

Title 18 § 2441 – War Crimes

Legislative History

The current text of 18 U.S.C. § 2441 was adopted in 1997 as an amendment to the War Crimes Act of 1996. The bill passed in 1996, H.R. 3680 was intended to codify the obligations of the United States under the Geneva Convention of 1949. H.R. 1348, the bill passed in 1997, amended § 2441 to expand the scope and definition of war crimes. As adopted the War Crimes Act of 1996 stated:

2401. War crimes

(a) Offense – Whoever, whether inside or outside the United States, commits a grave breach of the Geneva Conventions, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

(b) Circumstances- The circumstances referred to in subsection (a) are that the person committing such breach or the victim of such breach is a member of the armed forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).

(c) Definitions- As used in this section, the term “grave breach of the Geneva Conventions” means conduct defined as grave breach in any of the international conventions relating to the laws of warfare signed at Geneva 12 August 1949 or any protocol to any such convention, to which the United States is a party.

The amended and current language of 18 U.S.C. § 2441 reads:

(a) Offense. Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

(b) Circumstances. The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act [8 USCS § 1101]).

(c) Definition. As used in this section the term “war crime” means any conduct--

(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;

(2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;

(3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; or

(4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.

To discern the possible activities that might be considered “war crimes” each of the subparts of subsection (c) should be taken in order. The most important subpart for our purposes is (c)(1). The definitions of “grave breach” are taken from House Report 104-698, the Judiciary Committee report for the War Crimes Act of 1996, which cites each of the four Geneva Conventions.

H.R. 3680, as reported by the Committee, carries out the international obligations of the United States under the Geneva Conventions of 1949 to provide criminal penalties for certain war crimes. The bill provides that whoever, whether inside or outside the United States, commits a grave breach of the Geneva Conventions (where the perpetrator or the victim is a member of the armed forces of the United States or a national of the United States) shall be fined or imprisoned for life or any terms of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

0000961

Each of the four conventions denominates offenses known as "grave breaches." Conventions I and II (protecting wounded and sick soldiers and sailors) state that:

Grave breaches * * * shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.⁵²

52 Convention I, art. 50; Convention II, art. 51.

Convention III (protecting prisoners of war) states that:

Grave breaches * * * shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.⁵³

53 Convention III, art. 130.

Convention IV (protecting civilians in time of war) states that:

Grave breaches * * * shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.⁵⁴

54 Convention IV, art. 147.

The next definitional section that requires attention is (c)(2), relating to the articles of the Hague Convention. This subsection is less significant the Hague Convention covers only conduct of armed forces during war. On this topic House Report 105-204, the committee report for the Expanded War Crimes Act of 1997, is helpful in summarizing the applicable articles of the Hague Convention:

Article 23 of the Convention lists a series of acts prohibited in war, including, among other things, using poison weapons, killing individuals who have laid down their arms and surrendered, and employing arms calculated to cause unnecessary suffering. Article 25 prohibits the bombardment of undefended towns, villages, dwellings, or buildings. Article 27 requires forces to take steps to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes. Article 28 prohibits pillage.

The last definitional subsection of any relevance is (c)(3), relating to common Article 3 of the Geneva Conventions (subsection (c)(4), relating to use of mines and booby-traps is irrelevant). Common Article 3 is quoted here from House Report 105-204, the committee report for the Expanded War Crimes Act of 1997.

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion

0000962

or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

0000963