

WAR CRIMES ACT OF 1996

JULY 24, 1996.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SMITH of Texas, from the Committee on the Judiciary,
submitted the following

REPORT

[To accompany H.R. 3680]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3680) to amend title 18, United States Code, to carry out the international obligations of the United States under the Geneva Conventions to provide criminal penalties for certain war crimes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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PURPOSE AND SUMMARY

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 Conven-

tions (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.

BACKGROUND AND NEED FOR LEGISLATION

I. THE GENEVA CONVENTIONS

Four Geneva Conventions for the Protection of Victims of War, dated August 12, 1949, were ratified by the United States on July 14, 1955:

Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field ("Convention I");

Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea ("Convention II");

Convention Relative to the Treatment of Prisoners of War ("Convention III"); and

Convention Relative to the Protection of Civilian Persons in Time of War ("Convention IV").

Deputy Under Secretary of State Robert Murphy testified in 1955 as to the purpose of the conventions:

The Geneva conventions are another long step forward toward mitigating the severities of war on its helpless victims. They reflect enlightened practices as carried out by the United States and other civilized countries and they represent largely what the United States would do whether or not a party to the conventions. Our own conduct has served to establish higher standards and we can only benefit by having them incorporated in a stronger body of conventional wartime law. * * *

We feel that ratification of the conventions now before you would be fully in the interest of the United States.¹

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.²

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

¹"Geneva Conventions for the Protection of War Victims: Hearing on Executives D, E, F and G Before the Senate Comm. on Foreign Relations," 84th Cong., 1st Sess. 5 (1955).

²Convention I, art. 50; Convention II, art. 51.

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.³

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.⁴

The four conventions require that signatory countries enact appropriate implementing legislation criminalizing the commission of grave breaches:

The [signatory countries] undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention[s] * * *.

Each [signatory country] shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers * * * hand such persons over for trial to another [signatory country], provided such [country] has made out a *prime facie* case.⁵

II. CURRENT PROSECUTABILITY UNDER UNITED STATES LAW OF INDIVIDUALS FOR “GRAVE BREACHES” OF THE GENEVA CONVENTIONS AND THE IMPACT OF H.R. 3680

A. *Implementing legislation*

Despite ratifying the Geneva conventions, the United States has never enacted legislation specifically implementing their penal provisions. This was felt to be unnecessary, that existing United States law provided adequate means of prosecution. The Senate Committee on Foreign Relations stated that:

The committee is satisfied that the obligations imposed upon the United States by the “grave breaches” provisions

³Convention III, art. 130.

⁴Convention IV, art. 147.

⁵Convention I, art. 49; Convention II, art. 50; Convention III, art. 129; Convention IV, art. 146.

are such as can be met by existing legislation enacted by the Federal Government within its constitutional powers. A review of that legislation reveals that no further measures are needed to provide effective penal sanctions or procedures * * *.⁶

A review of current federal and state law indicates that while there are many instances in which individuals committing grave breaches of the Geneva conventions may already be prosecuted, prosecution would be impossible in many other situations.

B. Federal and State criminal statutes

Most acts considered grave breaches of the Geneva conventions—murder, hostage-taking, etc.—would be punishable by federal or state criminal law if committed within the United States. When crimes which fall under the definition of grave breaches occur outside of the United States, federal criminal law allows for prosecution in certain instances:

Use of Weapon of Mass Destruction: Federal law provides for criminal penalties for the use or attempted use of a weapon of mass destruction against a U.S. national while such national is outside the United States, or against property outside of the United States which is owned, leased, or used by the United States.⁷

Terrorism: Federal law provides for criminal penalties for the killing of, attempted killing of, or conspiracy to kill a U.S. national while such national is outside the United States and where the killing is intended to coerce, intimidate, or retaliate against a government or a civilian population.⁸

Torture: Federal law provides for criminal penalties for the torture of, or attempted torture of, an individual outside of the United States if the alleged perpetrator is a U.S. national or is present in the United States (irrespective of the nationality of the victim or alleged offender).⁹

Genocide: Federal law provides for criminal penalties for killings and certain other offenses committed outside the United States with the specific intent to destroy a national, ethnic, racial or religious group when the offender is a national of the United States.¹⁰

Killing of Protected Persons: Federal law provides for criminal penalties for the killing or attempted killing of internationally protected persons (heads of state and certain representatives or employees of governments when not in their home country, as provided by treaty) if the alleged offender is present in the United States, regardless of the place where the offense was committed or the nationality of the victim or offender.¹¹

Hostage Taking: Federal law provides for criminal penalties for the seizure or detention of (or attempt to seize or detain) a person followed by the threat to kill, injure, or continue to detain that person in order to compel a third person or a government to do or abstain from doing any act as a condition for release. This applies to

⁶“Geneva Conventions for the Protection of War Victims: Report of the Comm. on Foreign Relations,” Senate Exec. Rep. No. 9, 84th Cong., 1st Sess. 27 (1955).

⁷See 18 U.S.C. sec. 2332a (1994).

⁸See 18 U.S.C. sec. 2332 (1994).

⁹See 18 U.S.C. sec. 2340A (1994).

¹⁰See 18 U.S.C. sec. 1091 (1994).

¹¹See 18 U.S.C. sec. 1116 (1994).

acts occurring outside the U.S. if the offender or the persons seized is a U.S. national, the offender is found in the United States or the government sought to be compelled is the United States Government.¹²

The conduct these statutes proscribe would in many instances be considered grave breaches of the conventions if they took place in the context of armed conflict. However, many crimes which would be considered grave breaches are not encompassed by these statutes. For instance, the simple killing of a prisoner of war would not be covered by any of the statutes. They thus incompletely implement the Geneva conventions.

C. Courts-martial

The Uniform Code of Military Justice grants courts-martial jurisdiction to try individuals for violations of the laws of war.¹³ Since the Geneva conventions are considered parts of the law of war, courts-martial would seem to be a powerful mechanism for the punishment of war crimes. Their limitation, however, is that they apply to very circumscribed groups of people: generally, members of the United States armed forces, persons serving with or accompanying armed forces in the field, and enemy prisoners of war.¹⁴ The most famous example of a court martial for war crimes is probably that of William Calley, who was prosecuted by court-martial for his part in the Mai Lai massacre during the Vietnam War.¹⁵ A member of the U.S. armed forces who commits a war crime is only subject to court-martial for so long as he or she remains in the military.

D. Military commissions

“Very little attention has been paid in recent years to the possibility of using American military tribunals to enforce the law of war.”¹⁶ In certain situations, military commissions could be used to provide a mechanism for the prosecution of war criminals.

Military tribunals—or commissions—have been used widely by the United States from the Mexican-American War to the Civil War to World War II to prosecute war criminals and to provide a system of justice in lands occupied by our armed forces.¹⁷

Military commissions have “no statutory existence, though [they are] recognized by statute law[.]”¹⁸

[Congress] has left it to the President, and the military commanders representing him, to employ the commission, as occasion may require, for the investigation and punishment of violations of the laws of war and other offences not cognizable by court-martial.¹⁹

¹² See 18 U.S.C. sec. 1203 (1994).

¹³ See 10 U.S.C. sec. 818 (1994).

¹⁴ See 10 U.S.C. sec. 802 (1994).

¹⁵ See *United States v. Calley*, 46 C.M.R. 1131 (1973).

¹⁶ Robinson Everett, “Possible Use of American Military Tribunals to Punish Offenses Against the Law of Nations,” 34 Va. J. Int’l L. 289, 293 (1994).

¹⁷ See *Madsen v. Kinsella*, 343 U.S. 341, 346 n. 8. (1952).

¹⁸ Army Judge Advocate General Crowder in testimony before the Senate Subcommittee on Military Affairs (64th Cong., 1st Sess.), quoted in *Madsen*, 343 U.S. at 353. 10 U.S.C. sec. 821 preserves the jurisdiction of military commissions.

¹⁹ “William Winthrop, *Military Law and Precedents*” 831 (1920) (footnote omitted).

The jurisdiction of military commissions has traditionally been thought of as limited:

[T]he classes of persons who in our law may become subject to the jurisdiction of military commissions are the following: (1) Individuals of the enemy's army who have been guilty of illegitimate warfare or other offences in violation of the laws of war; (2) Inhabitants of enemy's country occupied and held by the right of conquest; (3) Inhabitants of places or districts under martial law; (4) Officers and soldiers of our own army, or persons serving with it in the field, who, in time of war, become chargeable with crimes or offences not cognizable, or triable, by the criminal courts or under the Articles of war.²⁰

Military commissions were most recently used during and immediately following World War II to prosecute German and Japanese war criminals and to provide a legal system for occupied areas.²¹ American military commissions have generally prosecuted individuals whose acts were committed in lands occupied by our military,²² and have always been used in instances where the United States was involved in hostilities.

Many gaps in federal law relating to the prosecution of individuals for grave breaches of the Geneva conventions could in principle be plugged by the formation of military commissions. However, the Supreme Court condemned their breadth of jurisdiction to uncertainty in *Ex Parte Quirin*, where it stated that “[w]e have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war.”²³

E. Implementation of the Geneva conventions in other countries

A number of countries which are signatories to the Geneva conventions, such as the United Kingdom,²⁴ have enacted penal sanctions for the commission of grave breaches of the Geneva conventions. Other signatory countries, such as Germany,²⁵ have enacted legislation criminalizing certain conduct contrary to their international treaty obligations (presumably including the Geneva conventions).

F. Need for H.R. 3680

There are major gaps in the prosecutability of individuals under federal criminal law for war crimes committed against Americans.

²⁰ *Id.* at 838.

²¹ See, e.g., *Madsen* (trial of American citizen who killed her husband in occupied Germany); *In Re Yamashita*, 327 U.S. 1 (1946) (trial of Japanese General for war crimes committed while in command of an army group in the Philippines); *Ex Parte Quirin*, 317 U.S. 1 (1942) (trial of German saboteurs who landed on Long Island).

²² An exception was *Ex Parte Quirin*, where the military commission could by presidential proclamation try “all persons who are subjects * * * of any nation at war with the United States * * * and who during time of war enter or attempt to enter the United States * * * through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war * * *” *Ex Parte Quirin*, 317 U.S. at 22–23. The Supreme Court in this case found that a military commission could constitutionally try as war criminals German saboteurs who landed on Long Island.

²³ *Id.*, 317 U.S. at 45–46.

²⁴ 5 and 6 Eliz. 2, ch. 52.

²⁵ StGB, sec. 6, No. 9.

For example, what of American civilians subjected to grave breaches of Convention IV—perhaps murder—in an armed conflict overseas? What of American prisoners of war subjected to grave breaches of Convention III—perhaps, again, murder? Military commissions might be able to fill these gaps, at least when the United States is involved in hostilities. However, the extent to which commissions can be employed is unclear. Making grave breaches of the Geneva conventions violations of federal criminal law when the victims are American, as H.R. 3680 does, would ensure that perpetrators of many types of major war crimes against Americans would be prosecutable by the United States.

H.R. 3680 would also fill another gap in current law. The ability to court martial members of our armed forces who commit war crimes ends when they leave military service. H.R. 3680 would allow for prosecution even after discharge. This may not only be in the interests of the victims, but also of the accused. The Americans prosecuted would have available all the procedural protections of the American justice system. These might be lacking if the United States extradited the individuals to their victims' home countries for prosecution.

III. CONSTITUTIONAL CONSIDERATIONS

The constitutional authority to enact federal criminal laws relating to the commission of war crimes is undoubtedly the same as the authority to create military commissions to prosecute perpetrators of these crimes. The Supreme Court affirmed such authority in *In Re Yamashita*:

In *Ex parte Quirin* * * * we had occasion to consider at length the sources and nature of the authority to create military commissions for the trial of enemy combatants for offenses against the law of war. We there pointed out that Congress, in the exercise of the power conferred upon it by Article I, sec. 8, cl. 10 of the Constitution to “define and punish * * * Offences against the Law of Nations * * *,” of which the law of war is a part, had by the Articles of War * * * recognized the “military commission” appointed by military command, as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offenses against the law of war.²⁶

IV. ADMINISTRATION REQUESTS THAT THE SCOPE OF H.R. 3680 BE BROADENED

A. *Universal jurisdiction*

H.R. 3680 is operative where the victim or the perpetrator of a grave breach of the Geneva conventions is a member of the armed forces of the United States or a national of the United States.

The State Department and Defense Department have recommended that H.R. 3680 be amended to provide for universal jurisdiction—which would allow for criminal proceedings to be brought against a war criminal for crimes taking place outside of the United States where neither the victim nor perpetrator are

²⁶327 U.S. at 7.

American, as long as the perpetrator is present in the United States.²⁷

The Committee decided that the expansion of H.R. 3680 to include universal jurisdiction would be an unwise at present. Domestic prosecution based on universal jurisdiction could draw the United States into conflicts in which this country has no place and where our national interests are slight. In addition, problems involving witnesses and evidence would likely be daunting. This does not mean that war criminals should go unpunished. There are ample alternative venues available which are more appropriate. Prosecutions can be handled by the nations involved or by international tribunal.²⁸ If a war criminal is discovered in the United States, the federal government can extradite the individual upon request in order to facilitate prosecution overseas. The Committee is not presently aware that these alternative venues are inadequate to meet the task.

Finally, even if enacted, universal jurisdiction will in all likelihood be purely symbolic. The Committee has been informed that there has never been a single case of a signatory country to the Geneva conventions exercising its own criminal jurisdiction over an alleged war criminal on the basis of universal jurisdiction.²⁹

B. Additional treaties

The State Department and Defense Department have recommended that certain other offenses should also be made prosecutable by H.R. 3680:³⁰

Violations of common article 3 of the Geneva conventions.

Grave breaches of protocols to the Geneva conventions when ratified by the United States;³¹

Violations of articles 23, 25, 27, and 28 of the "Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land."³²; and

Certain violations of article 14 of the "Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on May 3, 1996, Annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects" when ratified by the United States.

²⁷See letter from Barbara Larkin, Acting Assistant Secretary for Legislative Affairs, U.S. Department of State, to U.S. Representative Lamar Smith (May 17, 1996) and letter from Judith Miller, U.S. Department of Defense, to U.S. Representative Bill McCollum (May 22, 1996).

²⁸For instance, a tribunal has been set up by the Security Council of the United Nations to try individuals for war crimes committed during the civil war in the former Yugoslavia. See Margaret Mikyung Lee, Raphael Perl and Steven Woehrel, "CRS Report for Congress—Bosnia War Crimes: The International Criminal Tribunal for the Former Yugoslavia and U.S. Policy" (1996).

²⁹See statement submitted to the Immigration and Claims Subcommittee of the Judiciary Committee in connection with the Subcommittee's June 12, 1996, hearing on H.R. 2587 by Alfred P. Rubin, Distinguished Professor of International Law, the Fletcher School of Law and Diplomacy, Tufts University.

³⁰See letter from Barbara Larkin to Lamar Smith and letter from Judith Miller to Bill McCollum.

³¹Presently, Protocol I (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts) and Protocol II (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts) have not been ratified by the United States.

³²The United States ratified the convention on February 23, 1909.

H.R. 3680 provides that, should the United States ratify any protocols to the Geneva conventions, perpetrators of grave breaches of such protocols may be prosecuted. As to the other measures, with the exception of the "Protocol on Prohibitions or Restrictions on the Use of Mines" (which the United States has yet to ratify in its amended form), none require that signatory countries enact penal sanctions against violators. Because of the lack of exigency, the Committee will consider in the future (as to those measures the United States has ratified) the merits of extending the criminal sanctions of H.R. 3680.

HEARINGS

The Committee's Subcommittee on Immigration and Claims held one day of hearings on H.R. 2587, the predecessor bill to H.R. 3680, on June 12, 1996. Testimony was received from Michael Matheson, Principal Deputy Legal Advisor, U.S. Department of State; John H. McNeil, Senior Deputy General Counsel (International Affairs and Intelligence), U.S. Department of Defense; the Honorable Robinson O. Everett, Senior Judge, U.S. Court of Appeals for the Armed Forces, Center on Law, Ethics, and National Security at the Duke University School of Law; Monroe Leigh, Steptoe and Johnson; and Mark S. Zaid, Law Office of Mark S. Zaid. Additional material was received from Alfred P. Rubin, the Fletcher School of Law and Diplomacy at Tufts University.

COMMITTEE CONSIDERATION

On June 27, 1996, the Subcommittee on Immigration and Claims met in open session and ordered reported the bill H.R. 3680, by a voice vote, a quorum being present. On July 16, 1996, the Committee met in open session and ordered reported favorably the bill H.R. 3680 without amendment by a recorded vote of 23 to 2, a quorum being present.

VOTE OF THE COMMITTEE

Vote on Final Passage: Adopted 23 to 2.

AYES	NAYS
Mr. Hyde	Mr. Scott
Mr. Moorhead	Ms. Waters
Mr. McCollum	
Mr. Gekas	
Mr. Coble	
Mr. Smith	
Mr. Schiff	
Mr. Canady	
Mr. Goodlatte	
Mr. Buyer	
Mr. Hoke	
Mr. Bono	
Mr. Heineman	
Mr. Conyers	
Mrs. Schroeder	
Mr. Frank	
Mr. Boucher	
Mr. Reed	
Mr. Nadler	
Mr. Watt	
Mr. Becerra	
Ms. Lofgren	
Ms. Jackson Lee	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(1)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(1)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(1)(3)(B) of House rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(1)(C)(3) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 3680, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 23, 1996.

Hon. HENRY J. HYDE,
*Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 3680, the War Crimes Act of 1996, as ordered reported by the House Committee on the Judiciary on June 19, 1996. CBO estimates that enacting H.R. 3680 would not result in any significant cost to the federal government. Because enactment of H.R. 3680 could afford direct spending and receipts, pay-as-you-go procedures would apply to the bill. However, CBO estimates that any impact on direct spending and receipts would not be significant.

H.R. 3680 would create a new federal criminal offense for the commission of certain war crimes in violation of the Geneva Conventions of 1949. Under the bill, the federal government could prosecute members of the U.S. armed forces or U.S. nationals who have allegedly committed certain war crimes such as murder and torture. H.R. 3680 also would permit the government to prosecute those individuals who commit war crimes against members of the U.S. armed forces or U.S. nationals. While current federal and state laws allow for the prosecution of some of these war crime offenses, there are some limitations in the existing laws. Thus, CBO expects that under H.R. 3680 the federal government would be able to pursue additional cases that it otherwise would have been prevented from prosecuting. Based on information from the Department of Defense, however, CBO does not expect the federal government to pursue many additional cases each year. Thus, CBO estimates that enacting H.R. 3680 would not have a significant impact on the cost of federal law enforcement activity.

Because those prosecuted and convicted of committing war crimes could be subject to fines, the government might collect additional fines if H.R. 3680 is enacted. Such collections are likely to be negligible, however, because it is not likely that the federal government would pursue many cases under the bill. Any collections of such fines would be recorded in the budget as governmental receipts, or revenues. They would be deposited in the Crime Victims Fund and spent in the following year. Because the increase in direct spending would be the same as the amount of fines collected with a one-year lag, the additional direct spending also would be negligible.

Section 4 of the Unfunded Mandates Reform Act of 1995 excludes from the application of that Act legislative provisions that are necessary for the ratification or implementation of international treaty obligations. The provisions of H.R. 3680 fit within that exclusion because the bill would implement penal provisions of the Geneva Conventions of 1949.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susanne S. Mehlman.

Sincerely,

JUNE E. O'NEILL, *Director.*

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(1)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that H.R. 3680 will have no significant inflationary impact on prices and costs in the national economy.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

The Act may be cited as the "War Crimes Act of 1996."

Section 2. Criminal penalties for certain war crimes

The bill creates a new Chapter 118 of title 18 of the United States Code titled "War Crimes," which contains a new section 2401 titled "War crimes." The section provides that whoever, whether inside or outside the United States, commits a grave breach of the Geneva Conventions in two specified circumstances shall be fined under title 18 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. The two circumstances are (1) the person committing the breach is a member of the armed forces of the United States or a national of the United States, and (2) the victim of the breach is a member of the armed forces of the United States or a national of the United States. "Grave breach of the Geneva Conventions" means conduct defined as a grave breach in any of the four international conventions relating to the laws of warfare signed at Geneva on August 12, 1949, or any protocol to the conventions to which the United States is a party.

The enactment of H.R. 3680 is not intended to affect in any way the jurisdiction of any court-martial, military commission, or other military tribunal under any article of the Uniform Code of Military Justice or under the law of war or the law of nations.

AGENCY VIEWS

The comments of the Department of State and the Department of Defense to H.R. 2587, the predecessor bill to H.R. 3680, are as follows:

GENERAL COUNSEL OF THE
DEPARTMENT OF DEFENSE,
Washington, DC, May 22, 1996.

Hon. BILL MCCOLLUM,
*Chairman, Subcommittee on Crime, Committee on the Judiciary,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Defense on H.R. 2587. H.R. 2587 would create in title 18, United States Code, a new chapter 118 containing section 2401 dealing with war crimes. Section 2401 would make it an offense cognizable in federal district court for any person to commit a grave breach of the 1949 Geneva Conventions against a citizen of the United States or a member of the Armed Forces of the United States. The term "grave breach" is defined in the applicable Geneva conventions.

The Department of Defense supports the purpose behind H.R. 2587. We believe, however, that the jurisdictional provisions should be broadened from the current focus on the nationality of the victims of the war crime. Specifically, we suggest adding two additional jurisdictional bases: (1) where the perpetrator of a war crime is a United States national (including a member of the Armed Forces); and (2) where the perpetrator is found in the United States, without regard to the nationality of the perpetrator or the victim. We also suggest using the term "national of the United States" for the term "citizen of the United States" (in proposed 18 U.S.C. 2401(a)), since national of the United States is used in many places in title 18 of the United States Code, e.g., 18 U.S.C. 1203(c), 2280(e), 2281(d), 2331(2), and 3077(a)(A).

The first jurisdictional change would hopefully never be required to be used. However, were a U.S. service member the perpetrator of a war crime, such general federal jurisdiction would be necessary to ensure that a former service member could be prosecuted. See *Toth v. Quarles*, 350 U.S. 11 (1955) (no UCMJ jurisdiction over former member of a military service). We note in this regard that, under a Memorandum of Agreement between the Department of Defense and the Justice Department, a current member of the Armed Forces would be tried for a violation of the War Crimes Act in a military court.

The second jurisdictional change is required in order to be in compliance with our international obligations.

We further suggest that "war crimes" be defined to encompass those activities prohibited by Articles 23, 25, 27 and 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907, as the Geneva Conventions are built upon the Hague Conventions and do not necessarily cover all the activity prohibited by the articles of this Hague convention. In addition, we believe that the provision should also cover violations of the rules of non-international armed conflicts, e.g., civil wars, rebellions, that are specified in common Article 3 of the Geneva conventions.

To facilitate the Committee's review of this important proposal, I have attached a redraft of this provision to accomplish the above mentioned situations.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

JUDITH MILLER.

Enclosure.

U.S. DEPARTMENT OF STATE,
Washington, DC, May 17, 1996.

Hon. LAMAR SMITH,
*Chairman, Subcommittee on Immigration and Claims, Committee
on the Judiciary, House of Representatives.*

DEAR MR. CHAIRMAN: This letter sets forth the views of the Department of State on H.R. 2587. H.R. 2587 would create in title 18, United States Code, a new chapter 118 containing section 2401

dealing with war crimes. Section 2401 would make it an offense cognizable in federal district court for any person to commit a “grave breach of the Geneva conventions” relating to the laws of warfare signed at Geneva 12 August 1949, or any protocol thereto to which the United States is a party, against a citizen of the United States or a member of the armed forces of the United States.

The Department of State supports the purpose behind H.R. 2587. We believe, however, that the provision should be expanded also to apply to grave breaches committed by a member of the armed forces of the United States or by any national of the United States. (The term “national of the United States,” which is used many places in title 18, United States Code, e.g., 18 U.S.C. 1203(c), 2280(e), 2281(d), 2331(2), 3077(a)(A), would be more appropriate than “citizen of the United States.”) We note in this regard that once a person is no longer a member of the armed forces of the United States, he/she is no longer subject to the jurisdiction of the Uniform Code of Military Justice, see *Toth v. Quarles*, 350 U.S. 11 (1955). Hence, any grave breach such an individual may have committed could go unpunished.

We also believe that, in order to be in compliance with our international obligations, jurisdiction should also exist when the perpetrator of any grave breach of the Geneva conventions is later found in the United States such activity was committed.

We note that while the title of the proposed chapter 118 is “War crimes,” the provision’s limitation to “grave breaches” of the Geneva conventions potentially omits important war crimes which we believe should be covered. Accordingly, we suggest that the provision be expanded to cover a more general category of “war crimes,” and that the phrase “war crimes” should be defined to include not only grave breaches of the 1949 Geneva conventions and their protocols, but also violations of the rules applicable in non-international armed conflict, e.g., civil wars and other internal conflicts, that are specified in common Article 3 of the Geneva conventions. “War crimes” should also be defined to include violations of other prohibitions on means and methods of warfare that are contained in the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907.

Finally, Protocol II (on landmines) to the Convention on Conventional Weapons (to which the United States is a Party) has recently been amended to require imposition of penal sanctions against persons who, in relation to armed conflict and contrary to the provisions of the Protocol, wilfully kill or cause serious injury to civilians. Accordingly, to ensure that the United States will be in compliance with its obligations under the revised Protocol when it is ratified by, and enters into force for, the United States, the provision should also cover such offenses.

To facilitate the Subcommittee’s review of this important proposal, we have attached a redraft of this provision to address the above mentioned concerns.

The Office of Management and Budget advises that from the standpoint of the Administration’s program there is no objection to the submission of this report.

I hope this information is useful to you. Please do not hesitate to call if we can be of further assistance.

Sincerely,

BARBARA LARKIN,
*Acting Assistant Secretary,
Legislative Affairs.*

Enclosure: As stated.

ADMINISTRATION PROPOSED REVISION

SEC. . CRIMINAL PENALTIES FOR CERTAIN WAR CRIMES.

(a) IN GENERAL.—Title 18, United States Code, is amended by inserting after chapter 117 the following new chapter:

“CHAPTER 118—WAR CRIMES

“Sec.
“2401. War crimes.

“§ 2401. War crimes

“(a) IN GENERAL.—whoever, whether inside or outside the United States, commits a war crime, shall be fined under this title or imprisoned for life or any term or years, or both, and if death results to the victim, shall be subject to the penalty of death.

“(b) JURISDICTION.—There is federal jurisdiction over the activity prohibited in subsection (a)—

“(1) if the perpetrator or the victim is a national of the United States or a member of the armed forces of the United States;

“(2) if the perpetrator is later found in the United States after such activity is committed; or

“(3) if such activity occurs within the United States.

“(c) DEFINITIONS.—As used in this chapter, the term—

“(1) ‘national of the United States’ has the meaning given in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)).

“(2) ‘war crime’ means any conduct—

“(A) 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;

“(B) 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;

“(C) 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

“(D) 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.

“(d) No prosecution of any activity prohibited in subsection (a) shall be undertaken by the United States except upon the notification in writing of the Attorney General or his designee that in his judgment a prosecution by the United States is in the public interest and necessary to secure substantial justice.”.

(b) CLERICAL AMENDMENT.—The table of chapters for part 1 of title 18, United States Code, is amended by inserting after the item relating to chapter 117 the following new item:

“118. War crimes 2401”.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

TITLE 18, UNITED STATES CODE

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PART I—CRIMES

Chap.		Sec.
1. General provisions		1
* * * * *		
118. War crimes		2401
* * * * *		

CHAPTER 118—WAR CRIMES

Sec.
2401. War crimes.

§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.

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