demands that states ensure respect for the Geneva Conventions by their armed forces and other individuals whose conduct can be attributed to them. This entails numerous negative and positive obligations, including the duty to prosecute under the grave breaches regime (Ambos 1999; Henckaerts 2016). Consequently, the sovereign use of the right to pardon finds its limitation in the international legal obligation to bring alleged war criminals to justice. Investigating, prosecuting, and convicting suspected war criminals only to eradicate the effects of prosecution by pardon for offenders who served a fraction of their actual sentence is but an ostensible fulfilment of the obligation and may indeed indicate conduct *mala fide*. This

line of reasoning is put forward by Kolb (2006) regarding international terrorism and is applied to pardons and amnesties for war crimes by Gaeta (2015).

3.4. Interim Findings

Consequently, there is substantial reason to believe that the present pardons violated the duty of the U.S. to prosecute war crimes under CIL and, contingent upon the characterization of the situation in Iraq, also the duty to prosecute grave breaches of the Geneva Conventions.

4. The Duty to Prosecute Serious Human Rights Violations

The possibility of parallel application of IHL and IHRL further allows considering the pardons conformity with the obligation of the U.S. to prosecute serious human rights violations under the ICCPR. The Covenant lacks explicit references to such a duty, like most general human rights treaties, whereas, for instance, the Torture Convention (Art. 7) or the Genocide Convention (Art. IV) contain according provisions. Instead, human rights treaty bodies "have required states to investigate, prosecute, and compensate victims" (Roht-Arriaza 1995b, 28). These bodies start from the widely accepted notion that states, alongside negative duties, must also protect and ensure/fulfil human rights (Kälin and Künzli 2019). These positive obligations are considered to give rise to an obligation to prosecute. The most prominent articulation of this duty originates from the *Velásquez* judgement of the IACtHR, which held that:

> *The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation* (1988, para. 174).[14]

The UN Human Rights Committee (HRC) developed a similar doctrine in its General Comments[15] on the ICCPR, suggesting positive obligations of states to prevent the recurrence of Covenant violations by bringing to justice human rights offenders (HRC 2004).

After a discussion of the application of the ICCPR to the present extraterritorial situations, this section elucidates which human rights violations by which offenders give rise to which concrete obligations. An examination of the legality of the pardons under IHRL ensues.

[14] It need be noted, however, that in the judgement, the Court interpreted the ACHR to which the U.S. is not a party. Hence, *Velásquez* is strongly limited in its significance for the cases under scrutiny.

[15] Under Art. 40 (4) ICCPR, the HRC may issue general comments which are non-binding, but may nonetheless be considered when interpreting the Covenant—after all, the International Court of Justice (ICJ) "believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty" (ICJ 2010, para. 66). This view is shared by Tomuschat, who, while acknowledging the lack of binding authoritativeness, emphasizes the "enormous factual weight of the views expressed by the treaty bodies," which "can never be lightly dismissed" (2002, 325).

4.1. Extraterritorial Application

U.S. human rights obligations under the ICCPR extend "to all individuals within its territory *and* subject to its jurisdiction" (Art. 2(1), emphasis added). It therefore warrants discussion whether the ICCPR was applicable also to U.S. overseas operations.

4.1.1. Conjunctive vs. Disjunctive Approaches to Art. 2(1) ICCPR

The conjunctive reading of the word "and" in Art. 2(1) ICCPR supported by the U.S. requires both conditions to be fulfilled for the Covenant to apply, which it accordingly refuses for its operations in Iraq and Afghanistan (Zilli 2011). The HRC opposes this position, asserting Covenant application to individuals "in the territory *or* subject to the jurisdiction of the State Party" (2004, para. 10, emphasis added). The International Court of Justice (ICJ) also finds the ICCPR to be "applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory" (ICJ 2004, para. 111). Besides, the U.S. view has been rejected in scholarly literature (McGoldrick 2004; Wenzel 2008; Milanovic 2013).

Following a disjunctive reading of the word "and" in Art. 2(1) ICCPR makes jurisdiction the decisive criterion for an application to extraterritorial conduct. Over whom or what it need be exercised requires clarification. In approaching this issue, the European Court of Human Rights (ECtHR) harmonized its conception of jurisdiction[16] after somewhat contradictory positions in *Bankovic* (ECtHR 2001) and *Issa and Others* (ECtHR 2004b) in *Al-Skeini* (ECtHR 2011b). In the Court's view, jurisdiction can be exercised according to the established principle of territoriality, through state agent authority and control, in cases of effective control over a territory, and within the *espace juridique* of the European Convention on Human Rights (hereinafter ECHR). These principles were reiterated in subsequent jurisprudence (see, for instance, ECtHR 2014, ECtHR 2021a, ECtHR 2021b). For the purposes of this analysis, these different constellations are divided into personal and spatial models of jurisdiction. Such a differentiation has also been suggested by Milanovic (2013).

4.1.2. Personal Jurisdictional Links: State Agent Authority and Control and Effective Control Over Individuals

The HRC early endorsed a personal view on jurisdiction in cases that dealt with kidnappings and detention by foreign state agents acting abroad (HRC 1981a, 1981b), finding the Covenant not to permit extraterritorial Covenant violations that would be prohibited on states' own territory (HRC 1981b). Other treaty bodies share this view. Among them is the Inter-American Commission on Human Rights, which followed the HRC in several cases (IACommHR 1998, 1999). Besides, the ECtHR even expressly based

[16] It must be noted that the jurisdiction *ratione materiae* of the ECtHR is limited to the ECHR and its protocols (Art. 32(1) ECHR). Nonetheless, the Court has stated on various occasions that its approach to interpreting the term jurisdiction in Art. 1 of the Convention is not situated in a legal vacuum but takes "the standpoint of public international law" (ECtHR 2001, paras. 57, 59); see also ECtHR (2004a). Accordingly, the findings of the ECtHR with respect to the extraterritorial application of the ECHR may be considered when interpreting jurisdiction clauses in other human rights treaties, including the ICCPR.

its assessment on IACommHR (1999), HRC (1981a), and HRC (1981b) in ECtHR (2004b).

The cases of Golsteyn and Behenna, who captured and killed foreign nationals on foreign soil, may represent such state agent authority and control over their victims within the meaning of the ECtHR's doctrine. The Court has dealt with several cases of detention and has, for instance, found Iraqi detainees in British military prisons to be under the jurisdiction of the UK as it exercised total and exclusive control over the prisons and the individuals detained in them (ECtHR 2010, 2011a). Golsteyn and Behenna as U.S. service members can be considered state agents under the CIL of state responsibility.[17] As such, they killed foreign civilians in their custody. The parolees' authority and control over the victims can hence be assumed, causing the latter to fall within U.S. extraterritorial jurisdiction.

Contrarily, the contractors and Lorance were convicted of killing civilians outside of detention. Although the ECtHR in *Banković* rejected a "'cause-and-effect' notion" according to which it would be decisive whether state conduct produces extraterritorial effects regardless of territorial control issues, it confirmed such a link for extraterritorial killings in later judgements (ECtHR 2006, 2007, 2008). It is also notable that the killings in both Iraq and Afghanistan occurred in a situation with substantial U.S. military presence in the wider region of the offence. A jurisdictional link in the present situations seems plausible insofar as "every time the Court ruled on a situation in which some elements of the personal model *and* some elements of the territorial model existed, it found the jurisdiction criterion to be fulfilled" (Steiger 2020). Moreover, the HRC has commented on the right to life (Art. 6 ICCPR) that the effective control necessary to establish jurisdiction under Art. 2(1) ICCPR is also given for "persons located outside any territory effectively controlled by the State whose right to life is nonetheless affected by its military" activities (HRC 2019, para. 62). This in in line with the Committee's overall approach that places the relationship between the state and the individual at the heart of the jurisdictional link question, regardless of territorial considerations (Corsi 2017). Under either doctrine, there is strong support for a jurisdictional link for killings outside the effective territorial U.S. control.

While Lorance was a U.S. service member and hence a state agent, the contractors' actions as PMSC employees would have to be attributable to the U.S. as "jurisdiction-establishing conduct". Otherwise, the victims could hardly be considered to have come under U.S. jurisdiction by a personal link.[18] This would be possible under Art. 5 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARS) if PMSC agents exercised elements of governmental authority. In addition, this exercise requires an authorization by the law of the state, yet this can typically be assumed for PMSCs, and the Blackwater employees working on a State Department contract (Whitten 2012) do not

[17] Art. 4 of the Draft articles on Responsibility of States for Internationally Wrongful Acts (ARS). The draft articles are not legally binding but reflect customary international law and may as such be considered as a yardstick for determining attribution.

[18] This is not to equate attribution with jurisdiction. Milanovic (2014) rightly argues that these are two separate concepts – although the Court seems to have sometimes conflated them over the decades. Milanovic's proposed terminology of the attribution of "jurisdiction-establishing conduct" on the one hand and "violation-establishing conduct" on the other hand clarifies their relationship and allows for rigorous conceptual distinctions like in the present case.

seem to constitute an exception (Arnpriester 2017). The elements of governmental authority at least include "[q]uintessentially [g]overnmental [f]unctions [...] typically performed by the state that are central to the nature of government" (Maddocks 2019, 64). That undoubtedly comprises offensive combat, and even contractors with a defensive mandate may offensively respond to a perceived threat (Maddocks 2019). Consequently, the contractors' conduct while protecting a government convoy seems attributable to the U.S., establishes jurisdiction over their victims, and triggers its human rights obligations under Art. 2(1) ICCPR.

4.1.3. Spatial Jurisdictional Link: Effective U.S. Control Over Foreign Territory

The U.S. may also have exercised effective control over the respective territories in Iraq and Afghanistan. A possible reconciliation of personal and spatial models of jurisdiction consists of tying different human rights obligations to different degrees of control. While states must respect human rights in both the personal and the spatial model, obligations to ensure or to secure human rights only exist depending on sufficient territorial control. Only then, positive obligations are no unreasonable burden upon states (Milanovic 2013). Nevertheless, what would have to be exempt in such an approach would be those positive obligations which are "procedural and prophylactic in nature, tied solely to the state's negative obligation to respect human rights" (Milanovic 2013, 212)—after all, these can typically be expected to be attainable without substantial territorial control. These obligations certainly include the duty to prosecute, making the question of U.S. effective control over foreign territory irrelevant to the present IHRL assessment.

4.1.4. Investigation of Extraterritorial Killings as a Jurisdictional Link

One might also consider recent ECtHR jurisprudence on the duty to investigate violations of the right to life (Art. 2 ECHR). In *Güzelyurtlu*, it found the institution of a domestic investigation for an extraterritorial killing to establish a jurisdictional link *ipso facto* (ECtHR 2019). When the court dealt with an airstrike that took place in 2009 in the Afghan province of Kunduz under German operative command over the ISAF troops, in *Hanan*, it adjusted this approach by additionally requiring "special features" (ECtHR 2021b, para. 135). The Court found three according circumstances for the ISAF mission in Afghanistan. The first one was the inability of Afghan authorities to investigate as the ISAF states retained exclusive jurisdiction over its personnel pursuant to an according provision in Section I, subsection 3 of Annex A (Arrangements Regarding the Status of the International Security Assistance Force) to the ISAF-Afghan Military Technical Agreement. Secondly, the Court mentioned Germany's duty to investigate under customary IHL and, thirdly, the latter obligation's counterpart under domestic law (ECtHR 2021b). The U.S. also undertook criminal investigations in all seven cases introduced above,[19] and its exclusive jurisdiction over both Lorance and Golsteyn in Afghanistan and Behenna and the contractors in Iraq has been confirmed above,[20] too. Besides, U.S. military regulations entail a duty to investigate (Drabik 2013; Department of Defense 2016, 2020) and, as previous sections have shown, the U.S. did face a

[19] See section 2.
[20] See section 3.2.1.

corresponding duty under IHL as well. Thus, the "special features" establishing jurisdiction following *Hanan* were present between the U.S. and victims of the pardoned offences under scrutiny were present, triggering U.S. human rights obligations.

4.2. Scope of the Duty to Prosecute

The next step of inquiry elucidates what the duty to prosecute serious human rights violations entails. It discusses with which measures states need to respond to which offences perpetrated by which individuals.

4.2.1. Personal Scope

The offenders in the present cases were U.S. service members and PMSC contractors. Concerning state officials, the HRC (2004) maintains that states must not relieve their agents violating Covenant rights from personal responsibility. According statements for detention, killing, torture, forced disappearance, or ill-treatment by state agents are abundant in HRC case-law (see *ex pluribus* HRC 1980, 1982, 1983b, 1985, 2007). They usually do not limit the duty to prosecute to state agents, but rather urge states to "bring to justice any persons found to be responsible" (HRC 1982, para. 11; 1983b, para. 16) for the respective human rights violations, too. Similarly, the IACtHR (1988) in *Velásquez* only referred to violations committed under the jurisdiction of a state, not necessarily to such by its agents. The incorporation of private offenders into the personal scope of the duty to prosecute was explicitly suggested by the HRC (2019), including a reference to PMSCs. States' obligations under the Covenant do, of course, "not, as such, have direct horizontal effect" (HRC 2004, para. 8). However, an indirect horizontal effect, or *mittelbare Drittwirkung*, of certain human rights has been accepted—most notably regarding the right to life, which states must not only refrain from violating, but also protect from infringements by private individuals (Nowak 2005). In this context, the HRC has repeatedly indicated a duty to penalize and prosecute violations by both private and state offenders for rights like that to life, which is widely accepted to create certain horizontal protective commitments (Nowak 2005; Seibert-Fohr 2009).

4.2.2. Material Scope

Although the duty to prosecute applies to private and state offenders alike, it is more restrictive in what offences trigger a state's duty to prosecute. Besides, the question of what actions it must undertake to comply with this obligation warrants further attention.

4.2.2.1. Preceding Human Rights Offence

While the IACtHR initially found a duty to prosecute "any violation" of ACHR rights (1988, para. 166), it later qualified this approach that put a rather heavy burden on states, requiring prosecution only concerning the right to life and personal integrity (IACtHR 1998a; for an overview over IACtHR jurisprudence see McGonigle Leyh 2016). HRC case-law contains the similar implicit view "that investigation and prosecution are the most effective means of securing the right to life and the right to be free from torture and forced disappearance" (Orentlicher 1991, 2575; similarly: Roht-Arriaza 1990, 492). Although criminal law may not be proportionate in protecting every human right, violations of the

"supreme right" (HRC 2019, para. 2) to life seem to require this in any case. Such an approach seems appropriate insofar as the means of criminal law may not be proportionate in protecting every human right, and Ambos (1997) convincingly suggests an orientation along the traditional protective goods of criminal law, which leads him to share the limitation of the material scope of the duty to prosecute to offences against personal integrity to which the right to life under Art. 6 ICCPR belongs.

A violation of Art. 6(1) ICCPR requires an arbitrary deprivation of the pardonees' victims' lives. The HRC understands 'arbitrary' in principle as "inconsistent with international law or domestic law" (2019, para. 12). This is not to equate arbitrariness to illegality. An interpretation of the term is to be supplemented by "elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality" (HRC 2019, para. 12) so as to "include both illegal and unjust actions" (Aceves 2019, 129).

Illegal killings were confirmed for those pardonees convicted of homicide—only Golsteyn was pardoned before his trial.[21] Nonetheless, the substantial grounds to assume it have been presented above.[22] Hence there is sufficient evidence to assume that all pardonees arbitrarily deprived their victims of their lives.

4.2.2.2. Investigation, Prosecution, and Punishment

The phrase "bring to justice" in HRC case-law indicates a certain leeway for states concerning the measures they must undertake to protect certain human rights using criminal law (Orentlicher 1991). Nonetheless, the three predominant manifestations of this duty are those to investigate, to prosecute (*stricto sensu*), and to punish (Kälin and Künzli 2019). All these obligations are obligations of conduct, not of result (Seibert-Fohr 2009), requiring an implementation in good faith (Art. 26 VCLT) without prescribing a specific result. As "there are legitimate reasons for the termination of an investigation or the dismissal of a case prior to trial" (Scharf 1996, 47), the duties are best understood as a temporal conditional sequence, with those to prosecute and to punish being triggered by a satisfactory prior stage that meets the requirements of the ordinary cause of justice.

The first step is mandatory investigations *bona fide* of alleged human rights violations (HRC 1982, 1983a) in an "impartial, independent, prompt, thorough, effective, credible and transparent" manner (HRC 2019, para. 28). Investigations corroborating the allegations trigger states' duty to prosecute *stricto sensu*. In this stage the leeway of states having to "bring to justice" perpetrators comes to bear. In principle however, "to prosecute" can be understood as instituting legal proceedings against a person for an offence (Oxford English Dictionary n.d.), subject to the relevant provisions of domestic law—without them being a valid justification for lacking compliance with an international obligation (Art. 27 VCLT). As for the other two stages, the human rights of the offenders (especially Art. 14, 15 (2) ICCPR) must be safeguarded.

After satisfactory investigation and a confirmation of guilt in court, states must punish convicted human rights offenders. These sanctions must be commensurate with the

[21] See Annex.
[22] See section 3.2.2.1.

gravity of the crime, grave enough to effectively deter future violations, and adequately respect the offenders' human rights (Seibert-Fohr 2009). As a general limitation, Schilling (1999) emphasizes the utilitarian nature of the duty to prosecute which, as an emanation of the duty to protect human rights, must remain the *ultima ratio* and subject to a strict proportionality assessment.

4.3. Violation through Pardons

The ICCPR applies to the situations of interest, and the duty to prosecute is triggered. This allows the analysis to now assess the second perspective on the guiding question: did the pardons violate the ICCPR? Conceptualizing the duty to investigate, prosecute, and punish as a temporal conditional sequence suggests differentiating the seven pardons based on when clemency was granted: before conviction, or after it.

4.3.1. Pardon Before Trial

Golsteyn's pardon seems to represent a relatively clear-cut case of illegal impunity. U.S. authorities investigated him, fulfilling their corresponding duty, and uncovering sufficient evidence to charge Golsteyn with premeditated murder. The pardon interrupted this process, "prevent[ing] any of the penalties and disabilities consequent upon conviction from attaching" (Supreme Court of the United States 1867, 380). That makes it a measure comparable to amnesty "leading to de facto or de jure impunity", which the HRC finds, "as a rule, incompatible with the duty to respect and ensure the right to life, and to provide victims with an effective remedy" (2019, para. 27). Unlike the investigation obligation, the duty to prosecute *stricto sensu* cannot be considered fulfilled, let alone the duty to punish. The prosecution was thus prevented from proceeding as provided for by U.S. criminal law (passed itself in fulfilment of the Covenant obligation to legislate as "necessary to give effect to the rights recognized" in the ICCPR): Trump forestalled its use to protect human rights as required by the Covenant, violating the duty to prosecute.

Discussions of amnesties in international law have also entailed debates on possible grounds for justification. Consider, for instance, the ruling by the South African Constitutional Court which had to review amnesty legislation. The Court emphasized the struggle of a post-conflict society to balance retributive justice against reconciliation and retribution and upheld the legal act it had to review due to its importance and specific design, finding *inter alia* no contravention of international obligations (Constitutional Court of South Africa 1996). A similar argument is advanced by Orentlicher (1991). However, such justifications emerge from post-conflict situations in unconsolidated democracies, and it seems untenable to argue that it would threaten U.S. democracy to charge a soldier with a murder committed in a foreign country.

4.3.2. Pardon After Conviction

The legality of the remaining pardons is less clear *prima facie*. In a literal reading of the duty to prosecute, the U.S. complied with its obligations: it did investigate, prosecute, and punish the six offenders, who were incarcerated and served different portions of their

sentences.[23] Nevertheless, it appears possible that such a reading would defeat the obligation's object and purpose.

For determining the latter, the underlying rationale applied by treaty bodies in the justification of an unwritten duty to prosecute provides valuable guidance. Seibert-Fohr (2009) distils two lines of reasoning from a somewhat heterogenous treaty body practice: prosecution as an emanation of victims' rights (a remedial perspective), and as a means of human rights protection. The remedial rationale has been articulated very clearly by the IACtHR: the Court has derived a duty to prosecute from the right to a fair trial in Art. 8 ACHR (IACtHR 1998a), from the right to judicial protection in Art. 25 ACHR (IACtHR, 1998b) and the right to justice, which has been derived from a conjunctive reading of the two latter articles (IACtHR 2000; for the derivation of the right to justice see Seibert-Fohr 2009).

However, as regards the ICCPR, the protective reasoning is more convincing. Although the HRC has discussed communications referencing judicial rights under the ICCPR like the right to fair trial (Art. 14(1), HRC 1989), the prohibition of retroactive criminal laws (Art. 15(2), HRC 1999) and remedial rights under Art. 2(3) (HRC 1994), it expressly rejected the notion of "an individual right to have perpetrators of human rights violations punished" (Seibert-Fohr 2009, 18). In the Committee's protective rationale, "prosecution and punishment are the most effective- and therefore only adequate-means of ensuring" *inter alia* the right to life (Orentlicher 1991, 2568). The corresponding obligation flows from the "respect and ensure" provision of Art. 2(1) ICCPR and the unwritten duty to protect human rights. The basic idea is that "respect for human rights may be weakened by impunity for perpetrators of human rights violations" (HRC 1995, para. 153). Accordingly, criminal prosecution is best understood as a mandatory preventive[24] means of protecting certain human rights by deterring future violations. The ECtHR also subscribes to this notion, finding for instance that with regard to sexual offences, "[e]ffective deterrence is indispensable [...] and it can be achieved only by criminal-law provisions" (1985, para. 27).

The sanction criteria under the duty to punish embody this, too—most importantly through their proportionality requirement. While punishment certainly must not be harsher than proportionate (Schilling 1999), too mild sanctions would violate the duty to punish (Orentlicher 1991), because akin to impunity, they fail the deterrence objective of criminal law as a means of human rights protection.

In view of the heterogeneity of criminal justice systems worldwide, it would be unreasonable to deny states at least a certain discretion in determining which punishment for particular offences is "commensurate with their gravity" (HRC 2019, para. 20) through legislation and the sentencing practice of their courts. Domestic provisions can of course not serve as a justification for internationally wrongful acts (Art. 27 VCLT), but in principle

[23] See Annex.

[24] Seibert-Fohr (2009) suggests another, retroactive dimension to the protective rationale, according to which a failure to prosecute in some cases may give rise to a violation of the respective substantive right, as it is understood of an acquiescence of or complicity with the offence (HRC 2004). Given that the offences in all present cases can be attributed to the U.S. (see section 4.1.2), it has acted in contravention of its substantive obligations anyhow, making a consideration of the retroactive dimension to the protective rationale seem superfluous for the purposes of this examination.

there is no evident reason to consider the sentences initially determined by U.S. courts disproportionate to the gravity of the crimes—either by U.S. or tentative international standards. However, none of the pardonees served their full initial sentences. The question then becomes whether the pardons retroactively rendered the sentences disproportionate by prematurely terminating the time that the pardonees effectively served.[25]

A proportionality assessment of the sentences as amended by pardon needs to be undertaken casuistically. The present situations provide at least one example for an effective sentence incommensurate to a violation of the "supreme right" (HRC 2019, para. 2) to life by any reasonable standard. Slatten, sentenced to life in prison for first-degree murder, only served 16 months and had his legal innocence fully restored. As of 2018, the average sentence for murder was 48.8 years in prison, and inmates served 57.6% of it on average. Against the background of a mean effective prison sentence of 17.8 years for murder (U.S. Department of Justice 2021), Slatten's imprisonment of little more than a year and without any lasting repercussions seems highly disproportionate.

Other situations may be more ambiguous. The remaining contractors served 15 months of 12.5, 14, and 15 years respectively, Lorance was pardoned after six of 19 years' imprisonment. For guidance in the assessment of these cases, one may turn to a means other than pardons shortening the effective sentence: early release on parole. Sentencing and parole provisions vary across U.S. states, but the close connection of the contractors' actions with Department of Defense operations (Arnpriester 2017) allowed criminal prosecution under the 2000 Military Extraterritorial Jurisdiction Act. Consequently, federal law applied to them. The federal parole provisions also extend to individuals convicted by courts-martial (Department of Defense 2013).

Under these laws, prisoners are eligible for parole after serving one-third of a sentence that exceeds one year (18 United States Code §4502(a)). This provides limited guidance on what may still be proportionate by domestic standards (which, concerning the length of the sentence served, is more lenient than that of the ICTY, ICTR and ICC)—limited, because parole may be granted only based on legally defined criteria (18 United States Code §4206) and contingent upon the parolee's compliance with certain terms (18 United States Code §4209), while, contrary to a pardon, all effects of a criminal conviction remain in place.

Therefore, the eligibility for parole can only provide an absolute minimum threshold of what is considered proportionate in the U.S. legal system. It indicates the served share of a sentence *starting from which* a preliminary release under strict conditions *may* be considered, while sanctions extending beyond the prison sentence remain in place. This consideration is subject to determining that "release would not depreciate the seriousness of [the] offense or promote disrespect for the law" (18 United States Code §4206(a)(1)) and

[25] Raising this question is to rely on an effective interpretation of human rights obligations. An assessment that would limit itself to the sentences imposed by the U.S. courts, regardless of the 'effective sentence' served by the pardonees, would fail to acknowledge the importance of the principle of effectiveness (*ut res magis valeat quam pereat*). It requires that human rights treaties be interpreted to rather have practical effects than not (Çalı 2020). Accordingly, it seems appropriate to also evaluate the actual time served as a practical manifestation of the duty to protect human rights.

is therefore compliant with the Committee's protective reasoning. Such an assessment is not required before pardons, which terminate punishment much more comprehensively.

It is safe to say that, for deterrence purposes, parole is more effective than pardons, but neither the contractors nor Lorance would have been eligible even for the much stricter former option. Accordingly, it would be at least doubtful to assume that although the more effective option of parole was unavailable, the less effective pardon could be considered proportionate to homicide.

The inversion of the above argument does not hold: the mere eligibility for parole does not suffice to confirm the appropriateness of an effective sentence. That makes cases like Behenna's even more difficult to assess. His sentence of 25 years' imprisonment had already been reduced to 15 years[26] of which he had served ten years (five on parole) when being pardoned.

That he only served half his sentence in prison does not greatly limit the deterrent effect of his punishment. Parole is, unless explicitly precluded in the sentence, in principle possible for every prisoner under certain conditions. Instead of considering it a threat to the effectiveness of criminal sanctions in general, it is more accurately understood as a tool of rehabilitative justice. As such, it might even emanate from the rights of the offenders that have been identified above as a limit to mandatory prosecution under the Covenant. Behenna' release on parole and the justification of his pardon *inter alia* with him being a "model prisoner" (The White House 2019a) rather provide an argument supporting the appropriateness of a reduced sentence.

Hence, it seems not beyond conceivable that Behenna's effective sentence still serves the protective goal of the duty to prosecute human rights violations. Arguably, there still is a considerable deterrent effect to a ten-year sentence for violating the right to life. The pardon undoubtedly diminished it, but to a far lesser extent than for the contractors. Additionally, the ten-year sentence equates to completing two thirds of the initial 15 years that the military judiciary had found appropriate. Reasonable minds can therefore readily disagree on whether Behenna's effective sentence was proportionate and compliant with the protective rationale of the duty to prosecute. The legality of Behenna's pardon under IHRL does, however, not necessarily seem precluded.

4.4. Interim Findings

At least six of the seven pardons issued by Trump violate the U.S. duty to prosecute violations of the right to life. While Golsteyn's pardon prevented him from being brought to justice, those for the contractors and Lorance likely represent failures to provide commensurate criminal sanctions for human rights offenders. This is less clear for Behenna who, as one might convincingly argue, was adequately punished, making his pardon potentially compatible with IHRL.

[26] As this study limits itself to the legality of the presidential pardons, the conformity of the previous reductions of sentence by five years each upon appeal and by the Army Clemency and Parole Board is beyond its scope.

5. Conclusion

The above analysis provides strong support for the assertion that the pardons issued by Trump for homicides related to U.S. military operations violated international law. They shielded one perpetrator from being brought to justice from the outset. In five of the seven cases, the pardons prevented criminal sanctions for violations of the right to life under the ICCPR that are proportionate to the offence and faithful to the protective aspiration of the duty to prosecute serious human rights violations. Only in one case, the sentence arguably was commensurate even after abridgement by a pardon. From an IHL perspective, all present pardons are to be considered illegal, either because of the interruption and termination of prosecution or due to undermining the deterrent effect of IHL enforcement provisions, defeating their objective.

Nevertheless, the deterrence argument has a central flaw. The highly individualized nature of the presidential pardon (concerning both the pardoner and the pardonee) limits the implications of a certain pardoning policy to that very administration. While Trump has demonstrated his willingness to grant clemency even to convicted human rights offenders and war criminals, the same thing cannot easily be assumed for subsequent administrations. The weakened deterrence criticised here thus probably does not extend beyond the Trump administration. However, even a temporary dilution of the respect for IHRL and IHL warrants criticism, and subsequent presidents and other heads of state vested with a similar power should refrain from following Trump's example.

A question related to the focus of this inquiry that surely warrants further interest is that of the validity and legal effect of pardons that violate international law. International criminal tribunals have already refused to recognize pardons and amnesties for serious international crimes: the Special Court for Sierra Leone found that, for those crimes that are subject to universal jurisdiction, one state cannot prevent others from exercising jurisdiction over such an offence by the grant of pardon or amnesty (2004), and the ICTY determined that amnesties for the crime of torture "would not be accorded international legal recognition" and therefore not represent a procedural impediment (1998, para. 155). Domestic courts, too, often reject pardons granted by other states (Slye 2002). Besides, it has been objected that the reference to "Offences against the United States" in the U.S. constitution prevents the President from pardoning "criminally sanctionable violations of international law" (Paust 1988, 56). The complex interplay of international and domestic law in this regard is certainly deserving of further scholarly attention.

On a more abstract level, one might question whether a pardon can even be held against positive law as a yardstick as in the present analysis. The objection that pardons, by their very nature follow extra-legal considerations of mercy, merits undoubtedly further exploration. This adds to the conclusion that pardons are a highly multi-faceted object for international legal analysis with much potential for future scholarly work.

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Annex: Military-Related Pardons Granted by President Trump

Name	Date of Pardon	Court	Sentencing Date	Sentence	Offence	Time Served
Michael Chase Behenna	06.05.2019	General court martial, U.S. Army	28.02.2009	Forfeiture of all pay and allowances; confinement for 15 years (reduction from 20 years, which were in turn amended from 25 years on July 2, 2009); dismissal from service	Murder in the second degree; assault	ten years (five on parole)
Mathew L. Golsteyn	15.11.2019		NA	[pardoned before trial]	Murder in the first degree	NA
Clint Lorance	15.11.2019		01.08.2013	Nineteen years in prison, forfeiture of pay, and dismissal from the Army	Murder in the second degree (two counts), attempted murder, communicating a threat (two counts), reckless endangerment, witness tampering, obstruction of justice	six years
Dustin Laurent Heard	22.12.2020	U.S. District Court for the District of Columbia	13.04.2015	151 months' imprisonment, 36 months' supervised release (as amended from 360 months and one day's imprisonment and 60 months' supervised release on September 5, 2019); fine of $1,800	Voluntary manslaughter, aiding and abetting and causing an act to be done (six counts); attempt to commit voluntary manslaughter, aiding and abetting and causing an act to be done (11 counts); using and discharging a firearm during and in relation to a crime of violence and aiding and abetting and causing an act to be done	15 months
Evan Shawn Liberty	22.12.2020		14.04.2015	168 months' imprisonment, 36 months' supervised release (as amended from 360 months and one day's imprisonment and 60 months' supervised release on September 5, 2019); fine of $2,100	Voluntary manslaughter, aiding and abetting and causing an act to be done (eight counts); attempt to commit voluntary manslaughter, aiding and abetting and causing an act to be done (12 counts); using and discharging a firearm during and in	15 months

					relation to a crime of violence and aiding and abetting and causing an act to be done	
Paul Alvin Slough	22.12.2020		15.04.2015	180 months' imprisonment, 36 months' supervised release (as amended from 360 months and one day's imprisonment and 60 months' supervised release on September 5, 2019); fine of $3,100	Voluntary manslaughter, aiding and abetting and causing an act to be done (13 counts); attempt to commit voluntary manslaughter, aiding and abetting and causing an act to be done (17 counts); using and discharging a firearm during and in relation to a crime of violence and aiding and abetting and causing an act to be done	15 months
Nicholas Abram Slatten	22.12.2020		14.08.2019	Life sentence; three years' supervised release; fine of $100	Murder in the first degree	16 months

Source: The United States Department of Justice, Office of the Pardon Attorney

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