

# Prosecuting War Crimes Symposium – Justice for Victims of [Some] War Crimes Act?



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by [Hemi Mistry](#) | Feb 15, 2023



*Editor's note: The following post highlights a subject addressed at a Lieber Institute expert workshop focusing on Prosecuting War Crimes. For a general introduction to this symposium, see Professor Sean Watts and Jennifer Maddocks's [introductory post](#).*

Recent years have witnessed a revitalization of interest in pursuing accountability for perpetrators of core international crimes using domestic laws. We have seen a flurry of activity within national legal systems to those ends, most prominently the Justice for Victims of War Crimes Act (the Act). Against this backdrop, a law that allows the US federal investigation and prosecution of alleged war crimes, wherever in the world they occur and whatever the nationality of the accused should, surely, be a development worthy of note. Yet there has been very little commentary among those operating in the field of international criminal justice.

This post presents some observations regarding the Act from the perspective of a non-US international criminal lawyer. It considers US authorities' powers under the Act, the efficacy of any action that may be taken pursuant to those powers, and the adoption of the Act in the form taken, all of which may explain this dearth of enthusiasm. These issues have implications for the effectiveness and the legitimacy of any proceedings pursuant to the Act and may limit the extent to which it strengthens the regime of international criminal justice.

## **The Act and its Scope**

Entering into law on 5 January 2023, the [Justice for Victims of War Crimes Act](#) extends pre-existing federal US jurisdiction over war crimes in two ways. Prior to this Act coming into force, US jurisdiction over war crimes was limited to those

offenses either committed on the territory of the United States, by a US national, or where the victim of the crime was a US national.

Firstly, the Act extends US jurisdiction over war crimes to also include offenses where “the offender is present in the United States, regardless of the nationality of the victim or offender.” By doing so it enables the prosecution of war crimes when there is no US nexus to the crime, beyond the fact that the accused is present in the United States at the time jurisdiction is exercised.

Secondly, the Act removes the time limit on prosecutions for war crimes, both under existing US jurisdiction and under the expanded jurisdiction provided by the Act. There has been some disagreement as to the effect of this in practice and whether the United States would be able to prosecute crimes that were committed prior to the Act’s enactment (see Elise Baker, [here](#)). On one account, the Act’s effects are purely prospective: it only extends US jurisdiction over crimes committed after the Act’s entry into force, and the removal of the time limitation on prosecutions for war crimes does not allow the United States to prosecute historical war crimes (whether under the existing or expanded jurisdiction). If this interpretation is correct, while the Act may have utility in the future, its present-day practical utility is slight.

On the other account, because this Act does not expand the existing definition of war crimes under US law, and because the definition of war crimes is limited to crimes that have been long recognized as crimes under international law, the Act poses no issues of retroactivity. Rather, the Act simply extends US jurisdiction over offenses that have long been criminal under both US and international law.

The Act applies only to war crimes. It does not apply to other international crimes such as genocide and crimes against humanity. [Section 2441 of title 18, United States Code](#), which the Act amends, defines war crimes as grave breaches of the Geneva Conventions and “any protocol to such Convention[s] to which the United States is a party” (the United States has signed but not ratified Additional Protocols I and II). The definition also encompasses certain violations of the Annex to the 1907 Hague Convention IV (Regulations 23, 25, 27 and 28), violations of Common Article 3 to the Geneva Conventions and wilful killing contrary to Protocol II to the Convention on Certain Conventional Weapons (1980) on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices.

While the Act brings US law closer into line with European nations, the US definition of war crimes is still considerably narrower than the definition included in the laws of its allies, European and non-European. All States party to the [Rome Statute of the International Criminal Court](#) (ICC) are required to ensure that they have the necessary domestic legislation to enable them, at a minimum, to comply with their obligations to cooperate with the Court, or more fully, to enable them to investigate and prosecute crimes within the Court’s jurisdiction under the principle of complementarity.

States have taken different approaches. Some have transposed the Rome Statute definitions of core crimes directly into domestic law (e.g. [s.50\(1\) ICC Act](#) (England and Wales)), while others have defined war crimes by reference to customary or conventional international law (e.g. s.4(3) Crimes Against Humanity and War Crimes Act (Canada)) or adopted their own definitions (e.g. [s.8 Code of Crimes Against International Law](#) (Germany), which does not distinguish between international and non-international armed conflicts when defining war crimes. Regardless of the approach taken, all the US allies that are parties to the Rome Statute are required to have definitions of war crimes under domestic law that are broad enough to enable national jurisdictions to cooperate in cases concerning the list of acts that constitute war crimes under Article 8(2) of the Rome Statute. By comparison to any of these, the material scope of US war crimes law is narrow.

The Act also appears to establish universal jurisdiction over war crimes in that it permits US federal authorities to prosecute war crimes irrespective of the territory on which the offense was committed, the nationality of the accused, or the nationality of the victims. However, the Act provides that jurisdiction is only triggered if “the offender is present in the United States.” This would prevent US authorities from exercising their investigatory powers prior to an accused’s presence in the United States. It would even limit the ability of US authorities to undertake preparatory acts upon receiving evidence collected and communicated to US authorities by States or other actors. If the US authorities received such evidence prior to an accused’s presence in the United States, they would have to wait until that individual arrived in US territory before they could exercise their powers to review the evidence and establish whether it provides sufficient basis upon which to arrest and charge an accused, prior to arrest.

Compared against Germany’s universal jurisdiction law, which does not require an accused’s presence in Germany for the initiation of an investigation into core international crimes (see Trial, [Universal Jurisdiction Law and Practice in Germany](#), p.17), this appears to be – and is – a significant limitation upon the types of cases that the United States can investigate and prosecute. However, the “presence in” limitation is not unique to US law. For example, under French universal jurisdiction law, the accused must be present in France (see [Article 689-1 CCP](#) and for discussion see [Trial, Universal Jurisdiction Law and Practice in France at p.13](#)). Similar limitations are found in the universal jurisdiction laws of a number of other States, including The Netherlands ([s.2\(1\)\(a\) International Crimes Act 2003](#)) and Switzerland (Article 6(1)(b), Article 7(1)(b) [Swiss](#)

[Criminal Code](#)) (Trial International has produced detailed reports on the universal jurisdiction laws of a number of States, see [here](#)).

In practice, it is unlikely that this jurisdiction could be used to initiate “opportunistic” proceedings against individuals present in the United States on a short visit. More likely, it will be used to investigate individuals present in the United States for extended periods, such as the case against [Jucontee Thomas Smith Woewiyu](#). The United States accused Woewiyu of committing war crimes during the Liberian Civil War but owing to the United States’ lack of jurisdiction over war crimes committed in that context, he was prosecuted for immigration offenses, with the evidence of war crimes being adduced for the purposes of establishing those charges rather than for war crimes charges as such. Of course, whether this legislation will support cases concerning historical war crimes will depend upon whether the Act, properly construed, simply removes a jurisdictional bar to prosecuting offenses that constituted crimes under US law at the time they were committed, or whether the exercise of powers under the Act in regard to historical offenses would violate the prohibition on *ex post facto* law.

Finally, the Act introduces a “certification requirement” for all war crimes prosecutions, not just those under the expanded jurisdiction provided by the Act. According to this requirement, the Attorney General, Deputy Attorney General or Assistant Attorney General must provide prior written authorization before any war crimes prosecution can proceed. Although new to US law, this is not a novel feature of domestic war crimes legislation. For example, Section 53(3) ICC Act 2001 (England and Wales), specifies that any proceedings in relation to war crimes, crimes against humanity or genocide can only be instituted “by or with the consent of the Attorney General.” An equivalent requirement appears in the Geneva Conventions Act 1957, which grants extended jurisdiction over “any person, whatever his nationality, who, whether inside or outside the United Kingdom” commits a grave breach of the Geneva Conventions or Additional Protocol I. Similarly, [s.16.1 Criminal Code Act 1995](#) (Australia), requires written consent from the Attorney General prior to the commencement of any proceedings involving wholly extraterritorial crimes where the accused is not an Australian citizen.

### “Justice for Victims” versus “Accountability for Perpetrators”

For the external observer, or at least this one, the “short title” for the Act, referring to “Justice for Victims of War Crimes”, is curious. Clearly, it was a strategic rhetorical choice, with both inward (domestic) and external (international) orientation. Inward, “justice for victims of (war) crimes” is a proposition that few, as a matter of principle, can object to, whatever one’s politics. In general terms, it situates the United States on “the side of victims” and appeals to an indeterminate concept of “justice.” It places US lawmakers on the side of the righteous. In the context of a political culture that appears (at least from the outside) deferential to the military and uncomfortable with confronting the possibility of military misconduct, emphasis upon “justice for victims” while downplaying the conduct, and identity, of perpetrators, seems strategically wise.

This positioning becomes compelling in light of the particular context in which the Bill was introduced and framed by its sponsors as it worked its way through Congress and the Senate, namely, the Russia-Ukraine conflict (see [here](#), [here](#), and [here](#)). Regardless of whether this Bill was conceived specifically in response to the mounting evidence of war crimes committed by Russian nationals in Ukraine, or whether proponents of the Bill seized the opportunity presented by the political moment to garner bipartisan support for a proposal that had been in the works, the Act and events in Ukraine are inextricably linked. By virtue of this association, the adoption of this Act titled “Justice for Victims” amounts to a political expression of solidarity and allyship with Ukraine and Ukrainians.

Despite its ostensible victim-orientation, however, we might question the extent to which this is actually the case. As both the internal and external rhetorical signals indicate, this is at least as much about positioning the United States and advancing its interests as it is about actually pursuing accountability for perpetrators or “justice for victims.” Of course, the interests of victims and the United States’ strategic goals may not be mutually exclusive. But if we are to take the victim-orientation seriously, the use of others’ victimhood to advance a State’s strategic interests does start to appear a little more opportunistic, at best, especially given the practical limitations of the powers that the Act actually confers upon US authorities to pursue “justice” for Ukrainian victims of war crimes.

Perhaps these observations are overly and unfairly cynical, and framing the Act in this way was simply the necessary political grease needed in the Washington machinery to turn a Bill into an Act. Perhaps, too, members of Congress and the Senate were genuinely moved by the imperative to provide justice for the victims of Russian war crimes. However, now enacted, this victim-orientation takes on further resonance, beyond the particular context in which the Act was adopted. Every prosecution pursuant to the “Justice for Victims of War Crimes Act” will be a reminder of those victims of war crimes for whom the United States has not only omitted to pursue justice but whose justice the State has worked actively to deny. Put bluntly, the framing of action (and, more to the point, inaction) under this Act in terms of “justice for victims” is an open invitation to critiques such as “great for the Liberian victims of war crimes, but what about the Afghan/Palestinian/Yemeni victims of war crimes?” While arguments may be advanced why some perpetrators should be held criminally accountable for their crimes but not others, it is much more difficult to overcome the pull of empathy for

victims (which, as previously described, was invoked to great effect by proponents of the Bill to gain bipartisan support) to justify selectivity as to which victims of war crimes obtain justice.

## Concluding Reflections

In her statement to [the ICC Assembly of States Parties in December 2022](#), Beth Van Schaack, U.S. Ambassador-at-Large for Global Criminal Justice spoke of “a sorely needed reset of the U.S. relationship with the ICC.” Ambassador Van Schaack presented a positive and constructive vision of the United States’ engagement with the broader normative regime of international criminal justice.

The Act undoubtedly furthers this vision. It is, certainly, refreshing to hear news of the United States’ engagement with international criminal justice that is not actively undermining the regime, its institutions, and processes. Moreover, we might welcome the fact that – in 2023 – some 68 years after ratifying the Geneva Conventions, the United States has adopted legislation to enable it to “prosecute” pursuant to the “prosecute or extradite” obligation within the grave breaches regime.

However, “resets” are easier said than done. Although we would like to think of the Trump-era of engagement with the rules based international order as an aberration, the United States’ engagement with the ICC and with the norms it embodies has always been turbulent. Consequently, it should be expected that news of US re-engagement and activism in the area of international criminal justice will be met with caution and some scepticism.

If the United States is committed to *building* its credentials as a legitimate “player” within international criminal justice, then the modesty of the powers claimed by this Act may be wise. Were the United States to have claimed expansive universal jurisdiction, similar in scope to that of Germany, few would say that the United States has the moral or political authority to exercise that jurisdiction. An expansive conception of universal jurisdiction and active use of that jurisdiction may have been more consistent with the now long outdated vision of the United States as the world’s policeman. In fact, even then, the exercise of expansive universal jurisdiction by the global hegemon would have been likely to be met with righteous disquiet. Today, such a proposition would be simply untenable.

By contrast, this more modest proposal gives the United States the opportunity to earn its credentials as a legitimate actor in the field of international criminal justice through cases closer to home. These cases may not be headline grabbing and they may not advance the United States’ strategic interests in other geopolitical respects. But it is precisely because such cases are unlikely to be those that are clearly in the United States’ self-interest that they will be perceived to be legitimate outside of the United States and within the wider international criminal justice regime. However, for this to happen, the powers under the Act must actually be exercised; enactment of the Act is not enough. Though there are exceptions, State practice across the world demonstrates it is one thing for a State to have the statutory powers in place to enable action, but it is quite another for it to have both the will and the capacity to exercise those powers.

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