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### Don Quixote or Darth Vader? President Trump's Views on International Humanitarian Law, 20 Wash. U. Global Stud. L. Rev. 45 (2021)

Stuart Ford

*UIC John Marshall Law School*, [fords@uic.edu](mailto:fords@uic.edu)

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# DON QUIXOTE OR DARTH VADER? PRESIDENT TRUMP'S VIEWS ON INTERNATIONAL HUMANITARIAN LAW

STUART FORD\*

## ABSTRACT

*This Article explores President Trump's views on international humanitarian law (IHL) – the body of rules that regulates the conduct of parties involved in an armed conflict. His beliefs are unlike those of any modern President. He has repeatedly called for actions that everyone, including his own administration, agree constitute war crimes. For example, he has called for the U.S. to torture its enemies, has threatened to kill the family members of enemy combatants, has praised the execution of prisoners by U.S. soldiers, has threatened to attack cultural heritage sites in Iran, and has said he wants to pillage Syria's natural resources. These are all acts that have been recognized as crimes for at least 100 years. In effect, President Trump wants to do away with IHL and revert to a legal regime of "might makes right" during armed conflicts. Luckily, he has failed dismally. There are numerous reasons for this failure, including President Trump's ignorance about international law, his disdain for expertise, and his lack of planning and follow-through. But the most important reason he has failed to remake IHL is that he has fundamentally under-estimated IHL's resilience. It is deeply embedded in law and culture in the United States, particularly within the U.S. military. It is also deeply embedded within international law. As a result, the President has made some incendiary statements but has failed to make any meaningful changes to IHL.*

**Keywords:** *international law, international humanitarian law, law of war, President Trump, pillage, collective punishment, cultural heritage, principle of distinction, torture*

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## I. INTRODUCTION

Much has already been written about President Trump's "America First" policy and its effect on international law.<sup>1</sup> This Article builds on that earlier literature by focusing on the President's views on international humanitarian law (IHL).<sup>2</sup> International humanitarian law is that part of international law that regulates the conduct of parties engaged in an armed conflict.<sup>3</sup> The most famous part of IHL is probably the Third Geneva Convention, which protects prisoners of war (POWs),<sup>4</sup> but IHL is considerably broader than just the protection of POWs. It also governs the treatment of civilians,<sup>5</sup> as well as when and how force can be used during

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1 See e.g., Catherine Amirfar & Ashika Singh, *The Trump Administration and the "Unmaking" of International Agreements*, 59 HARV. INT'L L.J. 443 (2018); Harold Hongju Koh, *The Trump Administration and International Law*, 56 WASHBURN L.J. 413 (2017); Jack Goldsmith, *The Trump Onslaught on International Law and International Institutions*, LAWFARE (Mar. 17, 2017, 10:09 AM), <https://www.lawfareblog.com/trump-onslaught-international-law-and-institutions>; Adam Chilton, *Has Trump's Promised Assault on International Law Materialized?*, U. ILL. L. REV. ONLINE (Apr. 29, 2017), <https://illinoislawreview.org/symposium/first-100-days/has-trumps-promised-assault-on-international-law-materialized/>. In addition, the *Case Western Reserve Journal of International Law* devoted an entire symposium issue to the topic of "International Law and Policy in the Age of Trump." See Michael P. Scharf & John G. Wrench, *Foreword: International Law and Policy in the Age of Trump*, 51 CASE W. RES. J. INT'L L. 1 (2019).

2 In contrast to the literature about international law generally, much less has been written about President Trump's effect on IHL. The author has only found a single article directly addressing President Trump's effect on IHL, and it was focused on his first 100 days in office. See Lesley Wexler, *The Role of "America First" in the Laws of War: President Trump's First 100 Days*, U. ILL. L. REV. ONLINE (Apr. 29, 2017), <https://illinoislawreview.org/symposium/first-100-days/the-role-of-america-first-in-the-laws-of-war/>.

3 See ROBERT CRYER, DARRYL ROBINSON & SERGEY VASILIEV, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 259–61 (4th ed.). IHL is distinct from the body of law that regulates whether the resort to hostilities is permitted. See *id.* at 261; INT'L COMM. OF THE RED CROSS, *What are the jus ad bellum and jus in bello?* (Jan. 22, 2015), <https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0>.

4 There are four Geneva Conventions. The treatment of POWs is the focus of Geneva Convention III. See Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

5 The treatment of civilians during armed conflicts is the subject of Geneva Convention IV. See Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

an armed conflict.<sup>6</sup> It determines which targets may be attacked<sup>7</sup> and what weapons may be used to attack them.<sup>8</sup> As a result, IHL is of critical importance for any military<sup>9</sup> and serves as the normative foundation for key components of international criminal law.<sup>10</sup> For these reasons, the rules of IHL are almost universally recognized as important, particularly among combatants.<sup>11</sup>

But why focus on President Donald Trump's beliefs about IHL? The

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6 The branch of IHL that deals with how force can be used during an armed conflict is sometimes referred to as Hague Law because it was originally codified in the Hague Regulations of 1899 and 1907. *See* CRYER

ET AL., *supra* note 3, at 260 (“Since then [the 1860s], there have been many treaties developing IHL. These are sometimes divided into ‘Hague Law’ and ‘Geneva Law.’ The Hague Conventions limit the methods and means of warfare, in order to reduce unnecessary destruction and suffering. The most important of these is the 1907 Hague Regulations, which recognized that ‘the right of belligerents to adopt means of injuring the enemy is not unlimited,’ and laid down many of the provisions on the means and methods of warfare that are now recognized as customary law.”).

7 *See, e.g.*, JEAN-MARIE HENCKAERTS & LOUSIE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: VOLUME 1 Rule 7 (2009), Rule 7 (“The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives.”).

8 *Id.* Rule 17 (“Each party to the conflict must take all feasible precautions in the choice of means and methods of warfare with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.”); *id.* at 58 (noting that compliance with this obligation may require consideration of “the selection of means of warfare proportionate to the target, the use of precision weapons and target selection”). In this regard, the U.S. military acknowledges that some weapons may be unlawful in particular circumstances if they produce “incidental effects” that are “excessive compared to the military advantages expected to be gained from the attack.” *See* OFF. OF GEN. COUNS. DEP’T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL, § 6.7.4 (June 2015, updated Dec. 2016) [hereinafter DEPARTMENT OF DEFENSE LAW OF WAR MANUAL]. The military explicitly acknowledges that this limitation on how weapons can be used stems from IHL’s principle of proportionality. *Id.*

9 Militaries must understand IHL so that they can make decisions about which targets can lawfully be attacked and which weapons systems can be used to attack them. *See, e.g.*, DEPARTMENT OF DEFENSE LAW OF WAR MANUAL, *supra* note 8, ch. 1 (discussing the importance of compliance with IHL to the operation of the U.S. military).

10 IHL serves as the foundation for war crimes. *See* CRYER ET AL., *supra* note 3, at 263 (“War crimes criminalizes only a subset of the rules of IHL. The major question is which rules of IHL constitute a criminal offence when violated.”). Not all violations of IHL constitute war crimes, but the most serious ones do. *Id.* at 265 (noting that violation of the “grave breaches” provisions of the Geneva Conventions does constitute a war crime). War crimes is one of the core crimes at the heart of international criminal law. For example, the International Criminal Court is designed to investigate and prosecute “the most serious crimes of concern to the international community” and it has jurisdiction over war crimes, crimes against humanity, genocide, and aggression. *See* Rome Statute of the International Criminal Court pmbL, July 17, 1998, 2187 U.N.T.S. 90 (entered into force on July 1, 2002); *id.* art. 8.

11 *See* Daniel Muñoz-Rojas & Jean-Jacques Frésard, *The Roots of Behavior in War: Understanding and Preventing IHL Violations*, 86 INT’L REV. RED CROSS 189, 191 (2004) (“IHL has a universal character, in that both civilians and combatants in very varied countries which have experienced different forms of armed conflicts acknowledge and adhere to humanitarian principles.”); DEPARTMENT OF DEFENSE LAW OF WAR MANUAL, *supra* note 8, § 2.6 (describing the importance of honor and respect for the rules of IHL to the conduct of the military).

President does not like complexity,<sup>12</sup> disdains expertise,<sup>13</sup> and does not have any military experience.<sup>14</sup> So why do his views on IHL matter? First, he is the elected leader of the world's second largest economy<sup>15</sup> which makes him one of the most powerful individuals on Earth.<sup>16</sup> Thus, in a general sense, what President Trump believes matters simply because he is President of the United States of America. This is especially true with regards to IHL because the U.S. Constitution designates him the Commander in Chief of the armed forces of the United States.<sup>17</sup> This gives him control over the day to day operations of the U.S. military,<sup>18</sup> which is the most powerful military

12 Consistent reporting indicates the President does not like nuance or detail and prefers not to engage deeply with complex problems. *See, e.g.,* Michelle Mark, *Trump Doesn't Read His Intelligence Reports, But Looks at the Graphs, Charts, and Tables*, BUS. INSIDER (May 21, 2020), <https://www.businessinsider.com/trump-looks-at-charts-in-intelligence-briefings-2020-5> (noting that President Trump struggles to focus during his intelligence briefings and frequently ignores information he disagrees with); Julian E. Barnes & Adam Goldman, *For Spy Agencies, Briefing Trump Is a Test of Holding His Attention*, N.Y. TIMES (May 21, 2020), <https://www.nytimes.com/2020/05/21/us/politics/presidents-daily-brief-trump.html> (noting that the President has a short attention span and rarely, if ever, reads intelligence reports); Carol D. Leonnig, Shane Harris & Greg Jaffe, *Breaking with Tradition, Trump Skips President's Written Intelligence Report and Relies on Oral Briefings*, WASH. POST (Feb. 9, 2018), [https://www.washingtonpost.com/politics/breaking-with-tradition-trump-skips-presidents-written-intelligence-report-for-oral-briefings/2018/02/09/b7ba569e-0c52-11e8-95a5-c396801049ef\\_story.html](https://www.washingtonpost.com/politics/breaking-with-tradition-trump-skips-presidents-written-intelligence-report-for-oral-briefings/2018/02/09/b7ba569e-0c52-11e8-95a5-c396801049ef_story.html) (noting that Donald Trump "rarely if ever reads the President's Daily Brief, a document that lays out the most pressing information collected by U.S. intelligence agencies").

13 *See* Stephen Collinson, *Trump Turns Angry and Defensive as Evidence Contradicts His Coronavirus Narrative*, CNN (Apr. 7, 2020), <https://www.cnn.com/2020/04/06/politics/donald-trump-coronavirus-angry-defensive/index.html>; Tom Nichols, *In Trump's World, Reality is Negotiable*, ATLANTIC (Jan. 13, 2019), <https://www.theatlantic.com/politics/archive/2019/01/donald-trump-rejects-expertise/579808/>.

14 President Trump received five draft deferments that allowed him to avoid serving in the military during the Vietnam War. *See* Steve Eder & Dave Philipps, *Donald Trump's Draft Deferments: Four for College, One for Bad Feet*, N.Y. TIMES (Aug. 1, 2016), <https://www.nytimes.com/2016/08/02/us/politics/donald-trump-draft-record.html>.

15 *See* CIA, *The World Factbook, Country Comparison: GDP (Purchasing Power Parity)*, available at <https://www.cia.gov/library/publications/the-world-factbook/fields/208rank.html>.

16 For example, according to Forbes, the three most powerful people in the world are the leaders of China, Russia, and the United States. *See* David M. Ewalt, *The World's Most Powerful People 2018*, FORBES (May 8, 2018), <https://www.forbes.com/sites/davidewalt/2018/05/08/the-worlds-most-powerful-people-2018/#4c96f0966c47>. *See also* *The World's Most Powerful People*, FORBES, <https://www.forbes.com/powerful-people/list/> (last visited Jan. 13, 2021).

17 *See* U.S. CONST., art. II, § 2 ("The President shall be Commander in Chief of the Army and Navy of the United States . . .").

18 *See* 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) ("The Commander in Chief Clause does not authorize the President to declare or initiate a condition of war, but it does give the President plenary power to *conduct war*. That includes all matters of military strategy and tactics, all rules of engagement with the enemy, all choices concerning the use of available weaponry, all decisions with respect to military objectives and targets, and all matters concerning the capture, detention, interrogation, and military punishment of enemy combatants."); David Lapan, *President Trump Is Damaging Our Military: War Crimes Cases Are the Latest Example*, JUST SECURITY (Nov. 18, 2019),

in the world.<sup>19</sup> Given the President's role as Commander-in-Chief of the world's most powerful military and the importance of IHL to the operation of every military, his views on IHL matter.

Second, the President's views on IHL are important because they are so anomalous.<sup>20</sup> They are unlike the views of any other modern U.S. President.<sup>21</sup> While previous Presidents have taken positions on IHL that have been controversial,<sup>22</sup> President Trump has regularly proposed actions that almost everyone, including the U.S. government, agrees are violations of IHL.<sup>23</sup> In many cases, those actions would also constitute war crimes.<sup>24</sup> For example, the President has repeatedly called for the use of torture.<sup>25</sup> Torture, when committed in the context of an armed conflict, is universally recognized as a war crime.<sup>26</sup> The President has also proposed other acts that would be war crimes, including intentionally killing the family members of enemy combatants<sup>27</sup> and deliberately attacking cultural heritage sites to punish an enemy.<sup>28</sup> His views are unprecedented for an American President.

The President, in his capacity as Commander in Chief of the armed forces, has enormous control over the U.S. military.<sup>29</sup> Thus, the President appears to be in a good position to implement his views about IHL within the U.S. military. Yet, the President has often been unable to turn his vision of IHL into action.<sup>30</sup> For example, the President retreated from his initial

<https://www.justsecurity.org/67310/president-trump-is-damaging-our-military-war-crimes-cases-are-the-latest-example/> (“By our Constitution, the president serves as commander-in-chief of the armed forces and has wide latitude in his authority to make decisions and order their actions.”); *see also* Stuart Ford, *Has President Trump Committed a War Crime By Pardoning War Criminals?*, 35 AM. UNIV. INT'L L. REV. 757, 766–69, 778 (2020) (describing the President's authority over U.S. armed forces).

<sup>19</sup> *See* Ellen Ioanes, *This Is How the US and Iran Rank Among the World's 25 Most Powerful Militaries*, BUS. INSIDER (Jan. 7, 2020), <https://www.businessinsider.com/most-powerful-militaries-in-the-world-ranked-2019-9>.

<sup>20</sup> Every President's views on IHL are important, simply because of who the President is, but President Trump's views are particularly important because of how unusual they are. *See infra* Section VI(G) (describing the President's desire to violate the fundamental principles of IHL).

<sup>21</sup> *See infra* text accompanying notes 344–351. Indeed, many of the President's proposals would have been illegal by the mid nineteenth century, if not earlier. *See infra* text accompanying notes 334–335.

<sup>22</sup> *See infra* text accompanying note 345.

<sup>23</sup> *See infra* Section VI.G.

<sup>24</sup> *Id.* Not every violation of IHL is a war crime, but the most serious violations of IHL qualify as war crimes. *See* CRYER ET AL., *supra* note 3, at 263 (noting that war crimes criminalize “only a subset of the rules of IHL”); *id.* at 263–264 (noting that only the most serious violations of IHL constitute war crimes).

<sup>25</sup> *See infra* Section VI.B.

<sup>26</sup> *Id.*

<sup>27</sup> *See infra* Section VI.C.

<sup>28</sup> *See infra* Section VI.F.

<sup>29</sup> *See supra* text accompanying note 18.

<sup>30</sup> *See infra* Section VII.

desire to bomb cultural heritage sites in Iran after pushback from senior members of his administration<sup>31</sup> and the President has been unable to implement his plans to torture our enemies.<sup>32</sup> Despite a number of failures, however, President Trump has sometimes been able to take action. For example, the President pardoned several members of the U.S. military who were either accused of or had been convicted of war crimes despite opposition from within the military and his administration.<sup>33</sup> Understanding President Trump's views on IHL, as well as when and how he is able to implement them, is thus very important in understanding what effect he is likely to have on IHL.

This Article has three goals. First, it seeks to understand the President's views on IHL by looking at his public statements about issues related to IHL. While the President has never publicly articulated a coherent vision of IHL, his statements and actions are guided by certain beliefs about IHL. His statements reflect a consistent worldview in which international law is imposed on the United States to weaken it<sup>34</sup> and the indiscriminate use of violence is praiseworthy.<sup>35</sup> Not surprisingly, this causes him to instinctively reject the limitations imposed by IHL and he has repeatedly proposed violating IHL.<sup>36</sup> Second, this Article assesses the President's effect on IHL so far.<sup>37</sup> When has he been successful in implementing his vision of IHL? Why has he been unsuccessful so often? Finally, this Article looks at what effect President Trump will have on the future of IHL.<sup>38</sup> Can the President succeed in remaking IHL to be consistent with his vision of it? Or is IHL resilient enough to survive President Trump's attacks on it?

This Article proceeds as follows. Section II discusses the scope and importance of IHL, while Section III explores the best way to understand what President Trump believes about IHL. Sections IV and V explore the President's views on international law and violence, respectively. Section VI then uses the President's own statements to illuminate his views on IHL. The President's ability to turn his vision into action is evaluated in Section VII and the consequences of the President's repeated attacks on IHL are discussed in Section VIII, while Section IX summarizes this Article's

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31 *See infra* Section VI.F.

32 *See infra* Section VII.

33 *Id.*

34 *See infra* Section IV.

35 *See infra* Section V.

36 *See infra* Section VI.

37 *See infra* Section VII.

38 *See infra* Section VIII.



conclusions.

## II. BACKGROUND ON INTERNATIONAL HUMANITARIAN LAW

International humanitarian law regulates how force is used during an armed conflict.<sup>39</sup> Modern IHL has its origins in the nineteenth century.<sup>40</sup> In 1863, President Abraham Lincoln issued a set of instructions for how the Union Army was to conduct itself during the Civil War.<sup>41</sup> This set of instructions—known as the Lieber Code because it was written by the influential political scientist and international lawyer Francis Lieber<sup>42</sup>—was one of the earliest attempts to codify what was permissible during war and set the stage for much of the development of IHL.<sup>43</sup> The antecedents of many of the key components of modern IHL can be seen in the Lieber Code, including an early version of the principle of distinction.<sup>44</sup> For this reason, it is viewed as one of the most influential documents in the development of modern IHL.<sup>45</sup>

IHL continued to evolve during the second half of the nineteenth century,<sup>46</sup> but the next major developments occurred at the turn of the twentieth century, with the Hague Conventions of 1899 and 1907.<sup>47</sup> The Hague Conventions codified the rules that governed the means and methods

39 See CRYER ET AL., *supra* note 3, at 259–61.

40 *Id.* at 259–60 (noting that there have always been rules that regulate conflict but describing the codification of modern IHL that began in the mid nineteenth century).

41 See Theodor Meron, *Francis Lieber's Code and Principles of Humanity*, 36 COLUM. J. TRANSNAT'L L. 269–70 (1997) (describing the genesis of the Lieber Code); see also FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (1863).

42 See Meron, *supra* note 41 (describing the life and influence of Francis Lieber).

43 See Jenny Gesley, *The "Lieber Code" – the First Modern Codification of the Laws of War*, *Library of Congress*, (Apr. 24, 2018), <https://blogs.loc.gov/law/2018/04/the-lieber-code-the-first-modern-codification-of-the-laws-of-war/>.

44 See FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD Rule 15 (1863) (noting that militaries can attack “armed enemies” but that the “incidental” deaths of “other persons” is only permitted when those deaths are “unavoidable”); *id.* Rule 22 (“The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.”); see also Meron, *supra* note 41, at 274–75 (noting that the Lieber Code incorporated a version of the principle of distinction).

45 See Gesley, *supra* note 43 (“The Lieber Code, however, presents the first modern comprehensive codification of the laws and customs of war which greatly influenced subsequent codifications.”); Meron, *supra* note 41, at 278 (“Both the Code’s high quality and its timing, written when no other significant compilations of laws and customs of war were available, can explain its tremendous impact on the codification of international humanitarian law.”). On the other hand, it also described as lawful several practices that would no longer be acceptable, including the starvation of civilians, and the refusal to give quarter. *Id.* at 272–73.

46 Important late nineteenth century developments in IHL included the Brussels Declaration of 1874 and the Oxford Manual on the laws of war from 1880. See Meron, *supra* note 41, at 279.

47 See CRYER ET AL., *supra* note 3, at 260.

of warfare.<sup>48</sup> For example, the 1899 Hague Convention contains one of the bedrock principles of IHL: “The right of belligerents to adopt means of injuring the enemy is not unlimited.”<sup>49</sup> This is an early incarnation of what would later become known as the principle of humanity.<sup>50</sup> The Hague Conventions are important because they represented one of the earliest attempts to enshrine the rules of war in international law.<sup>51</sup> Ultimately, fifty-one states became parties to the 1899 Convention.<sup>52</sup>

The next major advances to IHL came after WWII with the adoption of the 1949 Geneva Conventions.<sup>53</sup> While the Hague Conventions addressed the means and methods of warfare, the Geneva Conventions spelled out states’ duties with respect to prisoners of war, non-combatants, and combatants *hors de combat*.<sup>54</sup> In particular, they contain detailed provisions on the treatment of civilians.<sup>55</sup> The Geneva Conventions principally apply

48 *Id.*

49 Convention with Respect to the Laws and Customs of War on Land (Hague II) Annex art. 22, July 29, 1899, 32 Stat. 1803 [hereinafter Hague Convention II of 1899].

50 See *infra* text accompanying notes 75-78 (describing the principle of humanity).

51 See George H. Aldrich & Christine M. Chinkin, *Symposium: The Hague Peace Conferences: Introduction*, 94 AM. J. INT’L L. 1 (2000) (noting that the 1899 Hague Peace Conference “achieved only modest results in addressing the subject . . . of arms limitation, but it was unquestionably successful in developing and codifying the . . . laws of war”). In contrast, the Lieber Code, which was undeniably important, represented the views of a single country. See *supra* text accompanying notes 40-43.

52 See *Treaties, States Parties and Commentaries*, INT’L COMM. OF THE RED CROSS, [https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=XPages\\_NORMStatesParties&xp\\_treatySelected=150](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=150) (last visited Jan. 13, 2021). The vast majority of countries that ratified the 1899 Hague Convention did so in the early twentieth century. *Id.*

53 There had been some advances in IHL during the interwar period. See Jean S. Pictet, *The New Geneva Conventions for the Protection of War Victims*, 45 AM. J. INT’L L. 462, 463 (1951). But the events of WWII forced countries to recognize the inadequacies of the existing rules. *Id.* (“In 1945, at the conclusion of a war without precedent, the complex and vital task had to be faced of completing and amending the rules of international law in the humanitarian field, in the light of experience gathered during hostilities.”) The Geneva Conventions were the result. *Id.* at 464-68.

54 See CRYER ET AL., *supra* note 3, at 260. There are four Geneva Conventions. The treatment of POWs is governed by Geneva Convention III. See Geneva Convention III, *supra* note 4. The Geneva Conventions also deal with the treatment of soldiers who are *hors de combat* (Geneva Conventions I and II) and the protections of civilians during armed conflicts (Geneva Convention IV). See Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention IV, *supra* note 5.

55 See Pictet, *supra* note 53, at 473 (noting that WWII demonstrated the need for a specific set of rules that governed the treatment of enemy civilians during armed conflicts). “The establishment of a new Convention for the Protection of Civilians in Wartime was an imperative necessity. After the bitter experiences of the last conflict and the horrors of the concentration camps, there was no need to stress the urgency and capital importance of international rules in this particular field.” *Id.* “Today there exists a new convention as detailed as that for prisoners of war; it has been signed and its object is to prevent a repetition of the tragic events of the second World War.” *Id.*

during international armed conflicts,<sup>56</sup> but they also provide some protections during non-international armed conflicts.<sup>57</sup> The Geneva Conventions now form a key part of IHL.<sup>58</sup>

IHL has continued to develop since WWII and more recent contributions include the Additional Protocols to the Geneva Conventions.<sup>59</sup> Additional Protocol II, in particular, is important because it expands on the protections of Common Article 3 of the Geneva Conventions and spells out in more detail states' duties in non-international conflicts.<sup>60</sup> Collectively, these and other treaties – like the Chemical Weapons Convention,<sup>61</sup> the Biological Weapons Convention,<sup>62</sup> and the Hague Convention on Cultural Property<sup>63</sup> – as well as state practice,<sup>64</sup> comprise the body of international humanitarian law.

Today, IHL is oriented around three limiting principles that underlie

56 By their own terms, they applied “to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.” See, e.g., Geneva Convention III, *supra* note 4, art. 2. In other words, they applied in conflicts between two or more states, what we would call today an international armed conflict.

57 Each of the four Geneva Conventions of 1949 contains identical language in Article 3 (often called “Common Article 3” as a result). Common Article 3 applies “[i]n the case of armed conflict not of an international character” (i.e., in non-international armed conflicts) and prohibits “violence to life and person, in particular murder, of all kinds, mutilation, cruel treatment and torture” directed at individuals “taking no active part in hostilities.” See, e.g., Geneva Convention III, *supra* note 4, art. 3; see also Jelena Pejic, *The Protective Scope of Common Article 3: More than Meets the Eye*, 93 INT’L REV. RED CROSS 189 (2011) (describing the scope and effect of Common Article 3).

58 See HENCKAERTS & DOSWALD-BECK, *supra* note 7, at xv (noting that the Geneva Conventions represent the “foundation of international humanitarian law in force today”).

59 There are three Protocols to the Geneva Conventions. Protocol I provides additional protections that apply during international armed conflicts. See Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, Jun 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]. Protocol II codifies the protections that apply during non-international armed conflicts. See Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II]. Protocol III adds an additional distinctive emblem that is entitled to protection under the Geneva Conventions. See Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Adoption of an Additional Distinctive Emblem, Dec. 8, 2005, 2404 U.N.T.S. 261.

60 See CRYER ET AL., *supra* note 3, at 260.

61 See Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 45.

62 See Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, April 10, 1972, 1015 U.N.T.S. 163.

63 See Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215 [hereinafter Convention for the Protection of Cultural Property].

64 Much of IHL is now customary international law and one of the key features of customary international law is a consistent state practice. See Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 33 U.N.T.S. 993 [hereinafter ICJ Statute] (describing customary international law as requiring a “general practice accepted as law” by states). Consequently, state practice is a crucial part of IHL.

many of the specific rules.<sup>65</sup> They are the principle of distinction, the principle of proportionality and the principle of humanity.<sup>66</sup> The principle of distinction requires that combatants distinguish between (1) civilians and civilian objects and (2) combatants and military objectives.<sup>67</sup> Combatants may never deliberately target civilians or civilian objects.<sup>68</sup> Combatants may only attack other combatants and military objectives.<sup>69</sup>

The principle of proportionality requires combatants to consider the consequences for civilians and civilian objects even when attacking legitimate military objectives.<sup>70</sup> For an attack on a military objective to comply with the principle of proportionality, the expected collateral damage to civilians and civilian objects cannot be disproportionately large relative to the expected military advantage to be gained from the attack.<sup>71</sup> This does not prohibit civilian casualties during armed conflicts,<sup>72</sup> but it forces militaries to consider the consequences of their actions for civilians,<sup>73</sup> and it prohibits some attacks, where the expected collateral damage is disproportionately large relative to the expected military advantage to be gained from the attack.<sup>74</sup>

65 There is a fourth principle in IHL, but it is not a limiting principle. The principle of military necessity permits uses of force that are necessary to accomplish a legitimate military objective. *See Military Necessity*, ICRC, <https://casebook.icrc.org/glossary/military-necessity> (last visited Jan. 13, 2021). While the principle of military necessity authorizes the use of force, the other principles impose limits on those uses of force. IHL is largely organized around the limits imposed by the principles of distinction, proportionality and humanity. *Id.* (noting that the “purpose” of IHL is to “strike a balance between military necessity” and humanitarian concerns).

66 *See* CRYER ET AL., *supra* note 3, at 260–61 (discussing the key principles of IHL).

67 *See* HENCKAERTS & DOSWALD-BECK, *supra* note 7, Rule 1 (“The parties to the conflict must at all times distinguish between civilian and combatants.”); *id.* Rule 7 (“The parties to the conflict must at all times distinguish between civilian objects and military objectives.”).

68 *Id.* Rule 1 (“Attacks must not be directed against civilians.”); *id.* Rule 7 (“Attacks must not be directed against civilian objects.”).

69 *Id.* Rule 1 (“Attacks may only be directed against combatants.”); *id.* Rule 7 (“Attacks may only be directed against military objectives.”).

70 *See id.* Rule 14 (“Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.”).

71 *Id.*

72 *See e.g.*, DEPARTMENT OF DEFENSE LAW OF WAR MANUAL, *supra* note 8, § 2.4.1.2 (“In war, incidental damage to the civilian population and civilian objects is unfortunate and tragic, but inevitable. Thus, applying the principle of proportionality in conducting attacks does not require that no incidental damage result from attacks.”).

73 *Id.* (noting that the U.S. military must “take feasible precautions in planning and conducting attacks to reduce the risk of harm to civilians” and civilian objects).

74 *Id.* (“[T]his principle creates obligations to refrain from attacks in which the expected harm incidental to such attacks would be excessive in relation to the concrete and direct military advantage anticipated to be gained.”).

The principle of humanity bars some means and methods of warfare because of the unnecessary suffering they impose.<sup>75</sup> One of the earliest examples of the principle of humanity is the 1868 Declaration of St. Petersburg, which banned exploding bullets because they “uselessly aggravate the sufferings of disabled men, or render their death inevitable.”<sup>76</sup> It can also be seen in the 1899 Hague Convention’s statement that states’ right “to adopt means of injuring the enemy is not unlimited.”<sup>77</sup> The bans on chemical and biological weapons are modern expressions of the principle of humanity.<sup>78</sup>

Today, IHL is a cornerstone of international law. The Geneva Conventions have been signed and ratified by nearly every country.<sup>79</sup> Much of IHL has been recognized as forming part of customary international law,<sup>80</sup> and 123 countries have become members of the International Criminal Court<sup>81</sup> – a court dedicated to providing a global forum for punishing serious violations of international law, including war crimes.<sup>82</sup> The U.S. military is also deeply committed to IHL and many of IHL’s rules are incorporated into U.S. law.<sup>83</sup> It is thus surprising to see a U.S. President argue for so many blatant violations of IHL.

75 See HENCKAERTS & DOSWALD-BECK, *supra* note 7, Rule 70 (“The use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering is prohibited.”).

76 See Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 138 Consol. T.S. 298. The Declaration acknowledges that the purpose of conflict is “weaken the military forces of the enemy” and that this includes “disabl[ing] the greatest possible number of men,” but it simultaneously bars exploding bullets because such bullets “uselessly aggravate the suffering” of those wounded by them. *Id.* It goes on to conclude that this “useless” aggravation of the suffering of the wounded is “contrary to the laws of humanity.” *Id.*

77 See *supra* text accompanying note 49.

78 See HENCKAERTS & DOSWALD-BECK, *supra* note 7, Rule 73 (“The use of biological weapons is prohibited.”); *id.* Rule 74 (“The use of chemical weapons is prohibited.”).

79 For example, the first Geneva Convention of 1949 has 196 state parties. See *Treaties, States Parties and Commentaries*, INT’L COMM. OF THE RED CROSS, [https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=XPages\\_NORMStatesParties&xp\\_treatySelected=365](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=365) (last visited Jan. 13, 2021) (list of signatories to the first Geneva Convention). The United States signed the treaty in 1949 and ratified it in 1955. *Id.*

80 See CRYER ET AL., *supra* note 3, at 260 (noting that much of the Hague Regulations and the 1949 Geneva Conventions, as well as some of the key parts of the Additional Protocols have become part of customary international law).

81 See International Criminal Court, *The State Parties to the Rome Statute*, INT’L CRIM. CT., [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) (last visited Jan. 13, 2021).

82 See Rome Statute, *supra* note 10, art. 8 (granting the ICC authority to punish war crimes); *id.* pmb1. (noting that the court was established to provide “an independent permanent International Criminal Court . . . with jurisdiction over the most serious crimes of concern to the international community”).

83 See *infra* Section VIII.

### III. HOW TO DETERMINE THE PRESIDENT'S VIEWS ON IHL

This Article explores the President's "views" on international humanitarian law.<sup>84</sup> It focuses on the beliefs of the President himself, rather than on the official policy of the U.S. government.<sup>85</sup> This is an important distinction because the President's personal beliefs often appear to be significantly different from the official position of his government.<sup>86</sup> For example, the President has repeatedly called for the use of torture<sup>87</sup> even though U.S. law explicitly prohibits torture.<sup>88</sup> Indeed, President Trump's beliefs about IHL are essentially unique amongst modern U.S. Presidents.<sup>89</sup> He has a radical view of IHL that would replace a carefully constructed rules-based international order with a "might makes right" free-for-all.<sup>90</sup> This view is fundamentally at odds with the official position of the U.S. military.<sup>91</sup> It is precisely this difference between the government's official positions and the President's personal beliefs that makes this Article so important.

If what President Trump believes matters, the next question then becomes what is the best way to understand what President Trump believes? One possibility is to look at the official statements issued in his name. Another possibility is to look at his unscripted personal statements.<sup>92</sup> This Article focuses on the President's extemporaneous personal statements rather than his official statements because his personal statements offer a more accurate account of his beliefs than the administration's carefully

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84 The word "views" is in quotations here because it is not clear how to describe the President's beliefs about IHL. He does not have a coherent theory about IHL. See *infra* Section VI.A. Indeed, he often does not seem to understand IHL at all. See *infra* Section VI.G. On the other hand, he does have some consistent beliefs that underlie his responses to IHL. First, he admires violence. See *infra* Section V. Second, he rejects rules or laws that try to circumscribe his power. See *infra* Section IV. These beliefs predispose him to reject the strictures of IHL. See *infra* Section VI.A.

85 See *supra* Section I (explaining why the President's beliefs about IHL are important).

86 See generally *infra* Section VI.

87 See *infra* Section VI.B.

88 *Id.*

89 See *infra* Section VI.G.

90 *Id.*

91 See *infra* Section VIII.

92 When this Article uses the phrase "personal statement" it refers to the sort of extemporaneous statements that the President is famous for rather than the more carefully constructed and vetted official statements that are also issued in his name. See *infra* text accompanying notes 93–98 (highlighting the differences between the President's scripted and unscripted comments).

vettted official statements.<sup>93</sup> Indeed, his official statements often act as damage control for his unscripted remarks.<sup>94</sup> For example, the President has repeatedly endorsed torture in his personal statements.<sup>95</sup> On at least one occasion, in response to criticism, he issued an official statement where he said he would be “bound by laws and treaties” if he became President and that he would not “order our military or other officials to violate those laws.”<sup>96</sup> Almost immediately afterwards, however, he went back to promising to use torture in his personal statements.<sup>97</sup> As his repeated personal statements make clear, the official statement issued in his name does not reflect President Trump’s beliefs about torture. Rather, the extemporaneous statements he makes at campaign rallies and other appearances seem to offer a more accurate window into his beliefs.<sup>98</sup> For this reason, this Article will try to understand President Trump’s beliefs about IHL as demonstrated by his unscripted personal statements. The next Sections will explore those beliefs.

#### IV. THE PRESIDENT’S VIEWS ON INTERNATIONAL LAW

IHL is a branch of international law and the President’s views on IHL are informed by his views on international law more generally. This section looks at those views.

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93 See Mary Newman, *Trump: Unscripted v. Scripted*, POLITICO (Jan. 31, 2019, 1:06 PM), <https://www.politico.com/video/2019/01/31/what-happens-when-trump-goes-off-script-067658>; New York Times, *A Tale of Two Trumps: Scripted vs. Unscripted*, YOUTUBE (Aug. 24, 2017), <https://www.youtube.com/watch?v=lzhPcQsj3dk&list=PL4CGYNsoW2iBfrlL3yvngQqCMdiBQo11D&index=132>.

94 See sources cited *supra* note 93.

95 See *infra* Section VI.B..

96 See Ryan Brown & Nicole Gaouette, *Donald Trump Reverses Position on Torture, Killing Terrorists’ Families*, CNN (Mar. 4, 2016), <https://www.cnn.com/2016/03/04/politics/donald-trump-reverses-on-torture/>.

97 See *infra* text accompanying notes 214–217.

98 Cf. Roger Cohen, Opinion, *Truth, Lies and Numbness*, N.Y. TIMES (Aug. 24, 2017), <https://www.nytimes.com/2017/08/24/opinion/trump-truth-lies.html> (“There’s the scripted Trump voice, which is fake. There’s the unscripted voice, which is genuine.”); David A. Graham, *How to Tell Which Donald Trump Will Deliver a Speech*, ATLANTIC (Aug. 24, 2017), <https://www.theatlantic.com/politics/archive/2017/08/trump-having-fun/537804/> (noting the differences between his scripted and unscripted remarks).

A. An “America First” Foreign Policy

President Trump entered office with a transactional, “America First”<sup>99</sup> approach to foreign policy. “My foreign policy will always put the interests of the American people and American security above all else . . . ‘America First’ will be the major and overriding theme of my administration.”<sup>100</sup> As part of his America First policy, he attacked the “false song of globalism” and said he was “skeptical of international unions that tie us up and bring America down.”<sup>101</sup> He vowed that he would “never enter America into any agreement that reduces our ability to control our own affairs.”<sup>102</sup>

This transactional approach has led the President to see the United States’ international relationships as a zero-sum game in which the U.S. must “win” each relationship. So, for example, President Trump argued that the United States cannot afford to “be the policeman of the world,”<sup>103</sup> and the U.S. should not protect its allies unless they paid for that protection.<sup>104</sup> He accused China of taking economic advantage of the United States<sup>105</sup> and denounced the “bad trade deals” that permitted this outcome.<sup>106</sup> He attacked NATO as “unfair economically” to the United States because it “helps [other NATO members] more so than the United States.”<sup>107</sup> More generally, he embraced a worldview in which the United States has been “disrespected, mocked and ripped off for many many years” by other countries, including our own allies, and he vowed “we [would] not be ripped off anymore.”<sup>108</sup>

99 As others have noted, the use of “America First” as a slogan bears striking similarities to the America First Committee, an anti-Semitic, pro-fascist group from the 1940s. See Ronen Ziv, Amanda Graham & Liqun Cao, *America First? Trump, Crime, and Justice Internationally*, 14 VICTIMS & OFFENDERS 997, 998 (2019).

100 See Jose A. Del Real, *Trump, Pivoting to the General Election, Hones ‘America First’ Foreign Policy Vision*, WASH. POST (Apr. 27, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/04/27/trump-pivoting-to-the-general-election-hones-america-first-foreign-policy-vision/>.

101 *Id.*

102 *Id.*

103 *Transcript: Donald Trump Expounds on His Foreign Policy Views*, N.Y. TIMES (Mar 26, 2016), <https://www.nytimes.com/2016/03/27/us/politics/donald-trump-transcript.html>.

104 *Id.* (“We are not being reimbursed for our protection of many of the countries that you’ll be talking about . . . I would say at a minimum we have to be reimbursed, substantially reimbursed . . . Because we are not being reimbursed for the kind of tremendous service that we’re performing by protecting various countries.”).

105 *Id.* (“China’s been taking advantage of us for many, many years and we can’t allow it to go on.”).

106 *Id.*

107 *Id.*

108 *Id.*



### B. *The United Nations and Other International Organizations*

Given his “America First” views, it is not surprising that the President has been highly critical of international organizations and multilateral solutions to problems.<sup>109</sup> For example, he has criticized the United Nations as a pernicious global government. In his address to the 73<sup>rd</sup> session of the United Nations General Assembly in 2018, he said that the United States would always choose “independence” over “global governance, control, and domination.”<sup>110</sup> He went on to say that America would “defend” itself against the threat posed by “global governance.”<sup>111</sup> He made similar statements a year later when he addressed the 74<sup>th</sup> Session of the General Assembly.<sup>112</sup> In other contexts, he has claimed that the UN is weak and incompetent, “not a friend” of the United States, and that it causes problems rather than solves them.<sup>113</sup> He has also refused to pay the United States’ UN dues.<sup>114</sup>

A variety of other international organizations and multilateral agreements have also come in for criticism, including NATO, the International Criminal Court, the Paris Climate Agreement, and the World Health Organization. President Trump rocked NATO in 2016 when he suggested it was “obsolete”<sup>115</sup> and the United States would only come to the aid of other NATO countries if those countries had “fulfilled their obligations to us.”<sup>116</sup> He attacked the International Criminal Court as

109 See Goldsmith, *supra* note 1 (describing President Trump’s attacks on international institutions); Amifar & Singh, *supra* note 1, at 443 (noting that President Trump has embraced “skepticism of, if not outright hostility to, the rules-based, interconnected international order that the United States has played a central role in painstakingly constructing since World War II”).

110 He claimed that the United States was “by far, the world’s most powerful nation,” and then went on to say that “[t]he future does not belong to globalists . . . [t]he future belongs to sovereign and independent nations . . . .” See Donald J. Trump, President, U.S., Remarks by President Trump to the 73<sup>rd</sup> Session of the United Nations General Assembly (Sept. 25, 2018), available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-73rd-session-united-nations-general-assembly-new-york-ny/>.

111 *Id.*

112 See Donald J. Trump, President, U.S., Remarks by President Trump to the 74<sup>th</sup> Session of the United Nations General Assembly (Sep. 24, 2019), available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-74th-session-united-nations-general-assembly/>.

113 Jill Colvin, *‘Not a Friend of Democracy’: Trump’s Past UN Criticism*, BUS. INSIDER (Sept. 18, 2017), <https://www.businessinsider.com/ap-not-a-friend-of-democracy-trumps-past-un-criticism-2017-9>.

114 See John Fritze and Deirdre Shesgreen, Pay freeze at the UN? Trump administration owes the United Nations \$1 billion, USA Today, Oct. 9, 2019, <https://www.usatoday.com/story/news/politics/2019/10/09/donald-trump-dismisses-united-nations-deficits-says-others-should-pay/3917554002/>.

115 See Transcript: *Donald Trump Expounds on His Foreign Policy Views*, *supra* note 103.

116 See David E. Sanger & Maggie Haberman, *Donald Trump Sets Conditions for Defending NATO Allies Against Attack*, N.Y. TIMES (July 20, 2016),

lacking legitimacy and authority and pledged that the United States would never surrender to an “unelected, unaccountable, global bureaucracy.”<sup>117</sup> He lambasted the Paris Climate Agreement as a “total disaster” and gave notice that he plans to withdraw from it.<sup>118</sup> Most recently, in the midst of a global pandemic, he denounced the World Health Organization, threatened to stop funding it,<sup>119</sup> and has begun the process of withdrawing from it.<sup>120</sup>

### C. Multilateral Trade Agreements

President Trump also vehemently dislikes multilateral trade agreements. Prior to withdrawing from the Trans-Pacific Partnership,<sup>121</sup> Trump derided it as the “continuing rape of our country.”<sup>122</sup> He said the World Trade Organization is “unfair”<sup>123</sup> to the U.S. and “needs drastic change.”<sup>124</sup> He claimed that the agreement to establish the WTO was the “single worst trade deal ever made” and threatened to withdraw from it.<sup>125</sup> He also blocked appointments to the WTO’s appeal body, effectively crippling the organization.<sup>126</sup> Similarly, he described the North American Free Trade

<https://www.nytimes.com/2016/07/21/us/politics/donald-trump-issues.html>.

<sup>117</sup> Remarks by President Trump to the 73rd Session of the United Nations General Assembly, *supra* note 110.

<sup>118</sup> See Brady Dennis, *Trump Makes It Official: U.S. Will Withdraw from the Paris Climate Accord*, WASH. POST (Nov. 4, 2019), <https://www.washingtonpost.com/climate-environment/2019/11/04/trump-makes-it-official-us-will-withdraw-paris-climate-accord/>.

<sup>119</sup> See Laurel Wamsley, *Trump Criticizes WHO and Threatens to Pull U.S. Funding*, NPR (Apr. 7, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/07/829244345/trump-criticizes-who-and-threatens-to-pull-u-s-funding>; Michael D. Shear & Donald G. McNeil Jr., *Criticized for Pandemic Response, Trump Tries Shifting Blame to the W.H.O.*, N.Y. TIMES (Apr. 14, 2020), <https://www.nytimes.com/2020/04/14/us/politics/coronavirus-trump-who-funding.html>. More recently, President Trump has begun the process for withdrawing from the WHO. Press Statement, U.S. Dep’t of State, Update on U.S. Withdrawal from the World Health Organization (Sept. 3, 2020), available at <https://www.state.gov/update-on-u-s-withdrawal-from-the-world-health-organization/>.

<sup>120</sup> See Zachary Cohen, Jennifer Hansler, Kylie Atwood, Vivian Salama & Sara Murray, *Trump Administration Begins Formal Withdrawal from World Health Organization*, CNN (last updated July 8, 2020, 4:53 AM), <https://www.cnn.com/2020/07/07/politics/us-withdrawing-world-health-organization/index.html>

<sup>121</sup> See *Trump Executive Order Pulls out of TPP Trade Deal*, BBC NEWS (Jan. 24, 2017), <https://www.bbc.com/news/world-us-canada-38721056>.

<sup>122</sup> See Cristiano Lima, *Trump Calls Trade Deal ‘A Rape of Our Country’*, POLITICO (June 28, 2016), <https://www.politico.com/story/2016/06/donald-trump-trans-pacific-partnership-224916>.

<sup>123</sup> See Jessica Dye, *Trump Calls WTO ‘Unfair’ to US in Latest Trade Bard*, FIN. TIMES (Apr. 6, 2018), <https://www.ft.com/content/afce06d0-39aa-11e8-8eee-e06bde01c544>.

<sup>124</sup> Remarks by President Trump to the 74th Session of the United Nations General Assembly, *supra* note 112.

<sup>125</sup> See *Trump Threatens to Pull out of World Trade Organization*, BBC NEWS (Aug. 31, 2018), <https://www.bbc.com/news/world-us-canada-45364150>.

<sup>126</sup> See Ana Swanson, *Trump Cripples WTO as Trade War Rages*, N.Y. TIMES (Dec. 8, 2019),

Agreement (NAFTA) as “the worst trade deal maybe ever signed anywhere.”<sup>127</sup>

#### D. International Human Rights

President Trump does not support human rights<sup>128</sup> and lavishes praise on authoritarian leaders who routinely violate those rights.<sup>129</sup> For example, he praised President Rodrigo Duterte of the Philippines for doing an “unbelievable job on the drug problem” in his country.<sup>130</sup> President Duterte is best known for initiating a war on drugs that has killed thousands of people and featured large-scale extrajudicial killings.<sup>131</sup> This led to so many killings by the police that the International Criminal Court has opened a preliminary investigation into possible crimes against humanity committed in the Philippines.<sup>132</sup>

Likewise, President Trump seems to admire North Korean leader Kim Jong-Un, a brutal dictator who has systematically abused, starved and killed his citizens in huge numbers.<sup>133</sup> He said that he “fell in love” with North

<https://www.nytimes.com/2019/12/08/business/trump-trade-war-wto.html>.

<sup>127</sup> See *Trump Threatens to Pull out of World Trade Organization*, *supra* note 125.

<sup>128</sup> See Ziv et al., *supra* note 99, at 1001 (noting that President Trump has preferred to “ignore many of the human rights violations occurring around the world – unless otherwise pressured – opting for these countries to handle the issues internally”); Koh, *supra* note 1, at 430–31 (describing the Trump administration’s disdain for human rights). For example, in one interview the President said that the United States should not criticize other countries’ human rights records and that he would only act internationally when it was in America’s direct interest to do so. See David E. Sanger & Maggie Haberman, *Donald Trump Sets Conditions for Defending NATO Allies Against Attack*, N.Y. TIMES (July 20, 2016), <https://www.nytimes.com/2016/07/21/us/politics/donald-trump-issues.html>; *Transcript: Donald Trump on NATO, Turkey’s Coup Attempt and the World*, N.Y. TIMES, (July 21, 2016), <https://www.nytimes.com/2016/07/22/us/politics/donald-trump-foreign-policy-interview.html>.

<sup>129</sup> See Chris Cilizza & Brenna Williams, *15 Times Donald Trump Has Praised Authoritarian Rulers*, CNN POLITICS (July 2, 2019), <https://www.cnn.com/2019/07/02/politics/donald-trump-dictators-kim-jong-un-vladimir-putin/index.html>.

<sup>130</sup> See *Transcript of Call Between President Trump and Philippine President Duterte*, WASH. POST (last visited Jan. 13, 2021), <https://apps.washingtonpost.com/g/documents/politics/transcript-of-call-between-president-trump-and-philippine-president-duterte/2446/> (call took place on April 29, 2017); see also Ziv et al., *supra* note 99, at 1002 (noting that President Trump has been “warm and supportive” towards President Duterte while “ignoring [the] atrocities” committed during the Philippine President’s war on drugs).

<sup>131</sup> See Lindsay Murdoch, *Australia Slams Philippines President over Drug Killings*, SYDNEY MORNING HERALD (May 9, 2017), <https://www.smh.com.au/world/australia-slams-philippines-president-over-drug-killings-20170509-gw0hbh.html>.

<sup>132</sup> See INT’L CRIM. CT., OFF. OF THE PROSECUTOR, REPORT ON PRELIMINARY ACTIVITIES 2018at 15–18 (2018), <https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf>.

<sup>133</sup> See Hum. Rts. Council, Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea, UN Doc. A/HRC/25/CRP.1 (Feb. 7, 2014); see also Ziv et al., *supra* note 99, at 1002 (noting President Trump’s “meetings with and adoration of” Kim Jong-Un despite North Korea’s well-known mistreatment of its own citizens).

Korean leader Kim Jong-Un after exchanging several “beautiful letters” and then meeting with him.<sup>134</sup> In another interview, he said that the people of North Korea love Kim Jong-Un and implied that he personally trusted the North Korean leader.<sup>135</sup>

President Trump also likes President Xi of China.<sup>136</sup> For example, he has said that he has “unlimited” respect and friendship for President Xi of China.<sup>137</sup> On another occasion he described President Xi as “great” and a “great gentleman” and said it would be “great” if President Xi could become “president for life” of China.<sup>138</sup> China has a poor human rights record. Since 2017, China has detained more than a million members of the Uighur ethnic group in hundreds of camps in Xinjiang province.<sup>139</sup> Detainees are forced to renounce Islam and pledge loyalty to the Communist Party, while they are continually monitored for disloyalty.<sup>140</sup> Most have never been charged with a crime.<sup>141</sup> While members of his administration have criticized China’s treatment of its Uighur minority, President Trump has remained largely silent on the issue.<sup>142</sup> In fact, according to one former advisor, President Trump actually encouraged the Chinese President to build the camps.<sup>143</sup>

President Trump seems to similarly admire President Putin of Russia. President Trump described President Putin of Russia as a leader who has

134 See *Trump on Kim Jong-Un*, ASSOCIATED PRESS (Sep. 30, 2018), <https://apnews.com/article/4d56f6e8f99d4eebf2f22b7a6dd072d0>.

135 See *President Trump sits down with George Stephanopoulos: Transcript*, ABC NEWS (June 12, 2018), <https://abcnews.go.com/Politics/president-trump-sits-george-stephanopoulos-transcript/story?id=55831055>.

136 See Cillizza & Williams, *supra* note 129; Domenico Montanaro, *6 Strongmen Trump Has Praised — And the Conflict It Presents*, NPR (May 2, 2017), <https://www.npr.org/2017/05/02/526520042/6-strongmen-trumps-praised-and-the-conflicts-it-presents>.

137 Donald J. Trump (@realDonaldTrump), TWITTER (May 14, 2019, 6:16 AM), <https://twitter.com/realDonaldTrump/status/1128257891805298690>.

138 See David Shephardson, *Trump Praises Chinese President Extending Tenure ‘For Life’*, REUTERS (Mar. 3, 2018), <https://www.reuters.com/article/us-trump-china/trump-praises-chinese-president-extending-tenure-for-life-idUSKCN1GG015>.

139 See Lindsay Maizland, *China’s Repression of Uighurs in Xinjiang*, COUNCIL ON FOREIGN RELS. (last updated June 30, 2020), <https://www.cfr.org/backgrounder/chinas-repression-uighurs-xinjiang>.

140 *Id.*

141 *Id.*

142 See Jane Perlez, *China Wants the World to Stay Silent on Muslim Camps. Its Succeeding.*, N.Y. TIMES (Sept. 25, 2019), <https://www.nytimes.com/2019/09/25/world/asia/china-xinjiang-muslim-camps.html>; Tara Francis Chan, *Donald Trump Accused of ‘Compromising’ Efforts to End China’s Abuses in Xinjiang*, NEWSWEEK (Oct. 18, 2019), <https://www.newsweek.com/xinjiang-uighur-donald-trump-mike-pompeo-hearing-1466295>.

143 See Michelle Goldberg, Opinion, *Don’t Buy John Bolton’s Book. But Don’t Ignore Its Revelations*, N.Y. TIMES (June 19, 2020), <https://www.nytimes.com/2020/06/19/opinion/trump-john-bolton-book.html> (quoting John Bolton).

“strong control” over his country.<sup>144</sup> He also praised President Putin’s 82% approval rating and said that President Putin was “far more” of a leader than President Obama.<sup>145</sup> Under Putin, Russia illegally invaded and annexed Crimea,<sup>146</sup> and has an extremely poor human rights record.<sup>147</sup> Overall, President Trump seems to prefer authoritarian leaders.<sup>148</sup>

### E. Conclusion

In sum, President Trump entered office deeply skeptical of all international entanglements.<sup>149</sup> He sees states as engaged in an adversarial battle for wealth and power, and he rejects the idea that international relationships can be mutually beneficial.<sup>150</sup> He is unwilling to help others unless it directly benefits him<sup>151</sup> and he does not care about human rights.<sup>152</sup> Instead, he admires authoritarian leaders who routinely abuse their citizens.

More importantly for this Article, in his view, international law is imposed on the United States by others to weaken the U.S. and limit its

<sup>144</sup> Montanaro, *supra* note 136.

<sup>145</sup> *Id.*

<sup>146</sup> See Neil MacFarquhar, *After Annexing Crimea, Euphoric Russia Turns Thoughts to Ukraine*, N.Y. TIMES (June 14, 2014), <https://www.nytimes.com/2014/06/15/world/europe/after-annexing-crimea-euphoric-russia-turns-thoughts-to-ukraine.html>; see also Thomas D. Grant, *Annexation of Crimea*, 109 AM. J. INT’L L. 68 (2015) (arguing that Russia’s invasion and annexation of Crimea violated international law); Jure Vidmar, *The Annexation of Crimea and the Boundaries of the Will of the People*, 16 GERMAN L.J. 365 (2015) (arguing that, while secession is not automatically unlawful, Russia’s use of force to procure the secession of Crimea was unlawful and noting that Russia’s annexation of Crimea was condemned by the United Nations General Assembly and would have been condemned by the Security Council but for a Russian veto).

<sup>147</sup> See *Russia: Events of 2019*, HUM. RTS. WATCH (last visited Jan. 13, 2021), <https://www.hrw.org/world-report/2020/country-chapters/russia>; see also Ziv et al., *supra* note 99, at 1002 (noting President Trump’s “warm relationship” with Putin despite the latter’s lengthy record of human rights violations).

<sup>148</sup> See Cilizza & Brenna, *supra* note 129; Montanaro, *supra* note 136; Krishnadev Calamur, *Nine Notorious Dictators, Nine Shout-Outs From Donald Trump*, ATLANTIC (Mar. 4, 2018), <https://www.theatlantic.com/international/archive/2018/03/trump-xi-jinping-dictators/554810/>.

<sup>149</sup> See *supra* text accompanying notes 99–102.

<sup>150</sup> See *supra* text accompanying notes 103–108, 123–127; see also Koh, *supra* note 1, at 467 (noting that President Trump’s “‘America First’ strategy . . . grimly views our interactions with the world as zero-sum”).

<sup>151</sup> See *supra* text accompanying notes 104, 116.

<sup>152</sup> See *supra* text accompanying notes 128–148.

power.<sup>153</sup> This leads him to distrust international law<sup>154</sup> and seek to free the United States from its limitations.<sup>155</sup> Thus, he is predisposed to reject the limitations on the United States' ability to use military force imposed by IHL.

## V. THE PRESIDENT'S VIEWS ON VIOLENCE

A central tenet of IHL is that the right to use armed force is limited.<sup>156</sup> Although certain uses of force are permitted during armed conflicts, military necessity cannot justify acts "such as cruelty or wanton violence."<sup>157</sup> IHL treats violence as necessary to achieve legitimate military objectives, but still ultimately inhumane, and limits the use of violence that is not necessary.<sup>158</sup>

This view of violence, embodied in the principles of distinction and humanity, stands in contrast to the President's public statements about violence. In those statements, the President advocated for and praised the use of violence. In one of his most famous statements, the President claimed that he could "stand in the middle of Fifth Avenue and shoot somebody" and not lose any voters because his supporters were so loyal,<sup>159</sup> but this is far from his only statement that encourages or endorses violence. As explained below, he has called for the use of violence against protesters, the

<sup>153</sup> See *supra* text accompanying notes 101–102; see also *infra* text accompanying notes 201–202. It is worth pointing out that this belief, which underlies so much of President Trump's hostility to international law, is almost completely wrong. Most of the present international order was created by the United States for its own (and others') benefit. See MICHAEL J. MAZARR, MIRANDA PRIEBE, ANDREW RADIN & ASTRID STUTH CEVALLOS, UNDERSTANDING THE CURRENT INTERNATIONAL ORDER iii (Rand Corporation 2016) (noting that "[s]ince 1945, the United States has pursued its global interest through creating and maintaining international economic institutions, bilateral and regional security organizations, and liberal political norms; these ordering mechanisms are often collectively referred to as the *international order*"); see also *id.* at 7–29 (describing the role of the United States in building the modern international order and explaining how this benefited the United States).

<sup>154</sup> See *supra* text accompanying note 101 (noting his skepticism of international law and institutions).

<sup>155</sup> See *supra* text accompanying note 102; see also *supra* text accompanying notes 110–111. More generally, he has tried to withdraw the United States from a host of international agreements and institutions. See *supra* text accompanying notes 118–127.

<sup>156</sup> See Hague Convention II of 1899, *supra* note 49, art. 22 ("The right of belligerents to adopt means of injuring the enemy is not unlimited."); DEPARTMENT OF DEFENSE LAW OF WAR MANUAL, *supra* note 8, § 2.6.2.1 (noting that "parties to a conflict must accept that certain limits exist on their ability to conduct hostilities").

<sup>157</sup> DEPARTMENT OF DEFENSE LAW OF WAR MANUAL, *supra* note 8, § 2.3.1.

<sup>158</sup> *Id.*

<sup>159</sup> See Mary Troyan, *Trump: I Could Shoot a Person and Not Lose Votes*, USA TODAY (Jan. 23, 2016, 3:42 PM), <https://www.usatoday.com/story/news/politics/onpolitics/2016/01/23/trump-could-shoot-person-and-not-lose-votes/79232258/>.

press, and his political enemies. Taken collectively, these statements show that President Trump both idolizes and glorifies violence and views it as a tool to get what he wants.

### A. *Violence Against Protesters*

Some of the most striking examples of the President's violent language have been his repeated calls for his supporters to attack protesters.<sup>160</sup> At a rally in Iowa, in February 2016, he both encouraged members of the audience to attack protesters ("knock the crap out of them, would you?") and promised he would pay their legal fees if they did attack protesters.<sup>161</sup> A similar incident occurred in Michigan that same month.<sup>162</sup> Later in February, he complained that security guards were being too gentle with a protester they were removing from a rally: "I'd like to punch him in the face, I'll tell you."<sup>163</sup> On several occasions he has said he misses "the good old days" when protesters would be beaten by the crowd.<sup>164</sup> For example, at one rally he lamented that "[w]e're not allowed to punch back anymore" and said that he "love[d] the old days" when protesters would have been "carried out on a stretcher."<sup>165</sup> Unsurprisingly in light of his encouragement, Trump supporters have attacked protesters at rallies.<sup>166</sup>

More recently, President Trump has endorsed violence against those protesting the police killing of George Floyd, a Black man. As some protests resulted in violence, President Trump called the protesters "THUGS," threatened to "send in the National Guard & get the job done right," and

160 See Eric Levitz, *Donald Trump Misses the Old Days When You Were Allowed to Beat Up Protesters*, INTELLIGENCER (Feb. 23, 2016), <https://nymag.com/intelligencer/2016/02/trump-on-protester-id-like-to-punch-his-face.html>; German Lopez, *Don't Believe Donald Trump Has Incited Violence at Rallies? Watch This Video*, VOX (Mar. 12, 2016), <https://www.vox.com/2016/3/12/11211846/donald-trump-violence-rallies>.

161 See Libby Cathey & 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> ("If you see somebody getting ready to throw a tomato, knock the crap out of them, would you? Seriously, OK? Just knock the hell . . . I promise you I will pay for the legal fees. I promise, I promise.").

162 *Id.* (quoting Mr. 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.").

163 *Id.*

164 See Robert Mackey, *Trump Concerned His Rallies Are Not Violent Enough*, INTERCEPT (Mar. 11, 2016), <https://theintercept.com/2016/03/11/trumps-good-old-days-when-battering-protesters-was-celebrated-in-the-white-house/>.

165 *Id.*

166 See Alana Abramson, *Donald Trump Rally Videos Show Protester Getting Punched*, ABC NEWS (Mar. 10, 2016), <https://abcnews.go.com/Politics/donald-trump-rally-videos-show-protester-punched/story?id=37551524>; Mackey, *supra* note 164.

warned “when the looting starts, the shooting starts.”<sup>167</sup> President Trump’s tweet was widely understood as calling for the police and military to shoot Black protesters.<sup>168</sup> Twitter, which recently began labeling tweets that increase the “potential for likely harm,”<sup>169</sup> responded by labeling the President’s tweet as “glorifying violence.”<sup>170</sup> The very next day, the President threatened protesters outside the White House with attacks by “the most vicious dogs” and the “most ominous weapons.”<sup>171</sup> Shortly after threatening the use of violence against protesters, the President did use excessive and unnecessary force against protesters in Lafayette Square in Washington, DC.<sup>172</sup> He has also tacitly endorsed police violence against protesters in other cities.<sup>173</sup>

167 See Davey Alba, Kate Conger & Raymond Zhong, *Twitter Adds Warnings to Trump and White House Tweets, Fueling Tensions*, N.Y. TIMES (May 29, 2020), <https://www.nytimes.com/2020/05/29/technology/trump-twitter-minneapolis-george-floyd.html>. The phrase “when the looting starts, the shooting starts” is associated with a former Miami police chief, Walter Headley, when he threatened in 1967 to open fire on Black protesters. See Maggie Haberman & Alexander Burns, *Trump’s Looting and Shooting Remarks Escalate Crisis in Minneapolis*, N.Y. TIMES (May 29, 2020), <https://www.nytimes.com/2020/05/29/us/politics/trump-looting-shooting.html>; see also Barbara Sprunt, *The History Behind ‘When The Looting Starts, The Shooting Starts’*, NPR (May 29, 2020), <https://www.npr.org/2020/05/29/864818368/the-history-behind-when-the-looting-starts-the-shooting-starts>. Chief Headley added that “[w]e don’t mind being accused of police brutality.” See Haberman & Burns, *supra*.

168 See Haberman & Burns, *supra* note 167 (describing President Trump’s tweet as a “threat to have unruly protesters shot”).

169 Sherisse Pham, *Twitter Says It Labels Tweets to Provide ‘Context, Not Fact-Checking’*, CNN BUSINESS (June 3, 2020, 5:13 AM), <https://www.cnn.com/2020/06/03/tech/twitter-enforcement-policy/index.html>.

170 See Peter Baker et al., *supra* note 167.

171 See Maggie Haberman, *Trump Threatens White House Protesters with ‘Vicious Dogs’ and ‘Ominous Weapons’*, N.Y. TIMES (May 30, 2020), <https://www.nytimes.com/2020/05/30/us/politics/trump-threatens-protesters-dogs-weapons.html>.

172 Philip Rucker & Ashley Parker, *Lafayette Square Clash, Still Reverberating, Becomes an Iconic Episode in Donald Trump’s Presidency*, WASH. POST (June 13, 2020, 6:30 PM), [https://www.washingtonpost.com/politics/lafayette-square-clash-still-reverberating-becomes-an-iconic-episode-in-donald-trumps-presidency/2020/06/13/9ddcc348-acb8-11ea-9063-e69bd6520940\\_story.html](https://www.washingtonpost.com/politics/lafayette-square-clash-still-reverberating-becomes-an-iconic-episode-in-donald-trumps-presidency/2020/06/13/9ddcc348-acb8-11ea-9063-e69bd6520940_story.html).

173 Jordyn Phelps & Libby Cathey, *Trump Tweets Conspiracy Theory About Buffalo Protester Police Officers Knocked to Ground*, ABC NEWS (June 9, 2020, 4:54 PM), <https://abcnews.go.com/Politics/trump-tweets-conspiracy-theory-buffalo-protester-police-officers/story?id=71150154>.



### B. Violence Against the Press

The President has advocated violence against the press on a number of occasions.<sup>174</sup> For example, in December 2015, he seemed to suggest that murdering journalists might be acceptable.<sup>175</sup> While discussing the murder of dissident journalists in Russia, then-candidate Trump said “I would never kill them.”<sup>176</sup> Then he paused and seemed to reconsider: “Ahhh . . . let’s see . . . well . . . no, I wouldn’t. I would never kill them. But I do hate them.”<sup>177</sup> Then, in 2017, Representative Greg Gianforte attacked a reporter who was asking him questions.<sup>178</sup> Trump praised the representative, saying: “Any guy that can do a body slam, he is my type!”<sup>179</sup> That same year, he tweeted a video clip that depicted him tackling and repeatedly punching someone, but with the CNN logo placed over that person’s face.<sup>180</sup> More generally, he has suggested that violence against the press is a logical and acceptable response to their critical coverage of him,<sup>181</sup> and he has repeatedly labeled the press the “enemy of the people.”<sup>182</sup> The result, unsurprisingly, has been violence directed against the press by Trump supporters.<sup>183</sup>

### C. Violence by Law Enforcement

President Trump has frequently argued that law enforcement personnel should be more violent. For example, in a speech to police 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

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

175 Aaron Rugar, *One Video Refutes Sarah Sanders’s Claim that Trump Has Never Encouraged Violence*, VOX (Feb. 22, 2019), <https://www.vox.com/2019/2/22/18236512/christopher-hasson-sarah-sanders-trump-encouraging-violence>.

176 *Id.*

177 *Id.*

178 See Cathey & Keneally, *supra* note 161.

179 *Id.*

180 See Charlie May, *Trump’s Media Takedown Goes Meta: President Tweets Ludicrous WWE Video — But Why?*, SALON (July 2, 2017, 6:01 PM), <https://www.salon.com/2017/07/02/trumps-media-takedown-goes-meta-president-tweets-ludicrous-wwe-video-mdash-but-why/>.

181 See Chait, *supra* note 174.

182 See Brett Samuels, *Trump Ramps Up Rhetoric on Media, Calls Press ‘The Enemy of the People’*, HILL (Apr. 5, 2019, 2:21 PM), <https://thehill.com/homenews/administration/437610-trump-calls-press-the-enemy-of-the-people>.

183 See *Bodyyslams, Bombs and Shoves: Anti-Media Violence in Trump’s America*, AXIOS (Feb. 12, 2019), <https://www.axios.com/violence-against-media-bombs-shootings-trump-a59584cb-ac2c-4813-bfef-7b3a4233690d.html> (describing violence directed against the media at Trump rallies and by Trump supporters).

you put their hand over [their head] . . . . You can take the hand away, OK?”<sup>184</sup> 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.<sup>185</sup> He has made similar comments about police violence at rallies, where he has claimed that law enforcement personnel were too afraid to use force against protesters and waxed nostalgically about the “old days” when law enforcement would have “rip[ped the protester] out of his seat.”<sup>186</sup> In 2018, during a roundtable on tax reform, President Trump praised Immigration and Customs Enforcement (ICE) officers for being violent: “And these ICE guys are so much tougher than them, and they’re grabbing [illegal immigrants] by the necks and throwing them into paddy wagons. And . . . the people are clapping and screaming.”<sup>187</sup> As noted above, the President has also approved of police violence aimed at peaceful protesters.<sup>188</sup>

#### *D. Using Violence to Maintain Power*

Finally, the President has implied his supporters could use violence to help him become President and keep him in power. Shortly before the 2016 presidential election, he suggested that his supporters might use violence if he did not win the presidency.<sup>189</sup> Talking about what might happen if Hillary Clinton became President, he said: “If she gets to pick her judges, nothing you can do folks . . . . Although the Second Amendment people – maybe there is, I don’t know.”<sup>190</sup> Most people saw his words as a suggestion that his supporters might assassinate Hillary Clinton if she won the Presidency.<sup>191</sup> Then, in 2018, he warned his political opponents: “I have the support of the police, the support of the military, the support of Bikers for

184 See Cathey & Keneally, *supra* note 161.

185 *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.”).

186 See Mackey, *supra* note 164.

187 See Donald J. Trump, President, U.S., Remarks by President Trump at a Roundtable Discussion on Tax Reform (Apr. 5, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-roundtable-discussion-tax-reform/>.

188 See *supra* Section V.A.

189 See Nick Corasaniti & Maggie Haberman, *Donald Trump Suggests ‘Second Amendment People’ Could Act Against Hillary Clinton*, N.Y. TIMES (Aug. 9, 2016), <https://www.nytimes.com/2016/08/10/us/politics/donald-trump-hillary-clinton.html>.

190 *Id.*

191 *Id.* The President later suggested that he was just encouraging gun rights supporters to vote for him, but it is worth noting that his explanation does not make sense. He was discussing what might happen after Hillary Clinton became President and she could nominate judges to the federal bench, not how to prevent her from becoming President. *Id.*

Trump – I have the tough people but they don’t play it tough – until they go to a certain point, and then it would be very bad, very bad.”<sup>192</sup> His words echo earlier statements in which he said that his opponents were lucky that his supporters were peaceful, but also suggested that violence might be necessary if he did not get his way.<sup>193</sup>

### E. Conclusion

The President’s divisive rhetoric and support for violence has inspired real violence.<sup>194</sup> Dozens of people who have engaged in violent acts against those presumed to be anti-Trump, including protestors, members of the LGBT community, immigrants, and non-whites, claimed that President Trump condoned or inspired their actions.<sup>195</sup> It is unusual for a President’s words to inspire such violence.<sup>196</sup> Yet, despite the high levels of violence his rhetoric inspires, President Trump has refused to take any responsibility for the consequences.<sup>197</sup>

President Trump’s own words reveal a lot about how he views violence. He glorifies violence (“I’d like to punch him in the face, I’ll tell you”). He is nostalgic for a past (“the good old days”) when indiscriminate violence was permitted, and he thinks that law enforcement should be able to use more violence against suspects (“[grab] them by the neck and throw[] them into paddy wagons”). Finally, he sees violence as an acceptable tool to keep those he does not agree with, including protesters, the press, and his political opponents, in their place. Given his glorification of violence, it is likely that he finds the constraints of IHL, with its emphasis on reducing unnecessary violence and suffering, to be too restrictive.

<sup>192</sup> Justin Wise, *Trump Suggests that It Could Get ‘Very Bad’ If Military, Police, Biker Supporters Play ‘Tough’*, HILL (Mar. 14, 2019), <https://thehill.com/homenews/administration/434110-trump-suggests-that-things-could-get-very-bad-if-military-police>; see also Chait, *supra* note 174.

<sup>193</sup> Wise, *supra* note 192.

<sup>194</sup> See, e.g., Samira Saramo, *The Meta-Violence of Trumpism*, 12 EUR. J. AM. STUD. 1 (2017) (discussing the links between President Trump’s violent rhetoric and actual violence).

<sup>195</sup> See Jone Swaine & Juweek Adolphe, *Violence in the name of Trump*, GUARDIAN, <https://www.theguardian.com/us-news/ng-interactive/2019/aug/28/in-the-name-of-trump-supporters-attacks-database> (cataloging more than fifty instances of pro-Trump violence directed against immigrants, non-whites, protestors, LGBT people, and journalists); Mike Levine, *‘No Blame?’ ABC News Finds 36 Cases Invoking ‘Trump’ in Connection with Violence, Threats, Alleged Assaults*, ABC NEWS (Aug. 14, 2019), <https://abcnews.go.com/Politics/blame-abc-news-finds-17-cases-invoking-trump/story?id=58912889>.

<sup>196</sup> See Levine, *supra* note 195 (noting that ABC News was unable to find a single criminal case where an act of violence was done in the name of President Barack Obama or President George W. Bush).

<sup>197</sup> *Id.* (noting that President Trump has refused to take any responsibility for the violence associated with his supporters).

## VI. THE PRESIDENT'S VIEWS ON INTERNATIONAL HUMANITARIAN LAW

This Article now turns to President Trump's views about IHL. It will begin with a discussion of his views about IHL generally and then move on to his comments about particular aspects of IHL. Together, these statements provide a good indication of the President's views on IHL.

### A. *General Views on IHL*

President Trump has never articulated a clear vision of IHL but he has made a number comments that shed light on his general beliefs about it.<sup>198</sup> In those comments, he has repeatedly railed against the need to follow the laws of war. For example, he complained the U.S. fights “very politically correct” wars<sup>199</sup> and argued that it was necessary for the U.S. to use the same methods as its enemies: “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.”<sup>200</sup> He has also described the rules that the U.S. follows as a source of weakness<sup>201</sup> and has claimed that our willingness to follow IHL makes the United States “weak” and “stupid.”<sup>202</sup>

His general comments about IHL are consistent with his views on both violence and international law. He rejects attempts to use law to restrict what he can do and sees international law as being imposed on the U.S. to weaken it.<sup>203</sup> At the same time, he favors using violence to solve

198 None of the comments discussed below mention international humanitarian law by name, but they take positions on issues that relate to IHL. Thus, whether knowingly or not, President Trump has taken positions on IHL.

199 See Tom LoBianco, *Donald Trump on Terrorists: ‘Take Out Their Families’*, CN, (Dec. 3, 2015), <https://www.cnn.com/2015/12/02/politics/donald-trump-terrorists-families/index.html>. This comment echoes his comments about the use of violence by the police in the United States, where he has complained that the ability of law enforcement to use force is unnecessarily constrained by “politically correct” rules. See Mackey, *supra* note 164 (“You see, in the good old days, law enforcement acted a lot quicker than this . . . In the good old days, they’d rip him out of his seat so fast. But today, everybody’s politically correct. Our country’s going to hell with being politically correct.”); see also *supra* text accompanying notes 184–186.

200 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>. When the President said that the U.S. has to play the game the way our enemies are playing it, he was talking about torturing our enemies. *Id.*

201 *Id.*

202 See Ashley Parker, *In ‘Good Old Days,’ Donald Trump Says, Campaign Protesters Got More Than Just an Escort Out*, N.Y. TIMES (Feb. 27, 2016), <https://www.nytimes.com/politics/first-draft/2016/02/27/in-good-old-days-donald-trump-says-campaign-protesters-got-more-than-just-an-escort-out/> (“We can’t talk about waterboarding, so they must think we are so weak and so stupid.”).

203 See *supra* Section IV.

problems.<sup>204</sup> Given that IHL is a series of international rules designed to regulate and limit violence, it is not surprising that he rejects it. Next, this Article will turn to specific proposals the President has made about how the U.S. should use violence.

### B. Views on Torture

Torture, including waterboarding, has been illegal since at least the 1860s.<sup>205</sup> Torture is banned by the Geneva Conventions,<sup>206</sup> the Convention Against Torture,<sup>207</sup> and customary international law.<sup>208</sup> Torture is also a war crime<sup>209</sup> and states have an obligation to prosecute individuals who engage in torture during armed conflicts.<sup>210</sup> The U.S. government's official position is consistent with international law. The U.S. Department of Defense's Law of War Manual clearly recognizes that interrogation of detainees "must be carried out in a manner consistent with the requirements for humane treatment, including the prohibition against torture."<sup>211</sup> U.S. law specifically prohibits the use of waterboarding.<sup>212</sup>

Despite this prohibition, President Trump has repeatedly argued the U.S. should torture people. As a candidate, he claimed that he would "bring back a hell of a lot worse than waterboarding."<sup>213</sup> He reiterated that position twice in February 2016. First, at a campaign rally in mid-February, he said waterboarding was "[a]bsolutely fine. But we should go much stronger than

204 See *supra* Section V.

205 See LIEBER, *supra* note 44, Rule 16 (forbidding the use "of torture to extort confessions").

206 See, e.g., Geneva Convention III, *supra* note 4, arts. 129–30 (noting that certain "grave breaches" of the Geneva Conventions, including the use of torture, must be criminalized and that states have an obligation to prosecute torture committed during armed conflicts).

207 See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 4, Dec. 10, 1984, 1465 U.N.T.S. 85 (obliging all states to criminalize torture).

208 See HENCKAERTS & DOSWALD-BECK, *supra* note 7, Rule 90 ("Torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, are prohibited.").

209 See, e.g., Rome Statute, *supra* note 10, art. 8(2)(a)(ii).

210 The prohibition on torture is contained in the grave breaches provisions of the Geneva Conventions, which require states not just to prevent grave breaches but also to prosecute those who engage in them. See, e.g., Geneva Convention III, *supra* note 4, arts. 129–30.

211 DEPARTMENT OF DEFENSE LAW OF WAR MANUAL, *supra* note 8, § 8.4.1.

212 U.S. law prohibits any interrogation technique that is not permitted by Army Field Manual 2-22.3. See 42 U.S.C. § 2000dd-2; see also Exec. Order No. 13,491, 3 C.F.R. 13491 (2009) (entitled "Ensuring Lawful Interrogations"). Army Field Manual 2-22.3 specifically prohibits waterboarding. See DEP'T OF THE ARMY, FM 2-22.3 (FM 34-52) HUMAN INTELLIGENCE COLLECTOR OPERATIONS § 5.75 (2006) (noting that "waterboarding" is specifically prohibited).

213 See Tom McCarthy, *Donald Trump: I'd Bring Back 'A Hell of a Lot Worse than Waterboarding'*, GUARDIAN (Feb. 7, 2016), <https://www.theguardian.com/us-news/2016/feb/06/donald-trump-waterboarding-republican-debate-torture>.

waterboarding.”<sup>214</sup> Later that same month, he reiterated his position, saying that waterboarding was “just fine” and “frankly, if you want to go a step above, or two or three steps above, that’s O.K. with me. . . .”<sup>215</sup> He was harshly criticized for that position.<sup>216</sup> Numerous senior retired military officers pointed out that waterboarding is illegal and that members of the U.S. military would be obligated to refuse such a manifestly illegal order.<sup>217</sup>

Then-candidate Trump quickly backtracked and released a formal statement<sup>218</sup> saying that he understood he would be “bound by laws and treaties” if he became President and that he would not “order our military or other officials to violate those laws. . . .”<sup>219</sup> His official contrition was short-lived, however, and he was soon back to arguing that he would torture terrorists: “waterboarding is absolutely fine, but we should go much further.”<sup>220</sup> Once he was elected, President Trump reaffirmed that he thought torture “absolutely” works and that the U.S. had to “fight fire with fire.”<sup>221</sup> Although it is irrelevant to whether torture is legal, it is worth pointing out that President Trump’s justification for waterboarding and other methods of torture (they “work”<sup>222</sup>) is not true.<sup>223</sup>

President Trump has equivocated about whether waterboarding is torture. At times he has claimed that, while “some people” consider

214 See Chris Deaton, *Trump: ‘Torture Works, OK Folks?’*, WASH. EXAM’R (Feb. 17, 2016), <https://www.washingtonexaminer.com/weekly-standard/trump-torture-works-ok-folks>.

215 See Parker, *supra* note 202.

216 See Brown & Gaouette, *supra* note 96.

217 *Id.*

218 Again, it is worth noting the incongruence between the statements released on his behalf and the President’s public statements. See *supra* text accompanying notes 92–98 (noting that the President’s official statements are a less reliable indicator of his beliefs than this off-the-cuff statements).

219 See Brown & Gaouette, *supra* note 96.

220 See Diamond, *supra* note 200, at 00:29.

221 See Matthew Weaver & Spencer Ackerman, *Trump Claims Torture Works But Experts Warn of Its ‘Potentially Existential’ Costs*, 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> (claiming that torture “absolutely” works). This is not the only time President Trump has claimed that torture is effective. See Ali Vitali, *Donald Trump: ‘Torture Works’*, NBC NEWS (Feb. 17, 2016), <https://www.nbcnews.com/politics/2016-election/donald-trump-torture-works-n520086> (noting that candidate Trump said “Don’t tell me it doesn’t work . . . Torture works.”).

222 See *supra* note 221.

223 See S. REP. NO. 113-288, at xi (2014) (the Senate Select Committee on Intelligence found in its Intelligence Committee Study of the CIA’s Detention and Interrogation Program that, “based on a review of CIA interrogation records . . . the use of the CIA’s enhanced interrogation techniques was not an effective means of obtaining accurate information or detainee cooperation.”); see also Shane O’Mara, *Torturing the Brain: On the Folk Psychology and Folk Neurobiology Motivating ‘Enhanced and Coercive Interrogation Techniques’*, 13 TRENDS COGNITIVE SCIS. 497 (2009) (concluding that torture is unlikely to be effective); Mary Lowth, *Does torture work?: Donald Trump and the CIA*, 67 BRIT. J. GEN. PRAC. 126 (2017) (concluding that the available evidence shows that torture does not work).

waterboarding to be torture, others do not.<sup>224</sup> On another occasion, he described waterboarding as “the least form of torture.”<sup>225</sup> But there is little doubt about its status. Torture is defined as the imposition of “severe physical or mental pain or suffering” for the purpose of obtaining information or a confession, as punishment, to intimidate or coerce, or for any other discriminatory purpose.<sup>226</sup> Waterboarding, as practiced by the CIA in its secret detention facilities, “was physically harmful, inducing convulsions and vomiting.”<sup>227</sup> It was described in internal CIA reports as a “series of near drownings” which left one person “completely unresponsive, with bubbles rising through his open full mouth.”<sup>228</sup> Waterboarding and other “enhanced interrogation techniques” also have severe long-term effects on their victims.<sup>229</sup> Those who have evaluated the technique have found it to constitute torture.<sup>230</sup>

Waterboarding is both a violation of IHL and a war crime<sup>231</sup> and President Trump is aware that it is illegal.<sup>232</sup> Indeed, he has said that even knowing it is illegal, he would do it anyway.<sup>233</sup> On multiple occasions he has proposed going “much further” than waterboarding though it is not clear

224 See Parker, *supra* note 202.

225 See Tessa Berenson, *Donald Trump Repeats Offensive Name for Ted Cruz at Rally*, TIME (Feb. 8, 2016), <https://time.com/4213231/donald-trump-ted-cruz-pussy/>.

226 See INT’L CRIM. CT., ELEMENT OF CRIMES art. 8(2)(a)(ii)-1; see also Convention Against Torture, *supra* note 207, art. 1.

227 See S. REP. NO. 113-288, *supra* note 223, at xii–xiii.

228 *Id.*

229 See O’Mara, *supra* note 223, at 498 (noting various studies that have shown that people subjected to torture show long-term effects in brain functioning, including effects on memory); *id.* at 499 (“[T]hese techniques cause severe, repeated and prolonged stress, which compromises brain tissue supporting memory and executive function.”).

230 See, e.g., *id.*, Dianne Feinstein, *Foreword* to S. REP. NO. 113-288, at vii (2014) (“While the Office of Legal Counsel found otherwise between 2002 and 2007, it is my personal conclusion that, under any common meaning of the term, CIA detainees were tortured . . . I believe the evidence of this is overwhelming and incontrovertible.”); see also U.N. Hum. Rts. Off. of the High Comm’r for Hum. Rts., *Torture is Torture, and Waterboarding Is Not an Exception — UN Expert Urges the US Not to Reinstate It* (Jan. 30, 2017), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21129&LangID=E> (quoting the United Nations Special Rapporteur on Torture as saying “Without any doubt, waterboarding amounts to torture”); M. Katherine B. Darmer, *Waterboarding and the Legacy of the Bybee-Yoo “Torture and Power” Memorandum: Reflections from a Temporary Yoo Colleague and Erstwhile Bush Administration Apologist*, 12 CHAP. L. REV. 639 (2009) (concluding that waterboarding was torture); Georgina Druce, *Does Waterboarding Constitute Torture?*, 6 DARTMOUTH L.J. 351 (2008) (examining the legal elements of torture and concluding that waterboarding is torture).

231 See *supra* text accompanying notes 205-212, 226-230.

232 See *supra* text accompanying notes 224-225 (noting that Trump has acknowledged, at least sometimes, that waterboarding is torture, even though he also sometimes claims that this conclusion is open to debate).

233 See Deaton, *supra* note 214 (“Some people say that it’s not actually torture. Let’s assume it is. But they asked me the question, what do you think of waterboarding? Absolutely fine. But we should go much stronger than waterboarding.”).

what he means.<sup>234</sup> Given that waterboarding is torture, any interrogation technique that goes beyond waterboarding would also constitute torture.<sup>235</sup> As such, the President of the United States has repeatedly said that he would like to engage in torture.

### C. *Views on Collective Punishment*

On several occasions, the President of the United States has argued that the U.S. should kill the families of its enemies.<sup>236</sup> Combatants must always distinguish between civilians and combatants and can never intentionally attack civilians.<sup>237</sup> This is known as the principle of distinction.<sup>238</sup> Deliberate violation of the principle of distinction is a war crime.<sup>239</sup> Thus, deliberately targeting and killing the family members of combatants would be a war crime.<sup>240</sup> However, President Trump's suggestion goes beyond violating the principle of distinction and also constitutes the war crime of collective punishment.

In the crime of collective punishment, people or groups are punished for the acts of others. The prohibition on collective punishment is rooted in the fundamental principle of criminal law that nobody may be punished for a wrong committed by someone else.<sup>241</sup> In international law it is embodied

234 See *supra* text accompanying notes 213-215, 220.

235 For example, in addition to prohibiting waterboarding, Army Field Manual 2-22.3 also prohibits hoodings, beatings, electric shocks, inducing hypothermia, depriving detainees of food, water or medical care, and conducting mock executions. See FM 2-22.3, Human Intelligence Collector Operations. Sept. 2006, at § 5.75.

236 See *infra* text accompanying notes 253-256.

237 See HENCKAERTS & DOSWALD-BECK, *supra* note 7, Rule 1 (“The parties to an armed conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.”).

238 See *supra* text accompanying notes 66–69.

239 See Rome Statute, *supra* note 10, art. 8(2)(b)(i) (noting that it is a war crime to intentionally direct attacks against a civilian population or against individual civilians who are not taking an active part in the hostilities).

240 There is one potential exception to this conclusion. If the family members were themselves combatants or directly taking part in hostilities, then they could be targeted. See HENCKAERTS & DOSWALD-BECK, *supra* note 6, Rule 1 (“Attacks may only be directed against combatants.”); *id.*, Rule 6 (“Civilians are protected against attack unless and for such time as they take a direct part in hostilities.”). But President Trump's public statements make it clear he is talking about killing noncombatants. He referred to the targets of this policy as the family members of combatants and he suggests killing these family members not because they are directly a threat but rather to punish or deter combatants. See *supra* text accompanying notes 253–257. He has also acknowledged that the victims of this policy would include children. See *supra* text accompanying note 254. These statements make it clear he was talking about deliberately targeting noncombatants.

241 See Shane Darcy, *Prosecuting the War Crime of Collective Punishment*, 8 J. INT'L CRIM. JUST. 29, 31 (2010).



in the Fourth Geneva Convention, which says that “[n]o protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measure of intimidation or of terrorism are prohibited.”<sup>242</sup> The prohibition was also incorporated into the Additional Protocols.<sup>243</sup> While collective punishment may have been permissible in the distant past,<sup>244</sup> it is now banned as a matter of customary international law in both international and non-international armed conflicts.<sup>245</sup> It is also prohibited by the U.S. Department of Defense.<sup>246</sup>

In addition to being a violation of international law, the imposition of collective punishment is a war crime.<sup>247</sup> It was included as a war crime within the jurisdiction of the International Criminal Tribunal for Rwanda,<sup>248</sup> and the Special Court for Sierra Leone,<sup>249</sup> and has resulted in several convictions.<sup>250</sup> There is no specific provision related to collective punishments in the Rome Statute,<sup>251</sup> but the International Criminal Court would probably prosecute it as another violation of international criminal law.<sup>252</sup>

In December 2015, then-candidate Trump argued that the best way to deal with members of ISIS was to kill their families: “The other thing with the terrorists is you have to take out their families, when you get those

242 See Geneva Convention IV, *supra* note 5, art. 33.

243 See Protocol I, *supra* note 59, art. 75(2)(d) (prohibiting “collective punishments”); Protocol II, *supra* note 59, art. 6(2)(b) (prohibiting conviction or punishment “except on the basis of individual penal responsibility”).

244 See Shane Darcy, *Prosecuting the War Crime of Collective Punishment*, 8 J. INT’L CRIM. JUST. 29, 30 (“Faced with resistance from among a population and unable to locate insurgents responsible for hostile acts, invading armies and occupying powers have used collective punishments in the hope of curbing attacks and ensuring obedience, although the stated aim of deterrence has at times served as a mere cloak for oppression and subjugation. International law has responded to this wartime practice by progressively restricting and outlawing the practice of collective punishment.”); *id.* at 31–32 (noting that collective punishment appeared to be accepted in the mid nineteenth century but was outlawed by the time of the 1899 Hague Regulations).

245 See HENCKAERTS & DOSWALD-BECK, *supra* note 6, Rule 103 (“Collective punishments are prohibited.”); *id.* at 374 (“State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.”).

246 See DEPARTMENT OF DEFENSE LAW OF WAR MANUAL, *supra* note 8, § 8.16.2.1 (“Collective punishments are prohibited.”).

247 See Darcy, *supra* note 244, at 34–39 (2010).

248 See S.C. Res. 955, art. 4(b) (Nov. 8, 1994) (Statute of the International Tribunal for Rwanda).

249 See Statute of the Special Court for Sierra Leone, art. 3(b), Jan. 16, 2002, 2178 U.N.T.S. 145.

250 See, e.g., *Prosecutor v. Fofana*, Case No. SCSL-04-14-T, Judgment, 290 (Special Ct. for Sierra Leone Aug. 2, 2007) (finding Moinina Fofana guilty of Count 7 of the indictment, the war crime of imposing collective punishments).

251 See Rome Statute, *supra* note 10, art. 8; see also Darcy, *supra* note 244, at 35–36.

252 See Darcy, *supra* note 244, at 46–47. For example, as noted above, the ICC would probably prosecute it as a violation of the principle of distinction. See *supra* text accompanying notes 236–240.

terrorists, you have to take out their families.”<sup>253</sup> When asked to clarify his statement the next day, he responded that “I would do pretty severe stuff.”<sup>254</sup> He later repeated his intention to kill ISIS family members at a Republic presidential debate in Las Vegas.<sup>255</sup> He also explained his rationale for targeting family members: “Frankly, that will make people think, because they may not care much about their lives, but they do care, believe it or not, about their families’ lives.”<sup>256</sup> President Trump was criticized for this position on the grounds that killing the families of ISIS members was immoral and probably ineffective,<sup>257</sup> but there is little doubt that the President’s plan to deliberately target and kill the family members of combatants would also constitute the war crime of collective punishment.<sup>258</sup>

#### D. Views on the Killing of Prisoners

The President has repeatedly praised the deliberate killing of prisoners by U.S. armed forces, despite fact that it is both a violation of IHL and a war crime.<sup>259</sup> The principle of distinction requires combatants to distinguish between other combatants and civilians and prohibits deliberate attacks on civilians,<sup>260</sup> but combatants are permitted to attack and kill other combatants during the course of hostilities.<sup>261</sup> This right is not unlimited, however. IHL does not permit attacks on combatants who are *hors de combat*.<sup>262</sup> A person who is *hors de combat* is a person who is no longer participating in hostilities.<sup>263</sup> When a person is *hors de combat*, they are no longer a

253 See Tom LoBianco, *Donald Trump on Terrorists: ‘Take Out Their Families’*, CNN (updated Dec. 3, 2015, 12:19 PM), <https://www.cnn.com/2015/12/02/politics/donald-trump-terrorists-families/index.html>.

254 See 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. 24, 2016), <https://www.newyorker.com/magazine/2016/02/01/the-duel-faceoff-ryan-lizza>.

255 See Emily Atkin, *Trump: I Would Intentionally Kill Families to Defeat ISIS*, THINKPROGRESS (Dec. 16, 2015), <https://thinkprogress.org/trump-i-would-intentionally-kill-families-to-defeat-isis-b5484a36a7a2/>.

256 *Id.*

257 See, e.g., Gregory Krieg, *Israeli Expert: Trump’s Call to Kill Terrorists’ Families Immoral, Ineffective*, CNN (Dec. 3, 2015), <https://www.cnn.com/2015/12/03/politics/donald-trump-kill-terrorist-families-war-crime/index.html>.

258 See *supra* text accompanying notes 241–252; see also Chilton, *supra* note 1 (noting that President Trump’s plan to kill the families of terrorists would be a “clear violation[] of the laws of war”).

259 See *infra* text accompanying notes 279–283; see also Ford, *supra* note 18, at 776, 791–792.

260 See *supra* text accompanying notes 67–69.

261 See HENCKAERTS & DOSWALD-BECK, *supra* note 6, Rule 1 (“Attacks may only be directed against combatants.”).

262 See HENCKAERTS & DOSWALD-BECK, *supra* note 6, Rule 47 (“Attacking persons who are recognized as *hors de combat* is prohibited.”).

263 *Id.* at 166. *Hors de combat* is a French phrase that translates as “out of the fight.”

legitimate target and cannot be attacked or killed.

A person who has been captured and is a prisoner in the power of an adverse party is *hors de combat*.<sup>264</sup> Consequently, it is forbidden to attack or kill prisoners, even if they are combatants. This prohibition is at the heart of IHL and is embodied in the Third Geneva Convention, which establishes a complex set of rules governing the treatment of prisoners of war.<sup>265</sup> Thus, parties to the Geneva Conventions are required to treat all persons who are prisoners of war “humanely” and they “must at all times be protected, particularly against acts of violence or intimidation.”<sup>266</sup> Violation of these prohibitions, particularly the deliberate killing of prisoners of war, is a grave breach of the Convention<sup>267</sup> and constitutes a war crime.<sup>268</sup> This is true in both international and non-international armed conflicts.<sup>269</sup> The prohibition on killing combatants who are *hors de combat* is a long-standing rule of customary international law which has existed since at least the time of the Lieber Code.<sup>270</sup> Today, there is no doubt that the intentional killing of persons who are *hors de combat* is both a violation of IHL and a war crime.<sup>271</sup>

Despite this prohibition on the killing of prisoners, the President has praised U.S. soldiers for executing prisoners. He even pardoned a soldier who was charged with murder for deliberately killing a prisoner.<sup>272</sup> Major Mathew Golsteyn and another soldier took a prisoner off the base in Afghanistan where he was being held and Major Golsteyn intentionally

264 There are three main ways a person can become *hors de combat*: 1) when they are in the power of an adverse party; 2) when they are defenseless due to injuries; and 3) when they give a clear expression of the intent to surrender. *Id.*, Rule 47.

265 See generally Geneva Convention III, *supra* note 4.

266 *Id.*, art. 13.

267 *Id.* art. 130 (noting that willful killing of a person protected by the Convention is a grave breach).

268 *Id.*, art. 129 (obligating parties to the Convention to criminally prosecute grave breaches).

269 While the Geneva Conventions apply primarily in international armed conflicts, even in non-international armed conflicts, Common Article 3 of the Geneva Conventions requires parties to treat people who are *hors de combat* “humanely” and “violence to life and person, in particular murder of all kinds” is absolutely prohibited “at any time and in any place.” *Id.* art. 3(1). See also Protocol I, *supra* note 59, art. 41; Protocol II, *supra* note 59, art. 4 (noting that, in non-international armed conflicts, persons “who have ceased to take part in hostilities” must be treated “humanely” and that the killing of such persons are prohibited “at any time and in any place”).

270 See HENCKAERTS & DOSWALD-BECK, *supra* note 6, at 164; see also LIEBER, *supra* note 44, Rule 71 (“Whoever intentionally inflicts additional wounds on an enemy wholly disabled, or kills such an enemy . . . shall suffer death . . .”).

271 See *supra* text accompanying notes 267–268; see also Rome Statute, *supra* note 10, art. 8(2)(a)(i) (prohibiting the willful killing of persons protected by the Geneva Conventions); *id.* art. 8(2)(c)(i) (prohibiting the murder of “persons taking no active part in the hostilities, including members of armed forces . . . placed hors de combat by sickness, wounds, detention or any other cause.”).

272 See Ford, *supra* note 18, at 761-762.

killed the prisoner.<sup>273</sup> They then buried the body in a shallow grave.<sup>274</sup> Major Golsteyn admitted both that he killed the man and that the killing was not permitted by the rules of engagement.<sup>275</sup> Major Golsteyn violated the prohibition on killing those who are *hors de combat*. Even if the victim had at one time been a combatant,<sup>276</sup> at the time he was killed he was in the custody and control of U.S. armed forces and therefore *hors de combat*. Major Golsteyn's execution of a prisoner was a war crime.<sup>277</sup> Major Golsteyn was charged with premeditated murder.<sup>278</sup>

In November 2019, before Major Golsteyn could stand trial, the President pardoned him.<sup>279</sup> The President described Major Golsteyn as a "hero" for his actions<sup>280</sup> and said he did not deserve to go to jail.<sup>281</sup> In October 2019, President Trump said about Major Golsteyn: "We train our boys to be killing machines, then prosecute them when they kill!"<sup>282</sup> On another occasion President suggested that prosecuting soldiers for killing people is unfair.<sup>283</sup>

273 See Helene Cooper, Michael Tackett & Taimoor Shah, *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>; *Issuing Several Pardons, President Trump Intervenes in Proceedings of U.S. Troops Charged or Convicted of Acts Amounting to War Crimes*, 114 AM. J. INT'L L. 307, 308 (2020).

274 See Cooper et al., *supra* note 273.

275 *Id.*

276 It is not clear that the victim was a combatant, although Major Golsteyn apparently believed him to be one.

277 See generally Ford, *supra* note 272, Section IV.A.

278 See Cooper et al., *supra* note 273; see also *Issuing Several Pardons*, *supra* note 273, at 308-309.

279 Dave Phillips, *Trump Clears Three Service Members in War Crimes Case*, N.Y. TIMES (Nov. 15, 2019), <https://www.nytimes.com/2019/11/15/us/trump-pardons.html>; ASSOCIATED PRESS, *Trump Intervenes in Military Justice Cases, Grants Pardons*, VOA (Nov. 15, 2019, 9:23 PM), <https://www.voanews.com/usa/trump-intervenes-military-justice-cases-grants-pardons>.

280 See 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>.

281 See Helene Cooper, Maggie Haberman & Thomas Gibbons-Neff, *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>.

282 Editorial Board, Opinion, *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>. This comment was made specifically about Major Golsteyn. See Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 12, 2019, 10:49 PM), <https://twitter.com/realDonaldTrump/status/118301689958995584>.

283 When President Trump first indicated he might pardon Major Golsteyn and several other soldiers accused of war crimes, he described them as soldiers that "have fought hard and long," and said "You know, we teach them how to be great fighters, and then when they fight sometimes they get really treated very unfairly." See Associated Press, *supra* note 279.

These statements demonstrate a profound misunderstanding about IHL. Soldiers are trained to kill, and do kill, other combatants, but that use of force is strictly circumscribed by IHL.<sup>284</sup> Contrary to President Trump's claim that soldiers are trained to be "killing machines," combatants are not permitted to kill indiscriminately.<sup>285</sup> In fact, they are strictly prohibited from deliberately killing several classes of protected persons, including prisoners.<sup>286</sup> Killing prisoners does not make someone a hero. Rather, intentionally killing prisoners makes a soldier a war criminal. Moreover, President Trump's pardon of Major Golsteyn may have been a war crime.<sup>287</sup> In sum, President Trump repeatedly praised or rewarded U.S. soldiers who violated IHL by killing prisoners.

### *E. Views on Pillage*

The President has repeatedly called for the United States to commit the war crime of pillage.<sup>288</sup> Pillage is the "forcible taking of private property by an invading or conquering army from the enemy's subjects."<sup>289</sup> Pillage has been expressly forbidden for more than 150 years. The Lieber Code forbids "all pillage"<sup>290</sup> and the Hague Regulations of 1907 do the same.<sup>291</sup> As envisaged in the nineteenth century, pillage applied largely to the theft of property by individual soldiers.<sup>292</sup> By the twentieth century, however, it was understood that governments could also engage in pillage.<sup>293</sup>

284 See HENCKAERTS & DOSWALD-BECK, *supra* note 6, Rule 1.

285 *Id.* Rule 11 ("Indiscriminate attacks are prohibited.").

286 *Id.* Rule 1 ("The parties to the conflict must at all times distinguish between civilians and combatants . . . Attacks must not be directed against civilians."); *id.* Rule 89 (prohibiting the killing of prisoners); see also *id.* Rule 47 (noting that attacking a person "who is in the power of an adverse party" is prohibited).

287 See Ford, *supra* note 18, at 770-789 (arguing that the President's pardon of Major Golsteyn could make the President guilty of a war crime under a theory of command responsibility because the pardon violated the President's duty to ensure that serious violations of IHL are punished).

288 See *infra* text accompanying notes 304-312.

289 See HENCKAERTS & DOSWALD-BECK, *supra* note 6, at 185.

290 See LIEBER, *supra* note 44, Rule 44.

291 See Convention (IV) Respecting the Law and Customs of War on Land and its Annex, art. 28 (1907) [hereinafter Hague Convention IV of 1907] ("The pillage of a town or place, even when taken by assault, is prohibited."); *id.* Art. 47 ("Pillage is formally forbidden.").

292 For example, the Lieber Code says that a "soldier, officer, or private" engaged in pillage "and disobeying a superior ordering him to abstain from it" could be "lawfully killed on the spot by such superior." See LIEBER, *supra* note 44, Rule 44.

293 An occupying power can collect taxes in occupied territory but cannot take the money to enrich itself. See Hague IV of 1907, *supra* note 291, art. 48; see also 1 INT'L MIL. TRIBUNAL NUREMBERG, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 239 (1947) (noting that "under the rules of war, the economy of an occupied country can only be required to bear the expense of the occupation, and these should not be greater than the economy of the country can reasonably be expected to bear").

The Nazi's pillage of the territory they occupied was famously prosecuted by the International Military Tribunal at Nuremberg (IMT).<sup>294</sup> The German government violated the prohibition on pillage when it systematically confiscated or stole agricultural products, raw materials, finished goods, and art from occupied countries.<sup>295</sup> The IMT held that these acts constituted war crimes.<sup>296</sup> The result of the IMT Judgment was a broad recognition that occupying powers cannot loot an occupied territory for their own benefit.<sup>297</sup> Today, pillage is a war crime that is prohibited in both international and non-international conflicts.<sup>298</sup> Pillage has been prosecuted before the ICTY<sup>299</sup> and is included as a war crime within the jurisdiction of the International Criminal Court.<sup>300</sup> It is also prohibited by the U.S. military.<sup>301</sup> There may be situations where military necessity warrants the seizure of enemy property to obtain a particular military advantage,<sup>302</sup> but pillage, looting and plunder are prohibited.<sup>303</sup>

In 2019, President Trump said he planned to seize Syria's oil once ISIS was defeated.<sup>304</sup> After initially calling for pulling U.S. troops out of Syria, he changed his mind and said that they would stay "to fight for the oil."<sup>305</sup> He then proposed "mak[ing] a deal with" an American oil company to extract the oil for the United States.<sup>306</sup> In January 2020, he repeated his

294 See Charter of the International Military Tribunal art. 6(b), Aug. 8, 1945, 82 U.N.T.S. 280, *annex to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, Aug. 8, 1945, 82 U.N.T.S. 279 (noting that the IMT had jurisdiction over war crimes, including "plunder of public or private property"); see also 1 INT'L MIL. TRIBUNAL NUREMBERG, *supra* note 293, at 55.

295 *Id.* at 239–42.

296 *Id.* at 295–96 (finding Rosenberg "responsible for a system of organized plunder of public and private property throughout the invaded countries of Europe" and convicting him).

297 See Larissa Van Den Herik & Daniella Dam-De Jong, *Revitalizing the Antique War Crime of Pillage: The Potential and Pitfalls of Using International Criminal Law to Address Illegal Resource Exploitation During Armed Conflict*, 15 CRIM. L.F. 237, 266 (2011) ("The crime of pillage as applied in the Nuremberg jurisprudence thus covered a very wide array of offences, without an express distinction between being made between looting for personal gain or for the economy of the occupying state. In this way, the Nuremberg jurisprudence significantly developed the crime of pillage beyond its original scope.").

298 See HENCKAERTS & DOSWALD-BECK, *supra* note 6, Rule 52 ("Pillage is prohibited."); see also Geneva Convention IV, *supra* note 5, art. 33 ("Pillage is prohibited.").

299 See Van Den Herik & Dam-De Jong, *supra* note 297, at 266.

300 See Rome Statute, *supra* note 10, art. 8(2)(b)(xvi); *id.* art. 8(2)(c)(v).

301 See DEPARTMENT OF DEFENSE LAW OF WAR MANUAL, *supra* note 8, § 5.17 ("Pillage is prohibited.").

302 *Id.* § 5.17.2.

303 *Id.* § 5.17.4.1.

304 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>.

305 *Id.*

306 *Id.*

claim to Syria's oil: "People said to me, 'Why are you staying in Syria?' Because I kept the oil."<sup>307</sup> Despite a State Department spokesperson saying that "[a]ny claim that the United States is stealing oil from Syria is completely false," President Trump reiterated that "I left the troops [in Syria] to take the oil. I took the oil. The only troops I have are taking the oil."<sup>308</sup>

This is very similar to his suggestion that the United States should have seized Iraq's oil after toppling Saddam Hussein's regime.<sup>309</sup> In 2011, he said: "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."<sup>310</sup> In 2017, he reiterated this position.<sup>311</sup> At that time, he rejected criticism that such a move would be illegal, calling the people who claimed it would be illegal "fools."<sup>312</sup>

If President Trump ordered the U.S. military to seize Syria's oil for the benefit of the United States, that seizure would constitute the war crime of pillage. President Trump's claim that "to the victor belong the spoils"<sup>313</sup> may have been true in the eighteenth century, but it is not true today and has not been true for more than 100 years.<sup>314</sup>

307 See David Brennan, *Trump Says U.S. Troops Stayed in Syria Because I Kept the Oil*, NEWSWEEK (Jan. 15, 2020), <https://www.newsweek.com/donald-trump-us-troops-syria-oil-bashar-al-assad-kurds-wisconsin-rally-1482250>.

308 *Id.*

309 See *Id.*; Jill Ornitz, Conor Kelly & Veronica Stracqualursi, *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 Trump planned to pay for U.S. military commitments in the Middle East by seizing Iraq's oil); *Transcript: Donald Trump Expounds on His Foreign Policy Views*, *supra* note 103 ("I said when we left [Iraq] that we should have taken the oil. . . . I said take the oil. I've been saying that for years.").

310 See Jill Ornitz et al., *supra* note 309.

311 See *Transcript: ABC News Anchor David Muir Interviews President Trump*, ABC NEWS (Jan. 25, 2017), <https://abcnews.go.com/Politics/transcript-abc-news-anchor-david-muir-interviews-president/story?id=45047602>

312 *Id.*

313 See Wright, *supra* note 310.

314 See DEPARTMENT OF DEFENSE LAW OF WAR MANUAL, *supra* note 8, § 5.17.4.2 (noting that pillage was common during the medieval era "but it ceased to be regarded as lawful with the widespread adoption of standing armies at the end of the Eighteenth Century"); see also *supra* text accompanying notes 290–291 (noting that pillage was prohibited in both the Lieber Code of 1863 and the Hague Regulations of 1907).

### F. Views on Protection of Cultural Heritage

President Trump has proposed deliberately attacking cultural property, which is a war crime. Cultural heritage sites are protected by international law. The 1954 Hague Convention for the Protection of Cultural Property, to which the U.S. is a party,<sup>315</sup> affirms that states must “respect cultural property” and “refrain[] from any act of hostility directed against any such property.”<sup>316</sup> It also specifically forbids “reprisals against cultural property.”<sup>317</sup> Attacks on cultural property are also prohibited by the Additional Protocols to the Geneva Conventions.<sup>318</sup> The prohibition on attacking cultural property<sup>319</sup> is now widely accepted to have become part of customary international law.<sup>320</sup>

Moreover, the deliberate violation of this prohibition is a war crime.<sup>321</sup> For example, the International Criminal Tribunal for the former Yugoslavia (ICTY) prosecuted attacks on cultural property, particularly the deliberate shelling of the historic medieval town of Dubrovnik.<sup>322</sup> These trials resulted in the convictions of Lt. General Pavle Strugar and Vice Admiral Miodrag Jokic for the crime of attacking cultural property.<sup>323</sup> More recently, the ICC prosecuted Ahmad Al Faqi Al Mahdi for the deliberate destruction of Muslim holy sites in the city of Timbuktu.<sup>324</sup> Al Mahdi pled guilty and was

315 See List of States Parties for the Convention for the Protection of Cultural Property in the Event of Armed Conflict, INT’L COMM. RED CROSS, [https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=XPages\\_NORMStatesParties&xp\\_treatySelected=400](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=400) (last visited Jan. 11, 2021).

316 See Convention for the Protection of Cultural Property, *supra* note 63, art. 4(1). This prohibition can be thought of as a specific application of the general principle of distinction. Cultural sites are, by their nature, civilian objects rather than military ones. As such, they cannot be deliberately attacked except in some very limited circumstances.

317 *Id.* art. 4(4)

318 See Additional Protocol I, *supra* note 59, art. 53; Additional Protocol II, *supra* note 59, art. 16.

319 See HENCKAERTS & DOSWALD-BECK, *supra* note 6, Rule 38 (“Each party to the conflict must respect cultural property” and “special care must be taken in military operations to avoid damage” to cultural property).

320 *Id.* at 127 (noting that state practice demonstrates that the prohibition on attacks on cultural property is “a norm of customary international law applicable in both international and non-international armed conflicts”).

321 See, e.g., Rome Statute, *supra* note 10, art. 8(2)(b)(ix) (prohibiting directing attacks against “buildings dedicated to religion, education, art, science or charitable purposes, [or] historic monuments”).

322 See Serge Brammertz, Kevin C. Hughes, Alison Kipp & William B. Tomljanovich, *Attacks Against Cultural Heritage as a Weapon of War: Prosecutions at the ICTY*, 14 J. INT’L CRIM. JUST. 1143, 1151–70 (2016).

323 *Id.* at 1158.

324 See Mark B. Ellis, *The ICC’s Role in Combating the Destruction of Cultural Heritage*, 49 CASE W. J. INT’L L. 23, 24–31 (2017).



sentenced to nine years in jail.<sup>325</sup>

In early January 2020, President Trump ordered an attack that killed a senior Iranian military official – Major General Qassin Suleimani.<sup>326</sup> Iran responded by firing missiles at U.S. troops in Iraq.<sup>327</sup> In the midst of this, President Trump took to Twitter to threaten to attack cultural heritage sites in Iran in retaliation for any attack on the U.S. or its forces.<sup>328</sup> He later reiterated his determination to attack Iranian cultural sites to reporters aboard Air Force One, saying “They’re allowed to kill our people.... And we’re not allowed to touch their cultural site? It doesn’t work that way.”<sup>329</sup> The President was immediately condemned for making the threat.<sup>330</sup> Shortly thereafter, U.S. Defense Secretary Mark Esper acknowledged that attacking cultural heritage sites would violate IHL and stressed that the U.S. military would “follow the laws of armed conflict.”<sup>331</sup> Thus, if the President were to order U.S. forces to attack Iranian cultural sites in retaliation for a military attack on U.S. forces, he would be committing a war crime.

325 *Id.* at 29–30.

326 See Peter Baker, Ronen Bergman, David D. Kirkpatrick, Julian E. Barnes & Alissa J. Rubin, *Seven Days in January: How Trump Pushed U.S. and Iran to the Brink of War*, N.Y. TIMES (Jan. 11, 2020), <https://www.nytimes.com/2020/01/11/us/politics/iran-trump.html>.

327 See Alissa J. Rubin, Farnaz Fassihi, Eric Schmitt & Vivian Yee, *Iran Fires on U.S. Forces at 2 Bases in Iraq, Calling It ‘Fierce Revenge’*, N.Y. TIMES (Jan. 7, 2020), <https://www.nytimes.com/2020/01/07/world/middleeast/iran-fires-missiles-us.html>.

328 See Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 4, 2020, 5:52 PM), <https://twitter.com/realDonaldTrump/status/1213593975732527112?s=20> (“Let this serve as a WARNING that if Iran strikes any Americans or American assets, we have . . . targeted 52 Iranian sites (representing the 52 American hostages taken by Iran many years ago), some at a very high level and important to Iran & the Iranian culture, and those targets, and Iran itself, WILL BE HIT VERY FAST AND VERY HARD.”).

329 See Maggie Haberman, *Trump Threatens Iranian Cultural Sites, and Warns of Sanction on Iraq*, N.Y. TIMES (Jan. 5, 2020), <https://www.nytimes.com/2020/01/05/us/politics/trump-iran-cultural-sites.html?searchResultPosition=3>.

330 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>.

331 See Peter Baker & Maggie Haberman, *Pentagon Rules Out Striking Iranian Cultural Sites, Contradicting Trump*, N.Y. TIMES (Jan. 6, 2020), <https://www.nytimes.com/2020/01/06/us/politics/trump-esper-iran-cultural-sites.html?searchResultPosition=1>. The Defense Secretary’s position is consistent with the official U.S. position, which – along with international law – prohibits attacks on cultural property. See DEPARTMENT OF DEFENSE LAW OF WAR MANUAL, *supra* note 8, § 5.18 (describing U.S. obligations to protect cultural property); *id.* at § 5.18.5 (“In general, acts of hostility may not be directed against cultural property . . .”).

### G. Conclusion

So, what does this tell us about the President's views on IHL? For one thing, the President does not understand or accept the rules of IHL, not even the most basic ones.<sup>332</sup> His call to kill the family members of his enemies demonstrates that he does not understand the most important rule in IHL – the principle of distinction.<sup>333</sup> In fact, he appears to be remarkably out of step with the times. Torture, the killing of prisoners, and pillage have been unlawful since the mid nineteenth century.<sup>334</sup> Collective punishment has been outlawed since at least 1899.<sup>335</sup> In short, President Trump's beliefs about IHL are at least 100 years out of date.<sup>336</sup>

He has repeatedly called for actions that are unequivocally illegal.<sup>337</sup> His threat to attack cultural heritage sites in Iran would be both illegal and a war crime.<sup>338</sup> His call to torture America's enemies would be both illegal and a war crime.<sup>339</sup> His desire to pillage Syria's oil would be both illegal and a war crime.<sup>340</sup> His plan to kill the families of combatants would be both illegal and a war crime.<sup>341</sup> Finally, he has praised the execution of prisoners, which is both illegal and a war crime.<sup>342</sup> Indeed, by pardoning Major Golsteyn, who admitted to executing a prisoner, he may have already committed a war crime.<sup>343</sup>

President Trump's record on IHL is truly astonishing and makes him

332 This is perhaps not surprising given his lack of military experience and general disdain for expertise. See *supra* text accompanying notes 12–14. President Trump also appears to be ignorant about international law more generally. See David Brennan, *Trump's 'Ignorance' About International Law Is 'Extreme Even by U.S. Standards': Expert*, NEWSWEEK (Jan. 15, 2020), <https://www.newsweek.com/donald-trump-ignorance-international-law-extreme-us-standards-expert-1482319>.

333 See *supra* text accompanying notes 236–258.

334 See *supra* notes 205, 270, 290–291 (noting that torture, killing prisoners, and pillage were all outlawed by the time of the Lieber Code in 1863).

335 See *supra* text accompanying notes 244–245.

336 It is worth noting that when the President has discussed the use of violence in domestic contexts, he has often yearned for a return to the “good old days” when the use of indiscriminate violence against ones enemies was permitted. See *supra* text accompanying notes 164–165.

337 See Ryan Pickrell, *Trump's Threat to Destroy Iranian Cultural Sites Is One of Many Times He's Supported Potential War Crimes and Atrocities*, BUS. INSIDER (Jan. 6, 2020), <https://www.businessinsider.com/trump-has-repeatedly-shown-support-for-possible-war-crimes-atrocities-2020-1>.

338 See *supra* Section VI.F.

339 See *supra* Section VI.B.

340 See *supra* Section VI.E.

341 See *supra* Section VI.C.

342 See *supra* Section VI.D.

343 See *supra* text accompanying note 287.

unique among modern U.S. Presidents.<sup>344</sup> While American Presidents often push the boundaries of IHL,<sup>345</sup> President Trump wants to get rid of IHL entirely.<sup>346</sup> He has repeatedly called for violating IHL's central tenets<sup>347</sup> and has shown little awareness that his actions would be illegal.<sup>348</sup> In the rare instances where he recognizes that his actions would be unlawful, he has said he would go ahead with them anyway.<sup>349</sup> No modern President has essentially proposed doing away with IHL and reverting to a system where

344 See Pickrell, *supra* note 337 (quoting an expert on military law who said "I think President Trump celebrates war crimes. He boasts of his willingness to do anything"); Andrew Sullivan, *Donald Trump Is the War Crimes President*, N.Y. MAG. (Jan. 10, 2020), <https://nymag.com/intelligencer/2020/01/andrew-sullivan-donald-trump-is-the-war-crimes-president.html> (describing President Trump as "unique in the history of the U.S." because of his willingness to condone, threaten, and propose committing war crimes); Donald J. Guter, John D. Hutson & Rachel VanLandingham, *The American Way of War Includes Fidelity to Law: Preemptive Pardons Break that Code*, JUST SEC. (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 decision to preemptively pardon members of the military charged with war crimes is unprecedented).

345 For example, the decision by President Bush to treat Taliban and al Qaeda prisoners as unlawful combatants was quite controversial and resulted in significant criticism. See, e.g., Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT'L L.J. 367, 370 (2004) (noting that the U.S. decision to treat captured prisoners as unlawful combatants "has been sharply criticized by allied governments, inter-governmental organizations, prominent human rights and humanitarian law organizations, and foreign courts").

346 See Brennan, *supra* note 332 (quoting one international law expert as saying that while past U.S. Presidents have at least tried to justify apparent violations of international law, President Trump "seemed to delight, both as a candidate and as president, in ignoring and even ridiculing international law"); *id.* (quoting another expert as saying that President Trump is "such an anomalous figure to be president of the United States or any other democracy that it throws a lot of the normal understanding of appropriate behavior out of the window"); *id.* (quoting a third expert as saying that President Trump's positions on international law boiled down to "We're not going to follow the law"); *cf.* Koh, *supra* note 1, at 420 (noting that the "Trump approach does not value concerted efforts to translate existing legal rules but rather claims that there are no [international] rules that bind our conduct").

347 Two of the most important prohibitions in IHL are the prohibition on killing non-combatants and the prohibition on killing prisoners, and Trump has proposed violating both. See *supra* Sections VI.C.–VI.D.

348 For example, he confidently claimed that the United States could legally attack Iranian cultural sites. See *supra* text accompanying note 329. He was wrong. See *supra* text accompanying notes 315–321, 331. He also called critics who said his pillaging of another state's oil would constitute a crime "fools." See *supra* text accompanying note 312. The "fools" were right, and he was wrong. See *supra* text accompanying notes 310–314.

349 For example, he admitted that even if waterboarding were illegal (which it is) he would do it anyway. See *supra* text accompanying note 233.

“might makes right”<sup>350</sup> and “to the victor go the spoils.”<sup>351</sup>

While he may not understand IHL, his view on it is consistent with his general beliefs about international law and violence. Consistent with his attitude towards international law, he largely rejects IHL on the grounds that it represents an attempt to undermine and weaken the United States.<sup>352</sup> This can be seen in his public comments about torture where he claimed that following the rules that prohibit torture makes the United States “weak” and “stupid.”<sup>353</sup> His views on the use of violence during armed conflicts are consistent with his views on the use of violence in domestic settings.<sup>354</sup> He valorizes violence, particularly violence aimed at the weak or vulnerable.<sup>355</sup> This can be seen in his calls to kill the family members of his enemies and his praise for soldiers who have executed prisoners.<sup>356</sup>

While President Trump does not understand IHL, he does have a consistent worldview when it comes to law and violence. Unfortunately, that worldview is profoundly anomalous. No modern American President has so directly attacked the rules that govern the conduct of war. But how successful has President Trump been in converting his beliefs about IHL into action? That question will be explored in the next Section.

350 President Trump’s views on international law and foreign policy boil down to: The United States is powerful and can do whatever it wants. *See supra* Section IV. In other contexts, he has also appeared to accept that might makes right. For example, he tacitly supported Russia’s illegal annexation of Crimea. *See* Nicole Gaouette, *Trump Refuses to Condemn Russian Aggression Against Ukraine*, CNN (Nov. 27, 2018), <https://www.cnn.com/2018/11/26/politics/russia-ukraine-trump-silence/index.html> (noting that President Trump has refused to condemn the annexation of Crimea); Krishnadev Calamur, *Donald Trump’s Crimean Gambit*, ATLANTIC (July 27, 2016), <https://www.theatlantic.com/news/archive/2016/07/trump-crimea/493280/> (noting that Donald Trump had said that if here were President he would “look[] at” recognizing Russia’s annexation of Crimea); *see also* Koh, *supra* note 1, at 415 (expressing a concern that the Trump Administration was engaged in a “slow backsliding of our Kantian postwar system into a more cynical, Orwellian system of global governance far less respectful of democracy, human rights, and the rule of international law”); *id.* at 466–67.

351 *See supra* text accompanying note 310 (noting that President Trump said, in connection with seizing Iraq’s oil, that “to the victor belong the spoils”); *see also* Joseph O’Mahoney, *Trump Says that Spoils Belong to the Victor. That’s an Invitation to More War*, WASH. POST (Feb. 1, 2017, 10:00 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/01/trump-says-that-spoils-belong-to-the-victor-thats-an-invitation-to-more-war/> (noting President Trump’s use of the phrase “to the victor belong the spoils” and comparing it to the way the Great Powers acted during the nineteenth century).

352 *See supra* Section VI.A.

353 *See supra* text accompanying notes 201–202.

354 *See supra* Section V.

355 This is analogous to his domestic politics, where he has demonized “others” including immigrants and racial and ethnic minorities. *See* Ziv et al., *supra* note 99, at 1000 (“Trump’s disdain for ‘others’ (e.g., immigrants, racial/ethnic minorities) is no state secret.”).

356 *See supra* Sections VI.C)–VI.D.

## VII. THE PRESIDENT'S ABILITY TO IMPLEMENT HIS VIEWS

President Trump has a truly radical view of IHL, one that would – if implemented – roll back IHL by more than a hundred years. But how successful has President Trump been in turning this radical “vision”<sup>357</sup> of IHL into action? The answer is: not very successful.

While candidate Trump confidently boasted that he could get the U.S. military to commit war crimes (“They won’t refuse. . . . If I say do it, they’re going to do it.”),<sup>358</sup> the reality is that he has been largely unable follow through on his desire to violate IHL. For example, President Trump has repeatedly argued in favor of torturing people,<sup>359</sup> but he has been unable to engage in torture because U.S. law prohibits waterboarding as well as a number of other forms of torture that were previously practiced by the CIA.<sup>360</sup> President Trump’s administration drafted an executive order<sup>361</sup> that proposed re-opening CIA black sites<sup>362</sup> and reconsidering the rules governing interrogation.<sup>363</sup> While the draft decried how “Congress recently imposed further restrictions on the ability of the Central Intelligence Agency to maintain an effective and lawful interrogation program,”<sup>364</sup> it nevertheless acknowledged that detainees in the custody of the United States can never be subjected to “torture, cruel, inhuman or degrading

357 The word “vision” is in quotes here because it is not clear that President Trump has anything as cohesive as a vision of what he thinks IHL should look like. See *supra* Section VI.A. Rather, he has a consistent worldview that rejects both the rule of law and restrictions on violence. See *supra* Sections IV–V. In the context of IHL, this has caused President Trump to take positions that would undermine the central tenets of IHL. See *supra* Section VI.G. But it is not clear that he has a concrete plan or vision for making changes to IHL.

358 See Victor Morton, *Trump Says He’d Force U.S. Military to Commit War Crimes*, WASH. TIMES (Mar. 3, 2016), <https://www.washingtontimes.com/news/2016/mar/3/donald-trump-says-hed-force-us-military-commit-war/>.

359 See *supra* Section VI.B.

360 See *supra* text accompanying notes 211–212.

361 For a general description of the draft Executive Order, see Mark Mazzetti & Charlie Savage, *Leaked Draft of Executive Order Could Revive C.I.A. Prisons*, N.Y. TIMES (Jan. 25, 2017), <https://www.nytimes.com/2017/01/25/us/politics/executive-order-leaked-draft-national-security-trump-administration.html>; Charlie Savage, *Draft Order on ISIS Detainees and Guantánamo*, N.Y. TIMES (Feb. 8, 2017), <https://www.nytimes.com/interactive/2017/02/08/us/document-Revised-draft-Trump-EO-on-detainees-and-Gitmo.html> (text of order).

362 The draft calls for government to “recommend to the President whether to reinstate a program of interrogation of high-value alien terrorist to be operated outside the United States and whether such program should include the use of detention facilities operated by the Central Intelligence Agency (CIA).” Savage, *supra* note 361.

363 “The Secretary of Defense [in consultation with others] shall review the interrogation policies set forth in Army Field Manual 2-22.3 of September 6, 2006, and shall make such modifications in and additions to those policies, as consistent with the law, for the safe, lawful, and effective interrogation of enemy combatants . . . .” *Id.* § 5.

364 *Id.* pmb1.

treatment” and reiterated that all “officers, employees, and other agents of the United States” must comply with the law.<sup>365</sup> The draft was immediately criticized,<sup>366</sup> and President Trump promptly backtracked saying that while he believed torture worked, he would defer to his national security team in deciding whether to reinstitute waterboarding.<sup>367</sup> The proposal to reconsider interrogation tactics was never implemented.<sup>368</sup>

President Trump was similarly unable to implement his plan to attack Iranian cultural heritage sites. He started by saying that he had a list of Iranian cultural heritage sites he intended to attack.<sup>369</sup> He followed this up by confidently declaring such attacks would be lawful.<sup>370</sup> This, of course, is wrong – attacking cultural heritage sites is both a war crime<sup>371</sup> and prohibited by the rules that govern the U.S. military.<sup>372</sup> The President’s statements resulted in an immediate outcry, and the U.S. Secretary of Defense publicly stressed that such attacks would violate IHL and that the U.S. would not attack Iranian cultural heritage sites.<sup>373</sup>

The President also failed to implement his plans to pillage Syria’s oil. Pillage violates both international and U.S. law.<sup>374</sup> So, it is not a surprise that the President was unable to turn his statements into action. The U.S. did send troops to secure certain Syrian oil fields, but the Chairman of the Joint Chiefs of Staff, General Mark Milley, carefully stressed that this was done to prevent ISIS from recapturing them – not to seize the oil for the U.S.<sup>375</sup> In response to the President’s claim that he was taking Syria’s oil for the United States, a State Department spokesperson issued a statement

<sup>365</sup> *Id.* § 9.

<sup>366</sup> See Mazzetti & Savage, *supra* note 361.

<sup>367</sup> See Arlette Saenz, *President Trump tells ABS News’ David Muir He ‘Absolutely’ Thinks Waterboarding Works*, ABC NEWS (Jan. 25, 2017), <https://abcnews.go.com/Politics/president-trump-tells-abc-news-david-muir-absolutely/story?id=45045055>.

<sup>368</sup> Parts of the draft executive order were ultimately contained in Executive Order 13823. See Exec. Order No. 13,823, 3 C.F.R. 13,823 (Jan. 30, 2018). But Executive Order 13823 dropped the portions of the earlier draft order that directed the administration to reconsider the limits on interrogations. See *The Trump Administration’s Executive Order on Guantanamo*, HUM. RTS. FIRST (Feb. 6, 2018), <https://www.humanrightsfirst.org/resource/trump-administrations-executive-order-guantanamo>.

<sup>369</sup> See *supra* note 328.

<sup>370</sup> See *supra* note 329.

<sup>371</sup> See *supra* Section VI.F.

<sup>372</sup> See DEPARTMENT OF DEFENSE LAW OF WAR MANUAL, *supra* note 8, § 5.18 (describing the rules that govern the protection of cultural heritage during hostilities).

<sup>373</sup> See Baker & Haberman, *supra* note 331.

<sup>374</sup> See *supra* Section VI.E.

<sup>375</sup> See David Welna, *If U.S. Takes Syrian Oil, It May Violate International Laws Against Pillage*, NPR (Oct. 30, 2019, 11:34 AM), <https://www.npr.org/2019/10/30/774521472/if-u-s-takes-syrian-oil-it-may-violate-international-laws-against-pillage>.

saying “any claim that the United States is stealing oil from Syria is completely false.”<sup>376</sup> The spokesperson went on to stress that the “Syrian oil is for the Syrian people.”<sup>377</sup>

President Trump’s only success has been to pardon U.S. service members accused or convicted of war crimes.<sup>378</sup> The President has nearly unlimited authority to issue pardons under U.S. law.<sup>379</sup> Thus, the President was able to pardon the service members despite significant opposition from both inside and outside his administration,<sup>380</sup> but the President’s acts have had relatively little effect on IHL. Murdering civilians and prisoners is still a violation of both international and U.S. law.<sup>381</sup> So, while the President can pardon individual offenders, he cannot easily change U.S. law, let alone international law. Indeed, his actions might expose him to criminal liability.<sup>382</sup>

Ultimately, the President has not been successful in converting his statements about IHL into action. He has repeatedly and confidently claimed that something was possible only to back down when it became clear that his plan was both unlawful and probably criminal. His ignorance<sup>383</sup> and lack of a clear plan<sup>384</sup> have hurt him. By failing to understand what IHL permits, he has repeatedly made statements or calls for action that cannot be implemented without violating U.S. and international law. By failing to have a clear plan for changing IHL,<sup>385</sup> he often embarked on quixotic attacks that failed because of a lack of planning and follow-through.<sup>386</sup> His failures to change IHL mirror many of his

376 See Brennan, *supra* note 307.

377 *Id.*

378 See *supra* Section VI.D.; see also Ford, *supra* note 18, at 760–764 (describing instances where President Trump pardoned soldiers accused or convicted of war crimes).

379 See Chris Jenks, *Sticking It To Yourself: Preemptive Pardons for Battlefield Crimes Undercut Military Justice and Military Effectiveness*, JUST SEC. (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 regardless of the appropriateness of the pardon); 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 intrusted [sic] the power of pardon; and it is granted without limit.”).

380 See Ford, *supra* note 18, at 767–769, 779–780.

381 See *supra* Section VI.D.

382 See Ford, *supra* note 18, at 770–789.

383 See *supra* text accompanying notes 332–334 (noting that President Trump’s statements demonstrate that he does not understand even the basics of IHL).

384 See *supra* text accompanying note 357 (noting that President Trump lacks a clear vision or plan for how we want to change IHL).

385 President Trump is not known for his attention to detail and careful planning. See *supra* note 12.

386 In answer to the question posed by the title of this Article, President Trump’s ignorance,

overall failures to change U.S. foreign policy. Both are driven by in-the-moment outrage but lack any clear plan for accomplishing the changes and fail to recognize the legal obstacles to their implementation.<sup>387</sup>

### VIII. THE FUTURE OF IHL

What effect, if any, will President Trump have on the future of IHL?<sup>388</sup> At the time of writing,<sup>389</sup> Joe Biden is projected to be the next President by every major news network,<sup>390</sup> but President Trump has refused to concede<sup>391</sup> and continues to pursue litigation in hopes of changing the outcome.<sup>392</sup> Many major Republican figures have refused to recognize Joe Biden as the winner<sup>393</sup> and misinformation about the election is rampant on social media.<sup>394</sup> Nevertheless, it seems likely that Joe Biden will be inaugurated

inability to grapple with reality, and repeated failures make him look more like Don Quixote than Darth Vader.

387 See Harold Hongju Koh, *Trump vs. International Law: He's Not Winning*, OPINIOJURIS (Feb. 10, 2018), <http://opiniojuris.org/2018/10/02/trump-vs-international-law-hes-not-winning/> (“A pattern has emerged whereby Trump announces that he will disrupt a previously settled relationship, the media reacts, the allies and opponents push back, and policy resettles roughly where it was before Trump roiled the waters. . . . So outside the headlines, key national security and defense policies continue to be made according to longstanding legal and policy principles, often embodied in established legal and policy frameworks embedded in congressional framework statutes, executive orders, presidential policy guidance, and institutional custom.”); Goldsmith, *supra* note 1 (noting that there is a “loud” way and a “quiet” way to pull back from international law and that President Trump prefers the loud way but that the “loud way . . . invites heightened resistance and retaliation”).

388 Cf. Koh, *supra* note 1, at 414 (noting that “[a] looming question is whether the Trump Administration’s many initiatives will permanently change the nature of America’s relationship with international law and its institutions”).

389 The bulk of this Article was written in May and June 2020. This section was updated in November 2020, shortly after the Presidential election.

390 See John Koblin, Michael M. Grynbaum & Tiffany Hsu, *Tension, Then Some Tears, as TV News Narrates a Moment for History*, N.Y. TIMES (Nov. 7, 2020), <https://www.nytimes.com/2020/11/07/business/media/presidential-election-tv-networks-call.html> (noting that CNN, NBC, ABC, CBS, the Associated Press, and Fox News all projected that Joe Biden won the election).

391 See Emily Cochrane, *Republican Congressional Leaders Remain Silent on Biden Victory as Trump Refuses to Concede*, N.Y. TIMES (Nov. 8, 2020), <https://www.nytimes.com/2020/11/08/us/elections/republican-congressional-leaders-remain-silent-on-biden-victory-as-trump-refuses-to-concede.html>.

392 See Jim Rutenberg, Nick Corasaniti & Alan Feuer, *With No Evidence of Fraud, Trump Fails to Make Headway on Legal Cases*, N.Y. TIMES (Nov. 6, 2020), <https://www.nytimes.com/2020/11/06/us/politics/trump-election-voter-fraud.html>.

393 See Katie Edmondson, *Who’s Going to Tell Him? Republicans Shy from Asking Trump to Concede*, N.Y. TIMES (Nov. 10, 2020), <https://www.nytimes.com/2020/11/10/us/politics/republicans-trump-concede.html>.

394 See, e.g., Davey Alba, *False Claims that Biden ‘Lost’ Pennsylvania Surge, and Tech Companies Struggle to Keep Up*, N.Y. TIMES (Nov. 10, 2020), <https://www.nytimes.com/2020/11/10/technology/false-claims-that-biden-lost-pennsylvania-surge-and-tech-companies-struggle-to-keep-up.html>. There appears to be very little evidence of voter fraud



as the next President of the United States in January 2021.

This means that President Trump will only be President for a few more months. It seems unlikely that he can do much additional damage to IHL in his remaining time in office.<sup>395</sup> Moreover Joe Biden's win represents a return to normalcy for the United States. For example, Biden's campaign website states that he will "reaffirm the ban on torture" and "[r]evitalize our national commitment to advancing human rights and democracy around the world."<sup>396</sup> Thus, President Biden will likely return to many of the policies that characterized President Obama's presidency<sup>397</sup> and put an end to the assault on IHL that has occurred under President Trump.<sup>398</sup> This means that President Trump's effect on IHL will largely be limited to what he has already accomplished. And, as noted above, President Trump has largely failed in implementing his vision of IHL.<sup>399</sup>

IHL has turned out to be very resilient for several reasons.<sup>400</sup> First, IHL is deeply embedded in U.S. law, particularly the rules and regulations that govern the U.S. armed forces. At one point, President Trump confidently said that he could order the U.S. military to violate IHL and they would comply.<sup>401</sup> However, that claim was based on a fundamental

and no evidence of systematic voter fraud that could change the outcome of the election. See Nick Corasaniti, Reid J. Epstein & Jim Rutenberg, *The Time Called Officials in Every State: No Evidence of Voter Fraud*, N.Y. TIMES (Nov. 10, 2020), <https://www.nytimes.com/2020/11/10/us/politics/voting-fraud.html>.

395 But see Garrett M. Graff, *'I'm Absolutely Expecting Him to Do Something Weird': How Trump Could End His Presidency*, POLITICO (Oct. 28, 2020), <https://www.politico.com/news/magazine/2020/10/28/trump-wild-transition-433025> (noting that the "lame duck period is always a time when outgoing presidents feel free to stir up controversy" and that President Trump, "a president who has spent four years demonstrating his lack of interest in norms and practices of a democracy," might use the power of the presidency to further undermine democracy and the rule of law); Rani Molla, *What Trump Can Do During His Lame Duck Session*, VOX (Nov. 9, 2020, 2:00 PM), <https://www.vox.com/2020/11/9/21552855/trump-lame-duck-pardon-executive-order-firing-transition>.

396 See *The Power of America's Example: The Biden Plan for Leading the Democratic World to Meet the Challenges of the 21st Century*, BIDEN HARRIS, <https://joebiden.com/americanleadership/> (last visited Jan. 12, 2021).

397 Cf. *id.* (noting that Biden would return to "policies instituted during the Obama-Biden administration to reduce civilian casualties"). He has also said he would restore U.S. support for NATO, rejoin the Iran nuclear deal, the Paris climate accord, and strengthen alliances with the United States' traditional allies. See *President-Elect Biden on Foreign Policy*, COUNCIL ON FOREIGN RELATIONS, <https://www.cfr.org/election2020/candidate-tracker/joe-biden> (last updated Nov. 7, 2020).

398 Biden does not appear to have taken an explicit position on IHL generally. The closest he comes is with his commitment to reaffirm the ban on torture. See *supra* text accompanying note 396.

399 See *supra* Section VI.

400 Having said that, it is possible that if President Trump has made a more concerted and better-planned effort to undermine IHL, he could have done more damage. See *supra* text accompanying notes 383–387.

401 See Morton, *supra* note 358.

misunderstanding of U.S. law. All members of the U.S. armed services are required to comply “in good faith” with the laws of war.<sup>402</sup> The Department of Defense notes that soldiers should ordinarily presume that the orders given by superiors are lawful,<sup>403</sup> but also stresses U.S. soldiers “must refuse to comply with clearly illegal orders to commit” violations of IHL.<sup>404</sup> In effect, U.S. soldiers must disobey orders that are clearly illegal.<sup>405</sup>

Most of the IHL violations discussed in this Article are clearly illegal. There is no doubt that torturing prisoners, executing prisoners, and deliberately targeting non-combatants are unlawful.<sup>406</sup> These are not issues where the legality is debatable. They are all clearly and firmly illegal and have been illegal in many cases for more than a hundred years.<sup>407</sup> Thus, members of the U.S. military would be obligated not to comply with orders to commit such crimes.<sup>408</sup> President Trump cannot simply order the U.S. military to commit serious violations of IHL and expect it to comply.

In addition to a legal obligation to respect IHL, the U.S. military has a strong practical commitment to IHL: “Compliance with the laws of war is not only legally required but also in the strong self-interest of everyone subject to the law of war.”<sup>409</sup> According to the U.S. military, “[u]se of indiscriminate force and excessive force is costly, highly inefficient, and a waste of scarce resources.”<sup>410</sup> The Department of Defense also notes that the reciprocity inherent in the universal application of IHL benefits the U.S.<sup>411</sup> The U.S. military also believes that violations of IHL are counterproductive because they undermine “the political goals sought to be

402 See DEPARTMENT OF DEFENSE LAW OF WAR MANUAL, *supra* note 8, § 18.3.1.

403 *Id.* § 18.3.2.1.

404 *Id.* § 18.3.2. The regulations give, as an example of a clearly illegal order, an order “to kill defenseless persons who have submitted to and are under effective physical control.” See *id.* § 18.3.2.1. Thus, according to the Department of Defense, all U.S. service members would be obligated to refuse to comply with an order to kill prisoners.

405 This is analogous to the standard under international law, which requires soldiers to refuse to comply with manifestly illegal orders. For example, under the Rome Statute, soldiers have a defense of complying with superior orders that serves as a complete defense to criminal liability when they comply with an order given by a superior. That defense is unavailable, however, when the order that was given was “manifestly unlawful.” See Rome Statute, *supra* note 10, art. 33(1). The effect is that soldiers are required to refuse manifestly illegal orders and the failure to do so exposes them to criminal liability.

406 See *supra* Section VI. Indeed, the Department of Defense describes an order to kill prisoners as the kind of manifestly unlawful order that must be disobeyed. See *supra* note 404.

407 See *supra* text accompanying note 334.

408 See Koh, *supra* note 1, at 434 (noting that several senior members of the Trump administration who were former military officers publicly stated that they would not follow an order to commit torture).

409 See DEPARTMENT OF DEFENSE LAW OF WAR MANUAL, *supra* note 8, § 18.2.

410 *Id.* § 18.2.1.

411 *Id.* § 18.2.2 (“For example, humane treatment of enemy persons detained by U.S. forces can encourage enemy forces to treat detained U.S. persons humanely.”).

achieved by military operations.”<sup>412</sup> In short, the U.S. military follows IHL because it serves the interest of the U.S. not just because it is required by international law.

Finally, seriously undermining the U.S. military’s commitment to IHL would require a culture change within the military. The U.S. military has a very strong commitment to the concept of honor.<sup>413</sup> “Honor forbids the resort to means, expedients or conduct that would constitute a breach of trust . . . .”<sup>414</sup> Honor provides the foundation of the obligation to implement and enforce the laws of war.<sup>415</sup> Violating the rules of IHL would require the military to act dishonorably.<sup>416</sup> Consequently, it would be hard to get the military to comply with orders to violate IHL without fundamentally changing the military’s culture. Thus, it is little surprise that the military has been resistant to President Trump’s calls for serious violations of IHL.<sup>417</sup>

In addition, while IHL is incorporated into domestic law in the United States, it is fundamentally international in nature. It is formed from an interlocking network of treaties and customary international law that has accumulated over the last 150 years.<sup>418</sup> Today, most of IHL’s key principles are customary international law,<sup>419</sup> meaning they represent a general practice amongst states that is accepted as law.<sup>420</sup> This means that IHL will remain resistant to change so long as most other states continued to treat the core principles of IHL as law. There is no reason to believe that many states want to embrace President Trump’s vision of an international order where might makes right. Some powerful states, like China and Russia,<sup>421</sup> might

412 *Id.* § 18.2.3.

413 *See id.* § 2.6.1 (“U.S. military canons of personal conduct continue to emphasize the importance of honor as a core value. Honor as a core value and other ethical norms continue to be vital as a medium for the implementation of the law of war.”).

414 *Id.* § 2.6.2.

415 *Id.* § 2.6.2.1.

416 *See, e.g., id.* § 5.9.4 (stating that it would be “dishonorable” to attack “[p]ersons who have been incapacitated by wounds, sickness, or shipwreck”).

417 As recently as July 2020, the Department of Defense reaffirmed its commitment to IHL. *See* U.S. DEP’T OF DEF., DIR. 2311.01, LAW OF WAR PROGRAM ¶ 1.2(a) (July 2, 2020). In that Directive, the Department of Defense reaffirmed that the U.S. military must “comply with the law of war during all armed conflicts,” made a specific reference to the protections of Common Article 3 of the Geneva Conventions, and stressed its commitment to the principles of humanity, distinction, and proportionality. *Id.*

418 *See supra* Section II.

419 *Id.*

420 ICJ Statute, *supra* note 64, art. 38(1)(b).

421 For example, Russia’s illegal annexation of Crimea fits a “might makes right” paradigm. *See supra* text accompanying notes 146, 350; *see also* Koh, *supra* note 1, at 468 (noting that “China, Russia, and illiberal democracies like Hungary, Poland, and Venezuela are emerging not just as spoilers of, but as active predators within, the liberal international order”).

temporarily<sup>422</sup> benefit from such a system,<sup>423</sup> but most states would not.<sup>424</sup> Consequently, it is unlikely that a critical mass of states will follow President Trump's lead in trying to undermine the central tenets of IHL. For these reasons, it seems unlikely that President Trump's actions will fundamentally change the trajectory of IHL. President Trump has had a greater impact in some other areas,<sup>425</sup> but he will not have a lasting effect on IHL.

### IX. CONCLUSION

As this Article demonstrates, President Trump does have a consistent worldview that informs how he views IHL. While he has not articulated a formal IHL policy,<sup>426</sup> his statements and actions reflect his underlying worldview.<sup>427</sup> This worldview is structured around two beliefs: (1) international law was created and imposed on the United States by other countries for the purpose of weakening the United States<sup>428</sup>; and (2) violence is heroic and praiseworthy.<sup>429</sup>

These beliefs have predictable consequences when applied to IHL – a branch of international law that limits indiscriminate and inhumane uses of violence. First, his rejection of the constraints imposed by law generally predisposes him to reject international humanitarian law.<sup>430</sup> Second, his valorization of violence causes him to reject the limitations on violence

422 See Koh, *supra* note 1, at 418–19 (arguing that Great Powers cannot rely simply on “hard military or economic force” to dominate other states because they cannot sustain it and become “plagued by external debt, national exhaustion, and internal dissension”).

423 See Amirfar & Singh, *supra* note 1, at 459 (“There are indubitably States that would relish a return to a global order that is a Hobbesian free-for-all, where power is the only arbiter and the strong States dominate the weak.”).

424 *Id.* (noting that it “took the world centuries to inch away from that model [a Hobbesian free-for-all] and towards a system of international cooperation” and that international cooperation “is the only way to build sustainable solutions to truly international problems such as climate change, migration, and war”); Koh, *supra* note 1, at 419 (arguing that “wise nations” need allies, multilateral institutions, and international law to help them achieve their goals and noting that “most international cooperation comes not from coercion but from joint action motivated by shared values”).

425 See, e.g., Coral Davenport, *What Will Trump's Most Profound Legacy Be? Possibly Climate Damage*, N.Y. TIMES (Nov. 9, 2020), <https://www.nytimes.com/2020/11/09/climate/trump-legacy-climate-change.html> (arguing that President Trump's most enduring legacy may be making it much more difficult to slow or reverse the effects of climate change).

426 See *supra* Section VI.A.

427 See *supra* Section VI.G.

428 See *supra* Section IV.

429 See *supra* Section V.

430 See *supra* Section VI.G.

embodied in IHL.<sup>431</sup> The result is that he has consistently rejected IHL.<sup>432</sup> So, for example, he has described IHL as a set of rules that makes the U.S. “weak” and “stupid,” and he argued the U.S. should not follow “politically correct” rules that limit the use of violence.<sup>433</sup>

Consistent with his rejection of IHL, the President has proposed numerous acts that would both violate IHL and constitute war crimes.<sup>434</sup> For example, the President has repeatedly said that he wants to torture America’s enemies.<sup>435</sup> He has also said the military should deliberately target and kill the families of our enemies.<sup>436</sup> He has praised the killing of prisoners by U.S. soldiers and pardoned several soldiers for murdering prisoners.<sup>437</sup> He has threatened to attack Iranian cultural heritage sites<sup>438</sup> and threatened to seize Syria’s oil.<sup>439</sup> These would all be serious violations of IHL as well as war crimes.<sup>440</sup>

These positions make President Trump unique amongst modern Presidents.<sup>441</sup> No modern President has so thoroughly rejected the central tenets of IHL – particularly the principle of distinction. This is not a situation where academics have criticized a sitting President for pushing the boundaries of IHL. Rather, President Trump’s own administration has had to repeatedly and publicly tell him that his proposals are illegal.<sup>442</sup>

If there is a silver lining to President Trump’s contempt for IHL, it is that he has been largely unable to implement his proposals.<sup>443</sup> This failure is due, in part, to his own ignorance about IHL and his lack of planning and follow-through.<sup>444</sup> He has consistently failed to recognize the legal and policy obstacles he would have to overcome to get his way or develop a coherent plan to overcome them. The only time he has been successful was when he pardoned several U.S. service members who had been convicted of murdering prisoners and civilians<sup>445</sup> and there is reason to believe this is

431 *Id.*

432 *See supra* Section VI.

433 *See supra* Section VI.A.

434 *See supra* Section VI.

435 *See supra* Section VI.B.

436 *See supra* Section VI.C.

437 *See supra* Section VI.D.

438 *See supra* Section VI.F.

439 *See supra* Section VI.E.

440 *See supra* Section VI.G.

441 *Id.*

442 *See supra* Section VII.

443 *Id.*

444 *Id.*

445 *Id.*

something of a special case.<sup>446</sup> IHL, like international law more generally,<sup>447</sup> has turned out to be quite resilient.

The fact that President Trump's only success came with the granting of pardons says a lot about IHL's resilience. The President has virtually unlimited pardon power, so there were essentially no constraints on his ability to pardon murderers and war criminals, which he did despite significant pushback from within the military and his own administration.<sup>448</sup> But in the other episodes described in this Article, the President has failed to implement his proposals because IHL is deeply embedded in U.S. law.<sup>449</sup> In particular, the U.S. military is committed to IHL, and most of the President's proposals would violate the military's own rules.<sup>450</sup> In fact, they are so clearly illegal that U.S. law would require members of the U.S. military to disobey the President if he ordered them to kill prisoners, deliberately target civilians, attack cultural heritage sites, or pillage foreign countries.<sup>451</sup>

It would require both significant changes to the rules that govern the U.S. military as well as a very significant cultural change within the military before the President could implement his vision of IHL.<sup>452</sup> Neither seems likely in the limited time the President has left.<sup>453</sup> Moreover, even if he were to successfully change U.S. law and the culture of the military to engage in fundamental violations of IHL before January 2021, this would not fundamentally change IHL.<sup>454</sup> IHL is international rather than national law.<sup>455</sup> It is also customary international law, which means that it draws its strength from the general practice of states.<sup>456</sup> A single state, even one as

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446 See *supra* text accompanying notes 378–382 (noting that President Trump was able to succeed in granting pardons to war criminals because of the virtually unlimited pardon authority given to the President by the Constitution).

447 See Koh, *supra* note 387 (arguing that international law has been quite resilient to President Trump's repeated attacks on it).

448 See *supra* Section VII.

449 See *supra* Section VIII.

450 *Id.*

451 *Id.*

452 *Id.*

453 See Koh, *supra* note 1, at 421 (describing President Trump as a “blustering player who loudly launches multiple ineffective initiatives to change the status quo” but who will be able to force “little real change” and will probably eventually get “tired, exhausted, and frustrated from all the flailing around”).

454 See *supra* Section VIII.

455 See *supra* Section II.

456 *Id.*

powerful as the United States, cannot easily change IHL.<sup>457</sup>

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<sup>457</sup> *Cf.* Koh, *supra* note 1, at 420 (noting that the “no single player in the transnational legal process—not even the most powerful one—can easily discard the rules that we have been following for some time”).