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THE U.S. CODIFICATION OF WAR CRIMES: 18 USCA §2441

HAMED ADIBNATANZI*

I. INTRODUCTION

The purpose of this paper is to examine the U.S. codification of its Geneva Convention obligations to prosecute war crimes. The War Crimes Statute is rarely used for its original enactment purpose. Instead the cases that have appeared are in response to political maneuvering in detaining foreign enemy combatants.¹ The War Crimes Statute has been used with the Geneva Convention in order to guarantee detainees certain fundamental rights to due process and impartial hearings.² Finally, the paper examines some of the Legislative responses to this judicial interpretation and the new proposed War Crimes Statute.

War crimes are recognized by the international community throughout history. International law condemns war crimes as violations of the laws of war by a military or civilian person.³ These crimes have historically

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1. David A. Martin, *Judicial Review and the Military Commissions Act: On Striking the Right Balance*, 101 *Am. J. Int'l L.* 344, 351, April 2007.

2. *Id.*

3. Michael Reisman, *The Laws of War: A Comprehensive Collection of Primary Documents on International Laws Governing Armed Conflicts*, Page 317, Vintage Books (1994).

been among the first uniformly recognized bodies of international law, only second perhaps to the Laws of the Sea. War crimes are seen as especially heinous crimes contrary to civilized warfare and a threat to all of humanity along with crimes like piracy and genocide.⁴ War crimes have specifically been punishable under international law throughout history. Such importance is given to war crimes that almost every current State is a signatory to the Geneva Conventions of 1949, which are the formal multilateral conventions codifying the modern humanitarian laws of armed conflict. Additionally the modern era has seen the development of special war crimes tribunals aimed at punishing breaches of the War Crimes Conventions.

Just because war crimes were well recognized does not mean they were well enforced throughout history.⁵ War crimes include violations of established protections of the laws of war, but also include failures to adhere to norms of procedure and rules of battle, such as attacking those displaying a flag of truce, or using that same flag as a ruse of war to mount an attack or the intentional targeting of civilians.⁶ The Geneva Conventions, while containing many specific examples of war crime violations, remain somewhat ambiguous documents. The details of the ambiguities are discussed in this paper. Throughout history, many States have routinely violated their obligations under the Geneva Conventions in a way which either uses the ambiguities of law or political maneuvering to sidestep the laws' formalities and principles.

The most recent application of the War Crimes Statute is to the detainment and treatment of enemy combatants. The War Crimes Statute has developed a new use in defending the rights of those persons detained mainly at Guantanamo Bay.⁷ The underlying issue, beyond the scope of this paper's discussion, is the detainment of foreign nationals violates international law and the Geneva Convention, even with the newly formed category of enemy combatants.⁸ In reality, for centuries it

4. Leslie Green, *The Contemporary Law of Armed Conflict*, Page 286, Juris Publishing (2000).

5. *Id.* at 293.

6. *Id.* at 295.

7. *Hamdan v. Rumsfeld*, 415 F.3d 33 (2006).

8. See U.N. General Assembly Resolution 33/173, G.A. Res. 33/173, U.N. Doc. A/RES/33/171 (Dec. 20, 1978), which demonstrates general recognition among the international community that disappearance and arbitrary detention are violations of international law. Resolution 33/173 states that any act arbitrary detentions are violations of Human Rights Rules. Arbitrary detention violates rights recognized by the Universal Declaration and the International Covenants on Political & Civil Rights to Life, Liberty, Security of the Person, Freedom from Torture, Freedom from Arbitrary Arrest and Detention, & the Right to a Fair & Public Trial. Restatement 3rd, while only advisory, provides further evidence under section 702 that the disappearance is a violation of international law. REST 3d FOREL § 702. Section 702(e) states that it is a violation of international

has been standard practice during armed conflicts to detain enemy combatants for the duration of the conflict. During World War II, the United States held more than 400,000 German and Italian prisoners of war in more than forty American states without providing them with legal counsel or a day in court.⁹ In the Vietnam War, American pilots were imprisoned without due process as POWs in North Vietnam from 1964 until 1973 without a single outcry from the United States (although America did complain that the POWs were being tortured).¹⁰

The Geneva Convention requires all signatory States to enact domestic laws making violations of the Geneva Conventions principles a punishable offense.¹¹ The United States as a signatory to the Geneva Convention has fulfilled its obligations to enact domestic laws by enacting 18 U.S.C.A §2441 on war crimes. On its face, the War Crimes Statute is a general codification of the principles of the Geneva Convention with domestic penalties available for its violation. However, an in depth analysis is required to ascertain that while this War Crimes Statute appears to be a proper “law on the books”, it is not just “window dressing” or clever political maneuvering. Specifically, an examination is required to ensure that the War Crimes Statute and the Judiciaries interpretation of the said Statute are a genuine and good faith attempt at domestic codification and enforcement of war crimes. Furthermore, the technicalities of the Statute must be examined to ensure that there is no abuse of “loopholes” or ambiguities in the Geneva Convention or within the language of War Crimes Statute. The 109th session of Congress is in the process of revising 18 U.S.C.A §2441, and an examination will reveal whether the legislature is attempting to close the “loopholes” and eliminate ambiguities or whether they are attempting to open new language to avoid enforcement of this Statute and its obligations in International Law.

II. HISTORICAL BASIS OF 18 U.S.C.A. §2441

Humanitarian law is the category of laws of armed conflict, attempting to place limitations upon the conduct of warfare in order to prevent unnecessary suffering to civilians and combatants.¹² Humanitarian law should not be confused with human rights law. Humanitarian law is a

law if a state practices, encourages, or condones prolonged or arbitrary detention. *Id.* However, it is still unclear whether disappearance or arbitrary detention is a violation of customary international law.

9. LAURENCE REES, *AUSCHWITZ: A NEW HISTORY* 248 (New York: Public Affairs 2005).

10. Robert F. Turner, *An Insider's Look at the War on Terrorism*, 93 CNLLR 471 (2008).

11. Geneva Conventions, Aug. 12, 1949, 6 U.S.T. 3114, Article 129.

12. Linda A. Malone, *INTERNATIONAL HUMAN RIGHTS* 81 (West 2003).

specific subdivision of human rights law mainly limited to the rules of international armed conflict. There are many sources of humanitarian law. The primary sources of humanitarian law are customary law and international treaties.¹³

A brief discussion of the development of Customary Humanitarian Law leading to the primary International Humanitarian Conventions is necessary. In the sixth century BCE, Chinese warrior Sun Tzu suggested putting limits on the way that wars were conducted.¹⁴ Around 200 BCE, the notion of war crimes as such appeared in the Hindu code of Manu.¹⁵ In 1305, the Scottish national hero Sir William Wallace was tried for the wartime murder of civilians.¹⁶ Hugo Grotius wrote "On the Law of War and Peace" in 1625, focusing on the humanitarian treatment of civilians.¹⁷ The Hague Convention and Declaration of 1899 and 1907 was one of the first international codifications of humanitarian law.¹⁸ Specifically relevant are the Convention Respecting the Law and Customs of War on Land.¹⁹ These customary humanitarian laws developed over time to be a recognized source of International Law. However, it was not until after the human rights violations during World War II that the international community felt the need to formalize human rights laws and specifically humanitarian laws by codifying them into formal multilateral conventions defining international standards for gross breaches of what has become considered crimes against humanity.²⁰

The codification of humanitarian laws took place in many conventions which have now been combined and are often referred to as the Geneva Convention of 1949. The First Geneva Convention "for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field" was first adopted in 1864 and last revised in 1949.²¹

13. *Id.*

14. Maria Trombly, *A Brief History of the Laws of War*, in GENEVA CONVENTIONS: A REFERENCE GUIDE (2003).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Manley O. Hudson*, Present Status of the Hague Conventions of 1899 and 1907, 25 *AM. J. INT'L L.* 114 (1931).

19. Hague Convention of 1907, Convention IV: Laws and Customs of War on Land; October 18, 1907; U.S.T.S. 539, 2 A.J.I.L. Supp. 90 entered into force on January 26, 1910.

20. Linda A. Malone, *INTERNATIONAL HUMAN RIGHTS* 18 (West 2003).

21. Geneva Conventions, Aug. 12, 1949, 6 U.S.T. 3114, 3217, 3316, 3516 [hereinafter referred to as Geneva Convention]. The Geneva Conventions include the First Geneva Convention "for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field" (first adopted in 1864, last revision in 1949). Second Geneva Convention "for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea" (first adopted in 1949, successor of the 1907 Hague Convention X). Third Geneva Convention "relative to the Treatment of Prisoners of War" (first adopted in 1929, last revision in 1949). Fourth Geneva Convention

The Second Geneva Convention "for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea" was first adopted in 1949 as a successor of the 1907 Hague Convention X.²² The Third Geneva Convention "relative to the Treatment of Prisoners of War" and was first adopted in 1929 and revised in 1949.²³ The Fourth Geneva Convention "relative to the Protection of Civilian Persons in Time of War" was first adopted in 1949 and was based on parts of the 1907 Hague Convention IV.²⁴ Nearly all 200 states of the world are signatories to these Geneva Convention of 1949.²⁵

In addition to the Conventions, three additional amendment protocols to the Geneva Convention have been proposed and adopted by many of the signatory countries. Protocol I (1977) is the Protocol Additional to the Geneva Conventions of August 12, 1949, and relates to the Protection of Victims of International Armed Conflicts.²⁶ As of January 12, 2007 it had been ratified by 167 countries.²⁷ Protocol II (1977) relates to the Protection of Victims of Non-International Armed Conflicts.²⁸ As of January 12, 2007 Protocol I had been ratified by 163 countries.²⁹ Last but not least, Protocol III (2005) relates to the Adoption of an Additional Distinctive Emblem.³⁰ As of June 2007, it had been ratified by 17 countries and signed but not yet ratified by an additional 68 countries.³¹

All four conventions were last revised and ratified in 1949, based on previous revisions and partly on some of the 1907 Hague Conventions, the whole set is referred to as the "Geneva Conventions of 1949" or simply the "Geneva Conventions." These conventions form the primary source of modern humanitarian laws binding states to international rules when engaging in armed conflict. In summary, these include protections of the individuals, combatants (healthy, wounded, sick, shipwrecked),

"relative to the Protection of Civilian Persons in Time of War" (first adopted in 1949, based on parts of the 1907 Hague Convention IV).

22. *Id.*

23. *Id.*

24. *Id.*

25. International Committee of the Red Cross, *International Humanitarian Law*, Oct. 22, 2007, available at, www.answers.com/topic/geneva-conventions.

26. Geneva Convention protocol 1, Aug. 12, 1949.

27. International Committee of the Red Cross, *International Humanitarian Law*, Oct. 22, 2007, available at, www.answers.com/topic/geneva-conventions.

28. Geneva Convention protocol 2, Aug. 12, 1949.

29. International Committee of the Red Cross, *International Humanitarian Law*, Oct. 22, 2007, available at, www.answers.com/topic/geneva-conventions.

30. Geneva Convention protocol 3, Aug. 12, 1949.

31. International Committee of the Red Cross, *International Humanitarian Law*, Oct. 22, 2007, available at, www.answers.com/topic/geneva-conventions.

prisoners of war, civilians, protection of property and other special protections.³²

As per articles 49, 50, 129 and 146 of the Geneva Conventions I, II, III and IV, respectively, all signatory states are required to enact sufficient national laws that make grave violations of the Geneva Conventions a punishable criminal offense.³³ In 1996, attempting to meet its obligation under the Geneva Conventions, the United States Congress enacted 18 U.S.C.A §2441 to punish “grave breaches of the common Article 3 of the Geneva Convention of August 12, 1949.”³⁴ The legislative history discusses in details the terms of the Geneva Conventions and their impact when codified into U.S. Law.³⁵ It is therefore reasonable to conclude that 18 U.S.C.A §2441 embodies the implementation of the war crimes offenses into the United States Domestic Laws.

The War Crimes Statute was specifically enacted to prosecute North Vietnamese soldiers who committed war crimes against U.S. soldiers during the Vietnam War.³⁶ Congress’ primary intent was to prosecute foreigners who violate international law and commit war crimes against U.S. citizens.³⁷ However it is particularly interesting that Congress wanted to set a high standard for other States to follow by creating a cause of action against its own U.S. soldiers who committed war crimes.³⁸ The War Crimes Statute also allows such prosecutions to be brought against U.S. citizens and soldiers who commit such war crimes against foreign nationals. Indeed, it is this possibility of prosecutions against U.S. soldiers that has prompted the statutory exemptions in section 6.³⁹ Additionally, an analysis of the recent proposed revisions indicates the creation of further defenses in cases brought against U.S. citizens or soldiers.

III. PRIMA FACIE CASE

The prima facie case under 18 U.S.C.A §2441 has three major elements. First, the defendant or victim must be a U.S. citizen or a member of the

32. Linda A. Malone, INTERNATIONAL HUMAN RIGHTS 82-86 (West 2003).

33. Geneva Convention, Aug. 12, 1949.

34. 18 U.S.C.A. §2441(d)(1).

35. Pub. L. No. 104-192, §2(a), 110 Stat. 2104, (2006).

36. Jeffrey R. Smith, *Detainee Abuse Charges Feared*, WASHINGTON POST, July 28, 2006, at A1.

37. Michael J. Matheson, *The Amendment of the War Crimes Act*, 101 AMJIL 48, 49 (Jan. 2007).

38. Jeffrey R. Smith, *Detainee Abuse Charges Feared*, WASHINGTON POST, July 28, 2006, at A1.

39. 18 U.S.C.A. §2441(d)(3).

Armed Forces of the United States.⁴⁰ While there is a separate cause of action for prosecuting war crimes committed by foreign soldiers and commanders during a time of war, that cause of action is authorized by Congress through the war power and is beyond the scope of this paper.⁴¹ Second the defendant must have engaged in some prohibited conduct in violation of the War Crimes Statute.⁴² Prohibited conduct is defined as “a grave breach of Article Three of the international conventions done at Geneva 8/12/1949” as defined in the following list.⁴³ This section of the statute is under proposed legislative revision.⁴⁴ The prohibited list includes torture, cruel or inhuman treatment, performing biological experiments, murder, mutilation or maiming, intentionally causing serious bodily injury, rape, sexual assault or abuse, and taking hostages.⁴⁵ It also includes violations of common Article 3 to the Geneva Conventions, which prohibits violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; outrages upon personal dignity, in particular humiliating and degrading treatment.⁴⁶

Many supplemental claims are often brought with a war claims prosecution. Military persons who mistreat prisoners are subject to court martial under various provisions of the Uniform Code of Military

40. 18 U.S.C.A. §2441(b).

41. See *Application of Yamashita*, 327 U.S. 1, 11 (1946); *Ex parte Quirin*, 317 U.S. 1, 28 (1942) for discussion of War Crimes Prosecutions of Enemy Soldiers during a time of War.

42. 18 U.S.C.A. §2441(d).

43. 18 U.S.C.A. §2441(d)(1).

44. See Proposed Legislation section below. Also see *Hamdan v. Rumsfeld*, 548 U.S. 557, n.8 (2006): discussion of Article 3 of the Third Geneva Convention is called “Common Article 3” because it is common to all four of the 1949 Geneva Conventions. It provides:

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 found 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 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.

45. 18 U.S.C.A. §2441(d)(1)(A)-(I).

46. Geneva Convention common art. 3, Aug 12, 1949.

Justice.⁴⁷ The Torture Victim Protection Act allows for prosecution of torturers of any nationality who are present in the United States.⁴⁸ Military contractors working for the Department of Defense might also be prosecuted under the Military Extraterritorial Jurisdiction Act of 2000.⁴⁹ However, the MEJA remains untested because the Defense Department has yet to issue necessary implementing regulations required by the law.

The most recent cases brought under the War Crimes Statute involve detainee challenges to their incarceration without due process or hearings to protest their incarceration. The punishments under the War Crimes Statute include fines and prison time. If death results to the victim, then the defendant shall also be subject to the penalty of death.⁵⁰

IV. DEFENSES

As a defense to the cause of action, the defendant may invoke the statutory defenses enumerated in 18 U.S.C.A §2441(d)(3). In relation to certain circumstances, these defenses include exceptions for collateral damage or death, damage or injury incident to a lawful attack.⁵¹ This is the main area which provides for both loopholes and exceptions to the effective enforcement of the principles of the Geneva Convention of 1949.

Finally, an important but very ambiguous and unclear section of the War Crimes Statute is 18 U.S.C.A §2441(d)(5). This section states that it limits the definition of "grave breaches to those under common Article 3 and not the full scope of the United States obligations under that Article."⁵² It is unclear whether the function of this section is to limit the application of the War Crimes Statute exclusively to breaches of Article 3 of the 1949 Geneva Convention or whether it functions to limit the definitions specifically listed in 18 U.S.C.A §2441(d) to Article 3 of the Geneva Convention.

It is important to note that torture is not within the statutory exemptions. Acts of torture cannot be justified even by exceptional circumstances.⁵³

47. See Uniform Code of Military Justice, 10 U.S.C.A. § 47, Articles 77-134.

48. Torture Victim Protection Act, 18 U.S.C.A. 2340A (1994).

49. Military Extraterritorial Jurisdiction Act, 18 U.S.C.A. §§ 3261-3267 (2000).

50. 18 U.S.C.A. §2441(a).

51. 18 U.S.C.A. §2441(d)(3).

52. 18 U.S.C.A. §2441(d)(5).

53. Dan Smith, *Summary of International and U.S. Law Prohibiting Torture and Other Ill-treatment of Persons in Custody*, HUMAN RIGHTS WATCH, May 20, 2004.

Neither does a direct order by a superior officer excuse the individual from liability for acts of torture.⁵⁴

Other possible defenses that may apply are the Foreign Sovereign Immunity or the State Act doctrine. The cases examined below are brought as a result of war crimes committed by U.S. nationals. Should a U.S. national commit a war crime, he would be unable to invoke these defenses since the enactment of the statute would effectively waive them. Since this statute has never been used against a foreign defendant, it is unclear whether these defenses could be used.

V. APPLICATION OF §2441 TO A WAR CRIMES CLAIM UNDER U.S. LAW

The first major procedural barrier to bringing a claim under the War Crimes Statute is the limitations on the applicability of the Geneva Conventions of 1949 as codifications of Humanitarian Law.⁵⁵ By the plain meaning of “war crimes”, one may argue that a state of war must exist for the War Crimes Statute to apply. A defendant may attempt to defeat a claim by arguing that there is no state of war and, as such, the statute is inapplicable. Because the definition of a “state of war” may be debated, the term “war crime” itself has seen different usage under different systems of international and military law. A defendant may attempt to argue that there can be no “war crime” without a formal declaration of war. Specifically, there exists a dichotomy between the U.S. Congress having the power to declare war and the Executive’s power as the commander-in-chief of the U.S. Armed Forces. Others argue that a “state of war” includes not only a formal declaration of war, but a conflict that persists long enough to constitute social instability.

These arguments will most likely fail, since the definitions within the War Crimes Statute make no mention of war specifically (other than in the title), but rather define the prohibited conduct during an “armed conflict.” Furthermore, the War Crimes Statute specifically incorporates the Geneva Convention Articles into the codification of the Statute for

54. *Id.*

55. The legalities of war have sometimes been accused of containing favoritism toward the winners (“Victor’s justice”), as certain controversies have not been ruled as war crimes. This discussion is a matter of public international law and international politics and is beyond the scope of this paper. Recent examples of such instances are the Allies’ destruction of civilian Axis targets during World War I and World War II (specifically the Dresden bombings), the use of atomic bombs on Hiroshima and Nagasaki in World War II; the use of Agent Orange against civilian targets in the Vietnam war; and the Indonesian occupation of East Timor between 1976 and 1999. In areas where International Law is yet unresolved, some ambiguity remains with regard to which crimes are considered as such and which are not.

enforcement.⁵⁶ Under Article 1 of the Geneva Convention, the parties undertake to enforce the Convention under “all circumstances.”⁵⁷ Article 2 of the Convention also states that “the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”⁵⁸ This article is directly on point in making the Convention and through incorporation, the War Crimes Statute, applicable to any war or armed conflict even if a state of war is not recognized. Therefore, this procedural attempt at dismissing a cause of action under the War Crimes Statute should fail.

The second issue is that of the extraterritorial application of U.S. Law. The War Crimes Statute attempts to create an extraterritorial application of U.S. law in the event a U.S. national or U.S. property were treated in a way that, if occurring in the U.S., would violate U.S. law.⁵⁹ The legislative history indicates Congress intended to make clear that those who mistreated a U.S. national could be tried after transfer to U.S. custody.⁶⁰ In 2006 Congress amended the War Crimes Statute to expand the scope of application of the War Crimes Statute.⁶¹ The amendment expanded the definition from parties to the Geneva Convention and instead included specific sections of the Geneva and Hague Conventions.⁶² The method of transference is presumably by extradition, but currently the CIA or U.S. Special Forces can obtain custody of individuals in order to prosecute them for war crimes through “rendition” or covert operations.⁶³ Although the U.S. has been subject to international scrutiny over its rendition and military extradition activities, the U.S. still maintains that the capture and detention of such persons is legal based on international law.

56. 18 U.S.C.A. §2441(c)(1).

57. Geneva Convention common art 1, 1949.

58. Geneva Convention common art 2, 1949.

59. Dan Smith, *No Standards, No Accountability*, COUNTERPUNCH, Aug. 12, 2006, available at <http://www.counterpunch.org/smith08042006.html>.

60. Pub. L. No. 104-192 (2006).

61. Pub. L. No. 109-366, § (c)(3), (2006).

62. *Id.*

63. Dan Smith, *No Standards, No Applicability*, COUNTERPUNCH, Aug. 12, 2006, available at <http://www.counterpunch.org/smith08042006.html>.

VI. WAR CRIMES STATUTE CASES

In order to understand the success or failure in the application of the War Crimes Statute, a brief survey of the U.S. war crimes cases is necessary. There are only three decided cases that substantively discuss the War Crimes Statute. Most claims were dismissed for lack of severity or specificity of the War Crimes Act. Only a few cases discuss the merits of the case or the application of the War Crimes Statute to war crime violations.

No case has resulted in judgment against a U.S. soldier in a federal court for the commissions of war crimes. The research revealed no insight as to why no such cases have been tried. The conclusion of this paper speculates as the possible reasons the War Crimes Statute has not been applied in any of these cases.

The Agent Orange Product Liability Case involved a suit by Vietnamese victims who suffered from agent orange being sprayed and poisoning the population.⁶⁴ The United States tried to raise the defense that the War Crimes Act creates no private cause of action for civil liability because it is a criminal statute.⁶⁵ The court referred by analogy to a previous case, and held that the reasons behind recognizing civil liability under the Alien Torts Act as well as criminal liability for war crimes remain sound.⁶⁶ The war crimes alleged in *Kadic* (acts of murder, rape, torture, and arbitrary detention of civilians) committed in the course of hostilities have long been recognized in international law as violations of the law of war and create civil as well as criminal liability for the defendants.⁶⁷ The *Kadic* precedent establishes that civil remedies exist for War Crimes in addition to criminal penalties in separate actions.

However, the war crimes claim in the *Agent Orange* case was dismissed because the court held the herbicide spraying did not constitute a war crime pre-1975.⁶⁸ The court relied on the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.⁶⁹ It defines "grave breaches" as "[W]illful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, ..., and extensive destruction and appropriation of

64. *In re Agent Orange Product Liability Litigation*, 373 F.Supp.2d 7, 112 (E.D.N.Y., 2005).

65. *Id.* at 113.

66. *Kadic v. Karadzic*, 70 F.3d 232, 242-43 (2d Cir. 1995).

67. *Id.* at 242.

68. *In re Agent Orange Product Liability Litigation*, 373 F.Supp.2d 7, 113 (E.D.N.Y., 2005).

69. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516; see also *infra* Part XI.C.5.

property, not justified by military necessity and carried out unlawfully and wantonly."⁷⁰ The court concluded that herbicide spraying by the United States did not constitute "willful killing" because the United States lacked the requisite criminal intent.⁷¹ As for property damage, any such damage was justified by military necessity and was carried out lawfully.⁷² The court in the *Agent Orange* case severely limited the application of the Statute by requiring both a criminal intent and lack of military necessity. This reasoning is flawed since military necessity does not justify acts amounting to war crimes.⁷³ Furthermore, the court acknowledges that such acts, if committed today, would be war crimes but that they were not at the time they occurred.⁷⁴ This excuse that at the time of the events they were not war crimes seems to be an arbitrary standard set forth without any logical explanation by the court.

The most recent case discussing the War Crimes Statute is *Hamdan v. Rumsfeld*.⁷⁵ Mr. Hamdan was classified as an alien enemy combatant and detained at Guantanamo Bay, Cuba.⁷⁶ He was charged with various terrorism-related offenses and designated for trial before a military commission.⁷⁷ He petitioned for habeas relief. The United States District Court for the District of Columbia granted petition.⁷⁸ The U.S. Government appealed. The United States Court of Appeals for the District of Columbia reversed.⁷⁹ Certiorari was granted by the United States Supreme Court. The Supreme Court held that (1) Detainee Treatment Act (DTA) did not deprive Supreme Court of jurisdiction; (2) abstention was not appropriate; (3) military commissions were not expressly authorized by any congressional act; (4) military commission's procedures violated Uniform Code of Military Justice (UCMJ); and (5) military commissions did not satisfy Geneva Conventions.⁸⁰

The Court decided that the "military commissions" created to try enemy combatants for War Crimes suffered from certain fatal procedural defects under the Uniform Code of Military Justice and the Geneva Convention, and were without other legal authority to proceed, despite Congress's

70. *Id.*, art. 147, 6 U.S.T. at 3618.

71. *In re Agent Orange Product Liability Litigation*, 373 F.Supp.2d 7, 113 (E.D.N.Y., 2005).

72. *Id.*

73. Dan Smith, *Summary of International and U.S. Law Prohibiting Torture and Other Ill-treatment of Persons in Custody*, HUMAN RIGHTS WATCH, May 5, 2004.

74. *In re Agent Orange Product Liability Litigation*, 373 F.Supp.2d 7, 113 (E.D.N.Y., 2005).

75. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Hamdan v. Rumsfeld*, 415 F.3d 33 (2006).

80. *Id.*

attempt to deprive the Court of jurisdiction to decide that issue by passing the Detainee Treatment Act. Justices in the majority (particularly Justices Kennedy and Breyer) disagreed with Justice Stevens as to whether the "charge" of conspiracy could be maintained to justify the determination of enemy combatant status. Although the Court struck down the military commissions as created by the Executive Branch, they did not provide the detainees with direct access to the federal courts, but only with access to a fair and impartial hearing to a tribunal constitutionally authorized by Congress and proceeding with certain due process guarantees (such as one operated under terms similar to those provided by Article I courts under the UCMJ or according to the terms of the Third Geneva Convention of 1949).⁸¹

In Justice William's concurrence, he states that Common Article 3 of the four Geneva Conventions of 1949 is incorporated into U.S. Law through the War Crimes Statute.⁸² It prohibits, as relevant here, "[t]he 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."⁸³ The *Hamdan* case opens the possibility that Common Article 3 of the Third Geneva Convention can be applied to the War on Terrorism.⁸⁴ There is an unstated implication that any interrogation techniques that violated Common Article 3 constitute war crimes.⁸⁵ The possibility that American officials and soldiers could be prosecuted for war crimes for committing the "outrages upon personal dignity, in particular humiliating and degrading treatment" prohibited by the Conventions led to a series of proposals to make such actions legal in certain circumstances, which resulted in the Military Commissions Act of 2006.⁸⁶

This decision expanded the application of the War Crimes Statute to protect detainees against unlawful detainment and possibly unlawful interrogation methods. In response to the U.S. Supreme Court's use of the War Crimes Statute for this purpose, Congress has proposed legislation amending the War Crimes Statute.

81. *Hamdan v. Rumsfeld*, 415 F.3d 33 (2006).

82. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

83. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, [1955] 6 U.S.T. 3316, 3318.

84. *Id.*

85. Rosa Brooks, *Did Bush Commit War Crimes?*, L.A. TIMES, Oct. 4, 2006, available at, http://en.wikipedia.org/wiki/War_Crimes_Act_of_1996.

86. Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, Aug 12, 1949, *Geneva Convention Relative to the Treatment of Prisoners of War art. 3*, 6 U.S.T. 3316.

VII. PROPOSED AMENDMENTS TO WAR CRIME STATUTE

In response to the current United States Supreme Court decisions, Congress has adopted legislation amending the War Crimes Statute through the Military Commissions Act of 2006.⁸⁷ The first revision is a broad statement overruling the previous U.S. Court decisions holding that the War Crimes Statute incorporates Article 3 of the Geneva Convention. The legislation states “the provisions of section 2441 of Title 18, United States Code, as amended by this section, fully satisfy the obligation under Article 129 of the Third Geneva Convention for the United States to provide effective penal sanctions for grave breaches which are encompassed in common Article 3 in the context of an armed conflict not of an international character. No foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated in subsection (d) of such section 2441.”⁸⁸ This in effect limits the prior interpretations by the courts. Congress is stating that no principles of international law shall be applicable, and that the war crimes enumerated are the sole source of law under this section.

However, an interesting conflict exists between Congressional intent and legal effect. Congress intended that no other international source of law be used other than the enumerated statute, however at the same time the United States is already party to the Geneva Convention and is obliged under the U.S. Constitution to fulfill its treaty obligations. Therefore, while this legislative act may override the previous Supreme Court rulings, it does not specifically override the treaty obligations. So in effect the law stays the same. However, in order to address the treaty issues Congress has come up with a new tactic.

The next set of revisions allows all obligations under the Geneva Convention to be interpreted by the President of the United States.⁸⁹ “As provided by the Constitution and by this section, the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions.”⁹⁰ This statement will limit the interpretation of treaty obligations exclusively to those stated by

87. S. 3930, 109th Cong. § 2 (2005).

88. *Id.*

89. Pub. L. No. 109-366 § 6(a), 120 Stat. 2632 (2006).

90. *Id.*

the President. Any well accepted international norm would not be applicable so long as the President interprets the obligation to fall outside the U.S. treaty obligations. For example if the President was to determine that in the future any detainee falling within the “enemy combatant” status does not fall under the Geneva Convention, the President could in effect exempt these persons from War Crimes protections. Additionally, if the President determined that certain interrogation methods did not violate international law they could not be prosecuted, even if by international standards these acts amounted to torture or war crimes. This author argues that such a subjective application and interpretation does not meet the spirit or the State obligations under international conventions.

The revisions also expressly limit punishable war crimes to those enumerated in the revisions. The enumerated war crimes are: torture, cruel or inhumane treatment, performing biological experiments, murder, mutilation, maiming, serious bodily injury, rape, sexual abuse or assault, and taking hostages.⁹¹ This list does encompass many of the principles of the Geneva Convention and sets clear and specific descriptions of each act. It encompasses much of the requirements under the Geneva Convention. However, the Geneva Convention is written more broadly and not specifically limited to the enumerated crimes. In fact, the U.S. Supreme Court held that Common Article 3 of the Geneva Convention does apply and would protect enemy combatant detainees from certain treatment and interrogation methods.⁹²

Congress has also addressed some of the legislation at the administrations’ current policies. “No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.”⁹³ But again instead of using the broad general prohibitions in the Geneva Convention to determine the standard, Congress has used its own interpretation. “Cruel, inhuman, or degrading means treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.” While none of these requirements seem worth mentioning, the following section is

91. *Id.*

92. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

93. Pub. L. No. 109-366 § 6(a), 120 Stat. 2632 (2006).

specifically addressed at the President. It states the "President shall take action to ensure compliance with this subsection, including through the establishment of administrative rules and procedures."⁹⁴ This change seems to require all interrogation and treatment of detainees to be in compliance with U.S. Constitutional laws. Furthermore, it places the responsibility on the President to ensure that these safeguards are established for the detainees.

Even with the proposed legislation, cases by detainees are still being brought to the courts. The current case of *Boumediene v. Bush* attempts to challenge the detention of enemy combatants with international law principles and violations of the War Crimes Statute.⁹⁵ In *Boumediene*, two judges on a three-judge panel of the D.C. Circuit Court of Appeals upheld the provision of the Military Commissions Act of 2006 that strips the rights of all Guantanamo detainees to have their habeas corpus petitions heard by U.S. federal courts.⁹⁶ If that decision is left to stand, the men and boys detained at Guantanamo can be held there for the rest of their lives without ever having a federal judge determine the legality of their detention.⁹⁷ The United States Supreme Court has granted review and many scholars predict the Court will reverse this decision.⁹⁸

The final revision has to do with habeas corpus under for war crimes breaches. The proposed legislation states "no court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."⁹⁹ The next revision states "no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."¹⁰⁰ These two clauses together would remove U.S. courts' jurisdiction to hear any cases relating to detainment or interrogation procedure amounting to torture or war crimes. If

94. Pub. L. No. 109-366, § 6(c)(3), 120 Stat. 2632 (2006).

95. *Boumediene v. Bush*, No. 06-1195, 2007 WL 2441569 (US Sup. Ct. argued Dec. 5, 2007).

96. *Id.*

97. Marjorie Cohn, *Why Boumediene Was Wrongly Decided*, THE JURIST, Feb 2, 2007, available at <http://jurist.law.pitt.edu/forumy/2007/02/why-boumediene-was-wrongly-decided.php>.

98. *Id.*

99. Pub. L. No. 109-366 § 7(e)(1), 120 Stat. 2632, (2006).

100. *Id.*

enacted, any person who is classified as an enemy combatant would have no course of action should he be subject to torture interrogation tactics. Furthermore, this statute seems to remove the courts' jurisdiction to hear cases against the United States or any U.S. agent relating to enemy combatants.

Finally, some of the language is peculiarly worded that seems contradictory.¹⁰¹ An example is two provisions that forbid any person to invoke the Geneva Conventions "as a source of right" before military commissions or in any judicial proceeding.¹⁰² However, this language seems to allow the possibility of the Geneva Conventions-sourced right being raised *sua-sponte*.¹⁰³ In fact the amended text of the War Crimes Statute contains more ambiguities than the original version.¹⁰⁴ The net effect is to create uncertainty in the application of War Crimes sanctions.¹⁰⁵

Many scholars think that the Supreme Court will strike down these new provisions if passed into law. Art. I of the Constitution contains the Suspension Clause, allowing Congress to suspend the Writ of Habeas Corpus in cases of rebellion or where invasion into public safety may require it.¹⁰⁶ As the dissenter in *Boumediene* pointed out, Congress has only suspended habeas corpus four times before, and made a finding of rebellion or invasion in each case.¹⁰⁷ In June 2004, the Supreme Court decided *Rasul v. Bush*, which upheld the right of those detained at Guantanamo Bay to have their petitions for habeas corpus heard by U.S. courts, under the federal habeas statute.¹⁰⁸ Currently, we are not in a state of invasion or rebellion, and yet, Congress did not make such a finding for suspending the detainees' rights. Therefore, any attempt to suspend the detainees' rights to have their review before an impartial court will most likely be struck down by the Supreme Court. The revisions to the War Crimes Statutes are clearly an attempt by Congress to remove jurisdiction in such matters from the courts. It will be interesting to see whether the courts will abide by Congress' legislation or whether they will keep jurisdiction under the Geneva Convention instead of the War Crimes Statutes.

101. David A. Martin, 101 AMJIL 344, 353 (April 2007).

102. *Id.*

103. *Id.*

104. Michael J. Matheson, The Amendment of the War Crimes Act, 101 AMJIL 48, 51 (January 2007).

105. *Id.* at 52.

106. U.S. Const. art. 1 § 9, cl. 2.

107. *Boumediene v. Bush*, No. 06-1195, 2007 WL 2441569 (US S.Ct. argued Dec. 5, 2007).

108. *Rasul v. Bush*, 542 U.S. 466 (2004).

VIII. CONCLUSION

The initial question posed in this paper is whether the War Crimes Statute fulfilled the U.S. obligation to punish war crimes. A study of the cases has shown that only one case has even been brought to punish such war crimes by U.S. nationals. Since the research did not reveal any insight as to why the statute remains largely unused, there are a few possible explanations.

First, in most situations in which war crimes occur, they can be defended through the exceptions listed in sections (d)(3)(a) & (d)(3)(b).¹⁰⁹ Specifically, most of the time war crimes can be justified as either collateral damage or death, damage, injury incident to a lawful attack. These categories could be applied so broadly that no case against officers committing war crimes will ever fall outside the coverage of the exception.

A second problem could be the difficulty in bringing witnesses and evidence from abroad in order to testify against U.S. officials who have committed these war crimes. All that would be required is for the U.S. to deny an entry visa and the case would not have sufficient witnesses to go to trial. Another possibility is these violations are handled so well by the military authorities abroad that they never see our domestic courts.

Finally, the one category of cases involving detention of enemy combatants has seen the most active use of the War Crimes Statute. The War Crimes Statute was used to challenge the detainment and treatment of enemy combatants. The first challenges arose from their rights to a fair and impartial hearing. In the same case the Supreme Court announced that the Geneva Conventions were part of U.S. law and the treatment of these detainees must conform to the Geneva Conventions minimum standards.¹¹⁰

The newest set of cases that will most likely invoke the War Crimes Statutes are challenges against interrogation methods. "In other words, with the *Hamdan* decision, U.S. officials found to be responsible for subjecting war on terror detainees to torture, cruel treatment or other outrages upon personal dignity could face prison or even the death penalty."¹¹¹ The problem again remains that the 2006 statutory revisions

109. 18 U.S.C.A. 2441(d)(3)(a) & (d)(3)(b).

110. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

111. Rosa Brooks, *Did Bush Commit War Crimes?*, L.A. Times, Oct. 4, 2006, available at http://en.wikipedia.org/wiki/War_Crimes_Act_of_1996.

to the War Crimes Statute would allow certain interrogation techniques such as water-boarding if interpreted by the President to not violate the Geneva Conventions. However, no such executive order exists currently, so these interrogation tactics that may amount to torture can be challenged as violations of the War Crimes Statute.

On its face, the War Crimes Statute does embody the enforcement of the Geneva Convention obligations. Most of the crimes listed are the most severe war crimes and the punishment for these crimes can be as severe as death. However, the failure to use or enforce the treaty measures with the statute seems to imply that there is something wrong with its enforcement. Finally, the War Crimes Statute was used by the Supreme Court to incorporate Common Article 3 of the Geneva Convention into U.S. law and holding the U.S. had violated its Geneva Convention obligations toward the treatment of enemy non-combatant detainees. Congress is attempting to legislate against this decision by changing the language in the War Crimes Statute to exclude the Geneva Convention references. However, even if the language of the War Crimes Statute was changed, the U.S. would still be under its obligations to fulfill the Geneva Convention requirements since it is a signatory to the convention. Therefore, the decision of the Supreme Court in *Hamdan* should be upheld despite the possible change in the language of the War Crimes Statute.

The attempt by Congress to legislatively limit the application of the Geneva Conventions to U.S. conduct is contrary to its good faith obligations to fulfill its international obligations. The initial motivation of enacting the War Crimes statute was to set a high standard for the international community to follow by creating a cause of action against its own citizens who commit war crimes.¹¹² However, when unexpected times come to apply those rules and sanctions against its own citizens, Congress legislates the U.S. out of its international obligations. This is not the example the U.S. should be setting for the other States. Instead, Congress should follow the example of the U.S. Supreme Court and rule that the U.S. is obligated to fulfill its Geneva Convention obligations.

112. Jeffrey R. Smith, *Detainee Abuse Charges Feared*, WASHINGTON POST, July 28, 2006, at A1.