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[See also Case No. 265, United States, Military Commissions ^[1]]

N.B. As per the disclaimer ^[2], neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

A. War Crimes Act of 1996

[Source: Title 18, Crimes and Criminal Procedure Part I, Crimes Chapter ^[116] 118, War Crimes, 18 USCS, §2401 (1996); available on <http://uscode.house.gov> ^[3]]

Sec. 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 a 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.’”

[...]

B. 1997 Amendment to the War Crimes Act of 1996

[Source: This Amendment was contained in the Foreign Operations Appropriations Act approved by the Senate on November 9, 1997 and the House of Representatives on November 12, 1997; available on <http://thomas.loc.gov/home/c105query.html> ^[4]

[N.B.: Section 2401 of the United States Code has since been re-numbered Section 2441.]

War Crimes Prosecution

SEC. 583. Section 2401 of title 18, United States Code (Public Law 104-192; The War Crimes Act of 1996) is amended as follows:

(1) in subsection (a), by striking “grave breach of the Geneva Conventions” and inserting “war crime”;

(2) in subsection (b), by striking “breach” each place it appears and inserting “war crime”;

and

(3) so that subsection (c) reads as follows:

“(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 Articles 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, wilfully kills or causes serious injury to civilians.”

Discussion

1.

a. How has the 1997 amendment to the War Crimes Act of 1996 enlarged the range of offences covered? Which further acts are now prohibited? (HR, Arts 23 ^[5], 25 ^[6], 27 ^[7] and 29 ^[8]; GC I-IV, common Art. 3 ^[9]; Amended Protocol II to the 1980 Conventional Weapons Convention [See Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996 (Protocol II to the 1980 Convention) ^[10]]

b. Is the choice of provisions of the Hague Regulations referred to in the amendment appropriate? Would you have referred to additional provisions or excluded some of them? Does Art. 25 of the Hague Regulations provide an appropriate formulation to determine which attacks are prohibited in contemporary IHL? Can an undefended dwelling ever be a legitimate military objective? Under Art. 52(2) of Protocol I? Under contemporary customary IHL?

c. Are violations of Protocol II within the range of offences covered by the amended Act?

2. Does the War Crimes Act as amended fulfil the US obligation under IHL to enact the necessary legislation for providing “effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention.”? (GC I-IV, Arts 49 ^[11]/50 ^[12]/129 ^[13]/146 ^[14] respectively)

3.

a. What is the jurisdictional scope of the War Crimes Act of 1996? Did the 1997 amendment alter this?

b. Does the amended War Crimes Act provide for universal jurisdiction? Is the United States, as a State Party, not required to provide for universal jurisdiction under the Conventions? (GC I-IV, Arts 49 ^[11]/50 ^[12]/129 ^[13]/146 ^[14] respectively)

c. Why do you think that the proposed version of the amendment to the Act, which would have provided for universal jurisdiction, did not prevail?

d. Does the absence of universal jurisdiction in the US Act create a US “safe haven” from prosecution for certain war criminals? Are extradition or deportation options available to the United States in such cases for it to respect its obligations under IHL? Are these always satisfactory options? (GC I-IV, Arts 49 ^[11]/50 ^[12]/129 ^[13]/146 ^[14] respectively)

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