

INTRODUCTORY NOTE TO THE JUSTICE FOR VICTIMS OF WAR CRIMES ACT (U.S.)
BY ADAM R. PEARLMAN*
[January 5, 2023]

Introduction

On January 5, 2023, the U.S. Justice for Victims of War Crimes (JVWC) Act was signed into law.¹ The legislation closed long-recognized gaps in U.S. federal jurisdiction for holding accused war criminals accountable. Prior to the JVWC, the federal war crimes statute provided jurisdiction over war crime offenses committed anywhere, but only if the victim or offender was a member of the U.S. Armed Forces or a U.S. national. The baseline federal statute of limitations also applied, meaning the United States could only bring charges within five years of the crime occurring.

The JVWC fundamentally changed the scope and reach of the United States' ability to prosecute war criminals. Now, anybody who commits a war crime anywhere in the world can be prosecuted by the United States if they are found therein. The new law also removes the statute of limitations, although the ability of the United States to exercise its new universal jurisdiction only can be applied to war crimes committed after the JVWC took effect.

Background

Each of the four Geneva Conventions of 1949 required States 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 Conventions.² Despite ratifying each of the Conventions, however, the United States had never enacted the called-for domestic penal legislation until 1996 (thirteen months after the Srebrenica genocide).

During the intervening decades, it was generally believed that other U.S. laws already “provided adequate means of prosecution” for war crimes.³ Indeed, ahead of passing the 1996 statute, Congress found that many war crimes, including use of weapons of mass destruction, terrorism, torture, genocide, killing of protected persons, and hostage taking, could be prosecuted under then-existing U.S. law. But others—such as the killing of a prisoner of war—could not.⁴ Congress further came to recognize that there were major gaps in the ability to prosecute those who committed certain war crimes against Americans, or former military service members no longer subject to court-martial.⁵ Congress passed the War Crimes Act (WCA)⁶ to fill those gaps and carry out its international obligations under the Geneva Conventions.

However, the WCA remained deficient, only allowing prosecutions when either a victim or the perpetrator was a U.S. national or a member of the U.S. armed forces. Unlike its sister statutes concerning genocide and torture, the WCA did not allow the United States to prosecute war criminals whose only connection to the United States was their presence when arrested for their crimes elsewhere.⁷ Failing to cover the vast majority of war criminals who had gone to the United States, were already there, or would eventually travel there, there was not a single prosecution under the 1996 statute.⁸

Rather, for many years (both pre- and post-dating the passage of the WCA), other measures were used against war criminals who could not be prosecuted in the United States. For decades, the U.S. Department of Justice's Office of Special Investigations brought cases against Nazi war criminals under immigration laws to remove them from the country and, if the defendants had fraudulently obtained citizenship, denaturalize them. More recently, Congress passed legislation for designating and sanctioning those who commit the specific war crime of using human shields.⁹ Still other atrocities that could not be prosecuted under the WCA were instead charged under U.S. immigration and counterterrorism laws.

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The Statute

The JVWC was introduced three months after Russia's February 2022 invasion of Ukraine. It passed the Senate by unanimous consent on December 21, 2022—the same day Ukrainian President Volodymyr Zelenskyy addressed a joint session of Congress, and passed the House without objection the following day.

The straightforward legislation makes two key changes to the U.S. federal criminal code: it allows the United States to exercise universal jurisdiction against alleged war criminals found in the United States and it removes the five-year statute of limitations from war crimes cases. The criminal treatment of war crimes now more closely mirrors U.S. laws on genocide, torture, and the use of child soldiers, which cover suspected perpetrators present in U.S. territory, regardless of their nationality.

The jurisdictional change enacted via the JVWC had been recommended to Congress before the original War Crimes Act passed in 1996. Both the U.S. Department of Defense and the Department of State requested that Congress empower the government to prosecute war crimes committed anywhere by anyone, so long as the perpetrator is found in the United States. Both agencies characterized that broader scope as necessary to fulfill the United States' obligations under international law.

At that time, however, Congress decided that, "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." It determined that extraditing war criminals to foreign nations or international tribunals was an adequate substitute, and that providing for universal jurisdiction would "in all likelihood be purely symbolic," as universal jurisdiction had never been exercised as such up to that time.¹⁰ Although President Clinton signed the legislation into law, he made known his disagreement with Congress's conclusion on those points, using his Signing Statement to make clear that the legislation's scope ought to be expanded further.¹¹

Congress appears to have resolved its foreign policy concerns via the JVWC's requirement for political-level certification that any war crimes prosecutions are "in the public interest and necessary to secure substantial justice." These non-delegable certifications must be made by an Assistant Attorney General or higher for matters involving U.S. nationals, or by the Attorney General or Deputy Attorney General for all other cases. The Departments of Defense and State may offer their views to the certifying authority but, whether they support or object to the Justice Department's proceeding with any given case, the ultimate certification is not reviewable by the courts.¹²

Conclusion

Only five years and three weeks after the original War Crimes Act took effect, the U.S. approach to asserting extra-territorial criminal jurisdiction fundamentally changed as the September 11, 2001 terror attacks redefined how it treated the relationships between war, terrorism, and criminal activity. It nevertheless took Russia's invasion of Ukraine (again) in 2022 to fill the jurisdictional shortcomings identified before the first WCA was passed.

Although Congress is now clearly convinced of the need for this broader power to prosecute war criminals, several of the concerns it expressed when it declined to pass a broader War Crimes Act in 1996 still exist in some form, or its solution carries with it new and different risks. The "daunting" problems involving witnesses and evidence that worried Congress in 1996 are as salient as ever, even if they take a different form in this digital and mobile age than they did 27 years ago.¹³ As for its concern over war crimes prosecutions drawing the United States into unwanted foreign policy matters, the JVWC's certification requirement is something of a double-edged sword. Although some suggest that this additional bureaucratic step "would likely not add a greater burden on [the] prosecution,"¹⁴ in that it does not add any element needing to be proved in court, it nevertheless makes taking action subject to political considerations that prosecutors much prefer to avoid and hands a talking point to those who accuse the United States of bringing politically motivated prosecutions.¹⁵

While the JVWC's impact will certainly reach far beyond the war in Ukraine, gaps in the U.S. domestic legal framework remain. The Constitution's prohibition against *ex post facto* laws means the old statute of limitations applies to any war crimes committed in Ukraine in 2022. It also means many of the most heinous crimes committed by the Islamic State for Iraq and Syria (ISIS), for example, will not be prosecutable in the United States as war crimes,

although terrorism, torture, and other charges may still be available. Moving forward, though, the extraterritorial application of the war crimes statute means it is more likely that many such atrocities can be “cumulatively charged”¹⁶ by the United States.

Further, it is uncertain whether commanders responsible for their subordinates’ war crimes can be prosecuted under the new law. And perhaps most contentious of all, the United States still cannot prosecute crimes against humanity (nor the crime of aggression). Not only did Congress not include crimes against humanity in the law that passed, but it did so despite advocacy by some for much broader legislation that would add crimes against humanity and other tools to the ability of the United States to hold human rights violators accountable for their crimes.¹⁷

On the other hand, one can reasonably conclude that the statutory language requiring the defendant to be “found in” the United States was chosen quite deliberately and will be interpreted literally. A defendant might be “found” while in the United States as a tourist, or having been extradited from another country, interdicted on the high seas, or possibly even the target of a rendition.¹⁸ This breadth helps to drive home Attorney General Merrick Garland’s observation that, “In the United States of America, there must be no hiding place for war criminals and no safe haven for those who commit . . . atrocities. This Bill will help the Justice Department fulfill that important mandate.”¹⁹

ENDNOTES

- 1 Pub. L. No. 117-351, 136 Stat. 6265.
- 2 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, Article 49; Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, Article 50; Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, Article 129; Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, Article 146.
- 3 H.R. Rep. 104-698 at **4–5.
- 4 *Id.*
- 5 *Id.* at **6–7.
- 6 Pub. L. 104-192, 110 Stat 2104, codified at 18 U.S.C. §2441.
- 7 *See* 18 U.S.C. § 1091 (genocide); 18 U.S.C. §§ 2340–2340A (torture).
- 8 Eli Rosenbaum, Opening Statement Before the Senate Judiciary Committee at a Hearing Titled, “From Nuremberg to Ukraine: Accountability for War Crimes and Crimes Against Humanity” (Sep. 28, 2022), <https://www.justice.gov/opa/speech/counselor-war-crimes-accountability-eli-m-rosenbaum-opening-statement-senate-judiciary>.
- 9 Sanctioning the Use of Civilians as Defenseless Shields Act (“Shields Act”), Pub. L. 115–348, 132 Stat. 5055.
- 10 H. Rep. 104-698.
- 11 William J. Clinton, Statement on Signing the War Crimes Act of 1996 (Aug. 21, 1996), <https://www.presidency.ucsb.edu/documents/statement-signing-the-war-crimes-act-1996>.
- 12 *See* 18 U.S.C. §§ 2441(f)–(h).
- 13 *See, e.g.*, Adam Pearlman, *Battlefield Evidence: From Terrorism to Ukraine*, THE SCIF.ORG (June 8, 2023), <https://thescif.org/battlefield-evidence-from-terrorism-to-ukraine-1396e5149356>.
- 14 Grace Lin, *Expanding U.S. Prosecutorial Power Over International War Crimes*, COLUM. J. TRANSNAT’L L. BULLETIN (Feb. 14, 2023), <https://www.jtl.columbia.edu/bulletin-blog/expanding-us-prosecutorial-power-over-international-war-crimes>.
- 15 *Cf.* Adam R. Pearlman, *Cabo Verde and the Extradition of Alex Saab*, THE INTERNATIONAL LAWYER, v. 56 n. 3. (2023).
- 16 Adam Pearlman and Arthur Traldi, *Greater than the Sum of the Parts: Cumulative Charging of Islamic State Fighters in Domestic Trials*, LAWFARE (July 2, 2020) <https://www.lawfareblog.com/greater-sum-parts-cumulative-charging-islamic-state-fighters-domestic-trials>.
- 17 *See* Press Release, Senator Dick Durbin, Following the Atrocities in Bucha, Durbin to Introduce Legislation to Hold Russian War Criminals Accountable (Apr. 5, 2022), <https://www.durbin.senate.gov/newsroom/press-releases/following-the-atrocities-in-bucha-durbin-to-introduce-legislation-to-hold-russian-war-criminals-accountable>.
- 18 *See, e.g.*, United States v. Alvarez-Machain, 504 U. S. 655 (1992).
- 19 Press Release, U.S. Department of State, Attorney General Merrick B. Garland Statement on the Passage of the Justice for Victims of War Crimes Act (Dec. 22, 2022), <https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-statement-passage-justice-victims-war-crimes-act>.

JUSTICE FOR VICTIMS OF WAR CRIMES ACT (U.S.)*
[January 5, 2023]



One Hundred Seventeenth Congress of the United States of America

AT THE SECOND SESSION

*Begun and held at the City of Washington on
Monday, the third day of January, two
thousand and twenty two*

An Act

To amend section 2441 of title 18, United States Code, to broaden the scope
of individuals subject to prosecution for war crimes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Justice for Victims of War Crimes Act”.

SEC. 2. WAR CRIMES.

Section 2441 of title 18, United States Code, is amended—

(1) by striking subsection (b) and inserting the following:

“(b) JURISDICTION.—There is jurisdiction over an offense described in subsection (a) if—

“(1) the offense occurs in whole or in part within the United States; or

“(2) regardless of where the offense occurs—

“(A) the victim or offender is—

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S. 4240—2

“(i) a national of the United States or an alien lawfully admitted for permanent residence; or

“(ii) a member of the Armed Forces of the United States, regardless of nationality; or

“(B) the offender is present in the United States, regardless of the nationality of the victim or offender.”; and

(2) by adding at the end the following:

“(e) NONAPPLICABILITY OF CERTAIN LIMITATIONS.—In the case of an offense described in subsection (a) and further described in subsections (c)(1) and (c)(3), an indictment may be found or an information may be instituted at any time without limitation.

“(f) CERTIFICATION REQUIREMENT.—

“(1) IN GENERAL.—No prosecution for an offense described in subsection (a) shall be undertaken by the United States except on written certification of the Attorney General, the Deputy Attorney General, or an Assistant Attorney General, which function of approving prosecutions may not be delegated, that a prosecution by the United States is in the public interest and necessary to secure substantial justice.

“(2) OFFENDER PRESENT IN UNITED STATES.—For an offense for which jurisdiction exists under subsection (b)(2)(B) (and does not exist under any other provision of subsection (b)), the written certification required under paragraph (1) of this subsection that a prosecution by the United States is in the public interest and necessary to secure substantial justice shall be made by the Attorney General or the Deputy Attorney General, which function may not be delegated. In issuing such certification, the same official shall weigh and consider, among other relevant factors—

“(A) whether the alleged offender can be removed from the United States for purposes of prosecution in another jurisdiction; and

“(B) potential adverse consequences for nationals, servicemembers, or employees of the United States.

“(g) INPUT FROM OTHER AGENCY HEADS.—The Secretary of Defense and Secretary of State may submit to the Attorney General for consideration their views generally regarding potential benefits, or potential adverse consequences for nationals, servicemembers, or employees of the United States, of prosecutions of offenses for which jurisdiction exists under subsection (b)(2)(B).

“(h) NO JUDICIAL REVIEW.—Certifications under subsection (f) and input from other agency heads under subsection (g) are not subject to judicial review.

“(i) RULES OF CONSTRUCTION.—Nothing in this section shall be construed as—

“(1) support for ratification of or accession to the Rome Statute of the International Criminal Court, which entered into force on July 1, 2002; or

“(2) consent by the United States to any assertion or exercise of jurisdiction by any international, hybrid, or foreign court.”

Speaker of the House of Representatives.

Vice President of the United States and

President of the Senate.