

Finally, a Better U.S. War Crimes Bill. Now What?

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The Justice for Victims of War Crimes Act would finally give the U.S. the ability to prosecute suspected war criminals found inside U.S. borders, regardless of nationality, and now Congress needs to close other loopholes in order to promote justice for international crimes.



The aftermath of the massacre in Bucha, Ukraine. (manhhai,<https://flic.kr/p/2ncnUgL>; CC BY 2.0, <https://creativecommons.org/licenses/by/2.0/>)

Justice is having a moment. Ongoing atrocities in Ukraine have put accountability for serious international crimes in the spotlight in ways not seen for decades. That's especially true in the United States, where legislators usually skeptical of non-U.S. legal efforts are lining up on congressional resolutions to hold Russian officials accountable for alleged abuses committed in Ukraine, including welcoming International Criminal Court (ICC) involvement.

One significant bipartisan and bicameral effort is the Justice for Victims of War Crimes Act. It would improve upon the 1996 war crimes legislation so that those implicated in war crimes committed abroad who are found in the U.S. can be brought to justice even if they or their victims are not U.S. citizens or members of the U.S. armed forces, which the 1996 law requires. Sen. Chuck Grassley, R-Iowa, one of the bill's authors and sponsors, said this bill would ensure that the U.S. does not become a "safe haven for war criminals." The bill was introduced in May and is expected to have bipartisan support.

Creating jurisdiction in the U.S. for war crimes committed abroad regardless of the alleged perpetrator's or victim's nationality is a long time coming. The expanded conflict in Ukraine may be the catalyst, but the abuses seen there aren't new or unique. Grave international crimes—in places such as the Central African Republic, the Democratic Republic of Congo, Ethiopia, Myanmar, Palestine, South Sudan, and Syria—continue to be committed with impunity, often with much less media and political attention. The victims of those crimes deserve every bit as much access to justice as the victims in Ukraine.

So what other steps can the U.S. take to look beyond what's happening in Ukraine and support international justice consistently? First, Congress should consider legislation to prosecute crimes against humanity, which, unlike war crimes, can be committed during peacetime as well as during war. Second, liability should be expanded to ensure that leaders responsible for war crimes as a matter of command responsibility can also be prosecuted. Third, Congress should remove legislative obstacles that it previously adopted so that the U.S. can constructively support the ICC. Fourth, the Department of Justice, evidence permitting, should bring cases based on these newly improved laws. We'll discuss all of these current gaps in U.S. law or practice below after a brief analysis of the proposed War Crimes Act.

While the U.S. contributed to the development of the global criminal justice architecture at Nuremberg and has continued to do so, it hasn't uniformly supported justice efforts over the decades, in part due to lack of political will and concern over non-U.S. investigations of U.S. military personnel as well as legislative obstacles. Here, we focus on bipartisan legislative fixes to help restore

the U.S.'s reputation on promoting justice for international crimes, although there are other practical ways to consistently support international justice (as we highlight in our conclusion).

War Crimes Bill Provides for Jurisdiction Based on Presence in the U.S.

The Justice for Victims of War Crimes Act would finally give the U.S. the ability to prosecute suspected war criminals found inside U.S. borders regardless of nationality. Currently, the 1996 war crimes statute only allows the U.S. to take on cases in which the alleged violator or victim is a U.S. national or a member of the U.S. armed forces.

The new bill would help U.S. judicial authorities catch up with the national courts of an increasing number of countries that have used the principle of universal jurisdiction to prosecute people implicated in serious international crimes committed abroad, even if neither they nor the victims are citizens of the prosecuting country. These cases have been crucial to providing justice, especially when domestic courts in countries where the crimes were committed are unable or unwilling to pursue investigations and prosecutions. Consider the prosecution in Switzerland last year that led to the first conviction on war crimes committed in Liberia.

That case currently would not be possible in the United States. Right now, criminal suspects living or traveling inside the U.S. can move freely without fear of domestic prosecution for war crimes because of the nationality requirement, which has left the 1996 war crimes bill effectively a “dead letter” law. Indeed, there has not been a single prosecution based on the statute in the 26 years since it was enacted. As discussed further below, because of this challenge, atrocities that could be prosecuted under the war crimes act have instead repeatedly been charged under U.S. immigration and counterterrorism laws.

The value of the new bill isn't only in the ability of the U.S. to prosecute alleged war criminals found on U.S. soil regardless of nationality. It would also bring the U.S. into compliance with the 1949 Geneva Conventions, which obligate states to investigate or extradite war crimes suspects found within their jurisdiction.

The new bill would also complement domestic U.S. laws on genocide, torture, and the use of child soldiers, which cover suspected perpetrators in U.S. territory regardless of their nationality.

Finally, the proposed legislation extends the statute of limitations for war crimes discovered years after they occur. International law has been ahead of the U.S. for some time on this issue. The current statute does not explicitly provide a limitation period and therefore the general five-year statute of limitations period for criminal offenses applies. The new act provides that prosecutions may take place “at any time without limitation.” Extending the time in which victims can seek justice is

essential, since their pain and suffering has no time limit and neither should justice for what they've endured. It's also important because war crimes cases are complicated. Investigations can stretch well beyond a typical statute of limitations, and those allegedly responsible may arrive on U.S. territory years later.

The draft bill does not have retroactive application, however, which means it would not cover, for example, any war crimes that have been committed from the start of the Ukraine conflict through the date the bill is adopted.

For all of its positive attributes, the new war crimes bill isn't without shortcomings. Purportedly to avoid conflicts with countries that do not want U.S. officials prosecuting their citizens, the bill requires the attorney general or their delegate to certify in writing that a war crimes prosecution "is in the public interest and necessary to secure substantial justice," creating a political check that builds on prior guidelines for other human rights-related prosecutions. While the bar for certification is relatively low and the attorney general could delegate this decision, this requirement should not stand in the way of efforts to bring future prosecutions.

The legislation also does not address the death penalty provision in the original legislation as a potential punishment, even though many other domestic jurisdictions around the world and international courts do not impose capital punishment, even for genocide. (Human Rights Watch opposes the death penalty in all circumstances as an inherently cruel and inhuman punishment.)

The Justice for Victims of War Crimes Act would help ensure the U.S. is not a safe haven for serious human rights abusers. Now Congress should close other legal loopholes that allow impunity for grave international crimes.

Closing the Justice Gap on Crimes Against Humanity

One major gap in the U.S. justice architecture is the lack of legislation expressly to make crimes against humanity a criminal offense.

Sen. Richard Durbin, D-Ill., one of the primary sponsors behind the new war crimes bill, has been pushing for a crimes against humanity bill since 2009. War crimes are serious violations of the laws of war committed in the context of armed conflict, while crimes against humanity can be committed during peacetime as well as war. Crimes against humanity have been defined as serious offenses committed as part of a widespread or systematic attack on a civilian population.

As Human Rights Watch wrote, "The conviction of a former Syrian intelligence officer for crimes against humanity by a German court" in Koblenz is a groundbreaking and recent example of how domestic prosecutions for crimes against humanity can advance justice for serious crimes committed elsewhere.

The initial scope of the new war crimes bill was much broader, also adding crimes against humanity to the criminal code and expanding both the Torture Victim Protection Act (which currently limits civil remedies to victims of torture and extrajudicial killing) and the Immigration and Nationality Act (which includes immigration-related offenses related to human rights violations and war crimes) to make war crimes and crimes against humanity grounds for inadmissibility.

While those elements didn't make it into the proposed war crimes bill, we understand that Durbin intends to introduce a broader bill—the War Crimes Accountability Act—to pick up all of those other important legislative pieces. Such initiatives should be seized with a view to increasing access to justice for serious crimes wherever possible.

Expanding Liability Along the Chain of Command

The duty of commanders to prevent or punish war crimes committed by their subordinates is a long-standing principle of the laws of war. Since World War II, this principle has been integral to holding those in positions of command accountable for abuses before domestic and international tribunals. Under this principle, liability extends not only to those who are directly involved in serious international crimes but also commanders and civilian leaders who knew or should have known about the crimes being planned or committed and failed to take appropriate action.

That basis of liability is already expressly recognized in the U.S. military manual, upheld by the U.S. Supreme Court in cases brought after World War II, and has been recognized in several civil cases in federal courts involving human rights violations. But U.S. federal law does not include command responsibility for federal crimes or serious international crimes. Said another way, there is no path for criminal liability along the entire chain of command. Currently under U.S. federal law, alleged perpetrators may only be prosecuted as principals and accomplices, under theories of attempt, or when they commit crimes as part of a conspiracy.

Congress has an opportunity now, with so much attention on Moscow's role in the serious crimes being committed in Ukraine, to build out this body of law and expand the definition of liability. Indeed, a theory of liability should apply to all statutes dealing with serious international crimes. Though it may not be feasible to add this to the current war crimes bill under consideration, a legislative fix to expand liability would give U.S. prosecutors a broader remit. Accountability, after all, should apply to everyone involved in the chain of command, from the foot soldier to the military commander or political leader.

Removing Legislative Obstacles to Supporting the ICC

The U.S. government has had a long-standing objection to the ICC because of its potential jurisdiction over nationals from non-member countries. This jurisdiction could extend to U.S. citizens implicated in crimes committed in ICC member countries. But lawmakers who have vigorously opposed the ICC are suddenly speaking favorably about the court's investigation to prosecute the alleged crimes occurring in Ukraine. Sen. Lindsey Graham, R-S.C., for example, led a unanimous Senate resolution supporting "any investigation" into crimes "levied by President Vladimir Putin," which would include those investigations by the ICC. He also encouraged ICC member states to petition the court to take steps to investigate those crimes. (Graham is also a co-sponsor of the new war crimes bill and even met with the ICC prosecutor during his recent visit to Washington, saying that the ICC's Ukraine investigation is "a proper exercise of jurisdiction" and "what the court was created for.")

The U.S. has a complicated history with the ICC, and was one of only seven countries voting against the Rome Statute, the court's founding treaty. The George W. Bush administration was initially hostile to the court when it was established in 2002, though later didn't veto a U.N. Security Council resolution asking the ICC prosecutor to investigate crimes in Darfur, Sudan. While the Obama administration didn't wholeheartedly embrace the court, it made some positive strides toward justice through its "case-by-case" approach. It voted in favor of a U.N. Security Council resolution that referred the situation in Libya to the ICC prosecutor, played a critical role in the transfer to the court of two suspects, and expanded the U.S. War Crimes Rewards Program to include ICC fugitives. (That program offers financial incentives for information leading to the arrest, transfer to, or conviction by international criminal tribunals.) The Trump administration aggressively reversed course, culminating with issuing sanctions against the then-prosecutor, which the Biden administration later rescinded. More recently, Reps. Joaquin Castro, D-Texas, and Jim McGovern, D-Mass., introduced a bill barring sanctions on international organizations, including the ICC.

The Biden administration and Congress have now unequivocally stated their support for the ICC's investigation in Ukraine (although some questions remain as to how this stated support translates into practice). But maintaining the U.S. jurisdictional objection to the court while also supporting the ICC's investigations of Russian officials, when neither Russia nor Ukraine is a member of the court (though Ukraine accepted the court's jurisdiction through declarations), is contradictory and unsustainable.

The political rhetoric supporting the ICC's Ukraine investigation has been intense since the start of the conflict, but rhetoric isn't enough when there are legislative obstacles to providing real assistance to the court. A central legislative restriction is the American Servicemembers' Protection Act (ASPA), enacted the same year as

the establishment of the ICC. The law aims to protect U.S. service members from the ICC's jurisdiction. Since its passage, the ASPA has been watered down by amendments, which have been interpreted to allow the U.S. to engage in diplomatic activities with the ICC, provide information in particular ICC cases involving foreign nationals, and train ICC personnel or detail employees to the court when limited to such specific cases.

Now, Congress needs to withdraw all remaining provisions of the ASPA—including broad restrictions on general support for the court and the act's infamous "Hague invasion" provision, which authorizes the use of military force to liberate any U.S. citizen or citizen of an U.S.-allied country being held by the court.

A bill from Rep. Ilhan Omar, D-Minn., would do just that. Removing ASPA from the law books would show broad and unconditional support for accountability for the worst crimes. And, despite what ICC critics have said, the U.S. would always have the option of prosecuting American service members implicated in serious crimes before the ICC ever became involved. The ICC was created to be a court of last resort and remains so.

While a wholesale repeal of ASPA is unlikely to pass, removing some specific obstacles to cooperation with ICC investigations would go a long way to putting the U.S. on the right side of justice. The new Atrocity Crimes, Relief and Accountability (ACRA) Act introduced by Rep. Bill Keating, D-Mass., is an initial effort in that direction. The ICC is currently prohibited from conducting any investigative activity in the U.S., which means the court could not even interview witnesses to war crimes in Ukraine who are now living here, which has always been a nonsensical limitation. The ACRA Act would allow ICC investigators onto U.S. soil to conduct investigations related to crimes occurring in Ukraine. The ACRA legislation as introduced may be an incremental step, and further efforts are needed to expand its narrow scope beyond Ukraine.

Another necessary fix is repealing legislation that broadly restricts U.S. material assistance to or general cooperation with the ICC. Section 705(b) of the FY 2000–01 Foreign Relations Authorization Act (FRAA) restricts any funding "for use by, or for support of" the ICC unless the U.S. ratifies the Rome Statute. One bill by Rep. Sara Jacobs, D-Calif., would repeal this restriction and allow the U.S. to provide "material and technical" support to all ICC investigations; she has also introduced a narrower bill focused only on Ukraine along with Rep. Victoria Spartz, R-Ind.

Separately, annual appropriations legislation prohibits funds being made available to the ICC, while allowing certain technical assistance training, assistance to victims and witness protection, law enforcement, and other activities. The current draft Senate appropriations bill would clarify that some prior funding restrictions "shall not apply with regard to support, including funding, information, or in-kind support, to the International Criminal Court to assist with investigations into and

prosecutions related to the Situation in Ukraine or circumstances in which the Secretary of State determines that it is in the national security interest of the United States to provide such support.” This would be a significant step forward to expand the type of support the U.S. could choose to provide to the ICC. There is no moment like the present for the U.S. government to stand with victims of atrocities by making greater assistance to justice efforts possible.

Pursuing Prosecutions for Serious Crimes

Laws matter most when they’re put into effect in actual cases. We hope stronger accountability laws will increase the prospects of prosecutions for serious crimes in courts in the U.S.

The Human Rights and Special Prosecutions Section of the Department of Justice has a mandate to pursue serious crimes cases. But the U.S. has successfully prosecuted only one individual, Charles “Chuckie” Taylor Jr., the son of the former Liberian president, under its substantive human rights statutes. Instead, the U.S. has relied mostly on immigration laws to prosecute or deport foreign nationals who committed immigration fraud or perjury and are also implicated in serious international crimes, instead of prosecuting them for the underlying substantive crime.

One case currently in pretrial proceedings shows how powerful current U.S. domestic laws can be when they’re actually used. Michael Sang Correa of Gambia was indicted in June 2020 under the U.S. torture statute. In its indictment before the U.S. District Court for the District of Colorado, the Department of Justice alleges that Correa, who was living in Colorado, is responsible for the torture of at least six people in 2006, following an attempted coup against the former Gambian president, Yahya Jammeh. Correa and other members of a Jammeh “death squad,” for which he was allegedly a driver, beat their victims with plastic pipes, wires, and branches, covered the victims’ heads with plastic bags, and subjected some to electric shocks.

Consider also the situation of former Sri Lankan President Gotabaya Rajapaksa, who as defense secretary during the civil war with the Liberation Tigers of Tamil Eelam, which ended in 2009, was implicated in extrajudicial killings, enforced disappearances, and other grave abuses over many years. Rajapaksa, a U.S. citizen until he relinquished his citizenship to become Sri Lanka’s president, had long avoided possible prosecution and civil lawsuits in the U.S. under cover of diplomatic immunity. Until his return to Sri Lanka on Sept. 3, he was outside the country and an ordinary citizen, which created opportunities to pursue legal action against him in the U.S.

These cases should receive more attention and bandwidth, including under the new war crimes bill once adopted.

Congress is already pushing the government to be more forward leaning on justice and accountability. It can do more, for example, by holding regular briefings on the U.S. role in investigating and prosecuting war crimes. Such hearings were once held by the Senate Judiciary Committee's Subcommittee on Human Rights and the Law. Such efforts could present an important opportunity for the public and Congress to stay apprised of how substantive human rights criminal statutes are being used to prosecute suspects found on U.S. soil.

In addition, the U.S. should continue to provide support for credible investigations pursued in other countries on the basis of universal jurisdiction, including through cooperation and sharing of information and intelligence with other national judicial authorities as they build these cases. This is an essential element of coordination in Ukraine, where there are now a number of such investigations.

Practical Ways for the United States to Consistently Support International Justice

The armed conflict in Ukraine has generated unprecedented support for accountability for serious international crimes. This focus should be leveraged to increase the prospects for justice for victims when those crimes are committed, wherever they are committed.

The legislative fixes detailed above should be buttressed by political and practical support for justice for the worst international crimes. After all, it is in the United States' national interest to support accountability for serious crimes around the world so that history doesn't keep repeating itself, needlessly creating victims and instability.

One practical and final recommendation to the U.S. is to eschew political and legislative barriers to supporting the ICC. While acceding to the Rome Statute, the ICC's founding treaty, may not be in the administration's sights, the U.S. could publicly express support for ICC investigations into atrocities committed—for example—by Myanmar's security forces against Rohingya Muslims (in fact, the administration recently stated that it would support a U.N. Security Council referral of the situation to the ICC) or those arising from the conflict between Georgia and Russia (it has now "emphasize[d]" the ICC's decision to issue arrest warrants), both cases involving non-member countries. The U.S. also should stop standing in the way of the ICC's investigation into the Palestine situation. Further, the U.S. can provide practical support to the court; U.S. intelligence agencies could share evidence of crimes in specific investigations while other U.S. offices issue rewards for information to find and apprehend all ICC fugitives, cooperate in securing their arrests, protect witnesses, and fund the Trust Fund for Victims.

The U.S. could support the ICC, even without joining the ICC.

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