

Strengthening the Protection of Civilians from the Humanitarian Consequences Arising from the Use of Explosive Weapons in Populated Areas.⁵¹ Upon the Declaration's adoption, the State Department, noting recent changes in U.S. policy regarding civilian casualties, including the CHMR-AP, commented: "atrocities committed by Russia's forces as part of its aggression against Ukraine have made a global unified approach on this issue urgent. . . . All States endorsing this Declaration are unified in their commitment to strengthen the protection of civilians during armed conflict and improve the implementation of international humanitarian law."⁵²

INTERNATIONAL CRIMINAL LAW

The Justice for Victims of War Crimes Act

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On January 5, 2023, President Joseph R. Biden, Jr. signed into law the Justice for Victims of War Crimes Act (2023 Act).¹ The Act "broaden[s] the scope of individuals subject to prosecution for war crimes" beyond the limited reach of the War Crimes Act of 1996 (1996 Act).² Alleged Russian atrocities in Ukraine drove the passage of the 2023 Act.³

Outside of the Uniform Code of Military Justice, criminalization of war crimes under federal law dates to the 1996 Act.⁴ That statute established an offense for grave breaches of the Geneva Conventions, wherever the offense took place, but only if 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."⁵ Because of these limitations, the statute did not allow the United States to comply with the obligation of parties to the Geneva Conventions to "bring [persons alleged to have committed, or to have ordered to be committed] . . . grave

⁵¹ Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences Arising from the Use of Explosive Weapons in Populated Areas, at <https://www.dfa.ie/media/dfa/ourrolepolicies/peaceandsecurity/ewipa/EWIPA-Political-Declaration-Final-Rev-25052022.pdf> [<https://perma.cc/YG7T-3ERG>].

⁵² U.S. Dep't of State Press Release, United States Endorses Political Declaration Relating to Protection of Civilians in Armed Conflict (Nov. 18, 2022), at <https://www.state.gov/united-states-endorses-political-declaration-relating-to-protection-of-civilians-in-armed-conflict> [<https://perma.cc/4WDV-G44Y>]; see also U.S. Mission Geneva, Protecting Civilians in Urban Warfare (June 21, 2022), at <https://geneva.usmission.gov/2022/06/21/protecting-civilians-in-urban-warfare> [<https://perma.cc/8A6B-UR5U>].

¹ Justice for Victims of War Crimes Act, Pub. L. 117-351 (Jan. 5, 2023), at <https://www.congress.gov/bill/117th-congress/senate-bill/4240> [hereinafter 2023 Act].

² *Id.*

³ See Senate Committee on the Judiciary Press Release, Bipartisan, Bicameral Lawmakers Introduce Bill to Broaden War Crimes Jurisdiction (May 18, 2022), at <https://www.judiciary.senate.gov/press/rep/releases/bipartisan-bicameral-lawmakers-introduce-bill-to-broaden-war-crimes-jurisdiction> [<https://perma.cc/Z37Z-X3B3>]; Charlie Savage, *U.S. Weighs Shift to Support Hague Court as It Investigates Russian Atrocities*, N.Y. TIMES (Apr. 11, 2022), at <https://www.nytimes.com/2022/04/11/us/politics/us-russia-ukraine-war-crimes.html>; Charlie Savage, *Russian Atrocities Prompt Bipartisan Push to Expand U.S. War Crimes Law*, N.Y. TIMES (May 16, 2022), at <https://www.nytimes.com/2022/05/16/us/senate-bill-war-crimes-ukraine.html>.

⁴ War crimes were previously prosecutable under the Uniform Code of Military Justice (UCMJ). See 10 USC § 818(a) (UCMJ Art. 18).

⁵ War Crimes Act of 1996, Sec. 2(a), Pub. L. 104-192, 110 Stat. 2104, 2104 (Aug. 21, 1996) (codified at 18 USC § 2401) [hereinafter 1996 Act].

breaches], regardless of their nationality, before its own courts.”⁶ The State Department and Defense Department had “recommended that H.R. 3680 [the bill that would become the 1996 Act] 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 American, as long as the perpetrator is present in the United States.”⁷ But the House committee considering the legislation decided against this request because universal jurisdiction prosecutions “could draw the United States into conflicts in which this country has no place and where our national interests are slight.”⁸ The committee reasoned that there were better alternative venues for prosecuting individuals not covered by the bill, such as “the nations involved or by international tribunal,” citing for the latter the International Criminal Tribunal for the former Yugoslavia.⁹ Since the 1996 Act applied only in limited circumstances, the United States could not prosecute some non-U.S. nationals for war crimes even when they were found in the United States.¹⁰

Until the 2023 Act, the 1996 Act had only been twice amended in substance. The year following its passage, legislation expanded the list of war crimes beyond grave breaches of the Geneva Conventions to include, among other things, violations of Common Article 3 of the Geneva Conventions.¹¹ That addition would have important consequences nearly a decade later when the Supreme Court ruled in *Hamdan v. Rumsfeld* (2006) that Common Article 3 applied to the conflict with Al Qaeda.¹² The Court’s determination meant that U.S. persons could be charged under the 1996 Act in connection with that conflict for “enhanced interrogations” and for trying persons in military commissions without full due process protections. Less than four months after *Hamdan*, the Military Commissions Act of 2006 eliminated these possibilities by restrictively and retroactively defining Common Article 3 in the 1996 Act to effectively decriminalize, in the context of non-international armed conflicts, Common Article 3’s prohibitions of “outrages upon personal dignity, in particular humiliating and degrading treatment” and “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the

⁶ See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Art. 146, Aug. 12, 1949, 6 UST 3516; 75 UNTS 287, at https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.33_GC-IV-EN.pdf.

⁷ H.R. Rep. No. 104–698, at 7–8 (1996), at <https://www.congress.gov/104/crpt/hrpt698/CRPT-104hrpt698.pdf> [<https://perma.cc/XCB2-UKTR>] [hereinafter House Report]; see also, e.g., Prepared Statement of Michael J. Matheson, Principal Deputy Legal Adviser, Department of State, in War Crimes Act of 1995, Hearing Before the Subcommittee on Immigration and Claims of the Committee on the Judiciary House of Representatives, at 11, 104th Cong., 2d Sess. (June 12, 1996), at <https://www.justice.gov/sites/default/files/jmd/legacy/2013/11/04/hear-81-1996.pdf> [<https://perma.cc/2JLB-JGYV>].

⁸ House Report, *supra* note 7, at 8.

⁹ *Id.*

¹⁰ Those persons could be prosecuted only for immigration or naturalization fraud. See, e.g., U.S. Dep’t of Justice Press Release, Liberian War Criminal Living in Delaware County Convicted of Immigration Fraud and Perjury (July 3, 2018), at <https://www.justice.gov/usao-edpa/pr/liberian-war-criminal-living-delaware-county-convicted-immigration-fraud-and-perjury> [<https://perma.cc/NE8V-HHDT>]; Katie Zezima, *Massachusetts: Conviction in War Crimes Case*, N.Y. TIMES (July 13, 2006), at <https://www.nytimes.com/2006/07/13/us/massachusetts-conviction-in-war-crimes-case.html>; Sebastian Rotella, *A Commander of the Dos Erres Massacre Squad Gets 10 Years in Prison*, PROPUBLICA (Feb. 10, 2014), at <https://www.propublica.org/article/a-commander-of-the-dos-erres-massacre-squad-gets-10-years-in-prison> [<https://perma.cc/3ZXM-WA9V>].

¹¹ Pub. L. 105-118, Sec. 583, 111 Stat. 2386, 2436 (Nov. 26, 1997).

¹² *Hamdan v. Rumsfeld*, 548 U.S. 557, 562 (2006).

judicial guarantees which are recognized as indispensable by civilized peoples.”¹³ Subsequent attempts to amend the 1996 Act were unsuccessful, though in 2008 enactment of the Child Soldiers Accountability Act criminalized the “recruitment or use of child soldiers.”¹⁴ No prosecutions have been brought under the 1996 Act.

The 2023 Act broadens the scope of persons subject to the 1996 Act’s prohibitions.¹⁵ In place of the 1996 Act’s limited applicability to circumstances when the victim or offender is a member of the Armed Forces or a U.S. national, the 2023 Act establishes jurisdiction over the offenses set out in the statute 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—
 - (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.¹⁶

Thus, the 2023 Act extends U.S. jurisdiction in three ways: to offenses that occurred in whole or in part within the United States; to victims or offenders who are aliens that have status as permanent residents; and to non-U.S. nationals or permanent residents present in the United States. The third change conforms the law to U.S. obligations under the Geneva Conventions and aligns jurisdiction for war crimes prosecutions with the “present in” jurisdiction that applies to prosecutions for torture, genocide, the recruitment or use of child soldiers, and other crimes.¹⁷

With this jurisdictional extension comes a check on prosecutors. Prosecution under the Act requires the written certification of the attorney general, the deputy attorney general, or an assistant attorney general that such action “is in the public interest and necessary to secure substantial justice.”¹⁸ When a prosecution is based on “present in” jurisdiction, certification can only be made by the attorney general or deputy attorney general, and in doing so they

¹³ Pub. L. 109-366, Sec. 6(b), 120 Stat. 2600, 2633; Geneva Conventions, Art. 3(1)(c)–(d). The Military Commissions Act also asserted that military commissions are “a regularly constituted court, affording all the necessary ‘judicial guarantees which are recognized as indispensable by civilized peoples’ for purposes of common Article 3 of the Geneva Conventions.” 120 Stat. at 2602.

¹⁴ Pub. L. 110-340, Sec. 2(a)(1), 122 Stat. 3735 (Oct. 3, 2008) (codified at 18 USC § 2442).

¹⁵ Senator Chuck Grassley introduced the Justice for Victims of War Crimes Act on May 18, 2022, as S. 4240. (The same day, the bill was introduced in the House by Representative David N. Cicilline as H.R.7818.) Seven months later, on December 21, 2022, Senator Richard Durbin introduced a substitute amendment, which was agreed to by unanimous consent, as was the amended bill. *See* Cong. Rec., 117th Cong., 2d sess., S9713 (Dec. 21, 2022). The next day, the House of Representatives, by voice vote, passed the Senate bill. *See* Cong. Rec., 117th Cong., 2d sess., H10012 (Dec. 22, 2022). President Biden signed the bill into law on January 5, 2023. *See* White House Press Release, Bills Signed (Jan. 5, 2023), at <https://www.whitehouse.gov/briefing-room/legislation/2023/01/05/press-release-bills-signed-h-r-680-h-r-897-h-r-1082-h-r-1154-h-r-1917-h-r-7939-s-450-s-989-s-1294-s-1402-s-1541-s-1942-s-2333-s-2834-s-3168-s-3308-s-3405-s-35> [<https://perma.cc/ZZ7Y-JC3H>].

¹⁶ 2023 Act, *supra* note 1, Sec. 2(1) (codified at 18 USC § 2441(b)).

¹⁷ 18 USC §§1091(e)(2)(B), 2340A(b)(2), 2442(c)(3).

¹⁸ 2023 Act, *supra* note 1, Sec. 2(1) (codified at 18 USC § 2441(f)).

must “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.”¹⁹ In all cases, the authority to certify is non-delegable. The secretary of defense and the 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 based on “present in” jurisdiction.²⁰ Certifications and input are not subject to judicial review.²¹

Two sets of *ex post facto* issues arise under the new statute. First, under the 1996 Act the general federal statute of limitations provided a five-year limit on non-capital offenses and no limit on capital offenses.²² Under the 2023 Act there is no statute of limitations for war crimes that are grave breaches of the Geneva Conventions or violations of Common Article 3 of the Geneva Conventions.²³ This change raises questions regarding whether persons can now be prosecuted for acts that were previously time-barred. Second, the 2023 Act has no statement of retroactivity. Generally, retroactive application would be constitutionally prohibited, but some have claimed that the Ex Post Facto Clause²⁴ does not apply to crimes prosecutable under the Act.²⁵ Prosecutions of alleged Russian war criminals for acts committed before January 5, 2023, would test the statute’s retroactivity.

The bill passed immediately after Ukrainian President Volodymyr Zelensky gave a congressional address calling on Congress “to help us bring to justice everyone who started this unprovoked and criminal war.”²⁶ Upon passage, Representative Jerome Nadler explained that the 2023 Act “will demonstrate to the people of Ukraine, to our allies abroad, and to war criminals around the world that the United States will not allow those who commit atrocities to evade justice on our shores.”²⁷ Attorney General Merrick Garland announced that “the Justice Department and our partners stand with the people of Ukraine and will pursue every avenue of accountability to bring to justice those responsible, wherever they are located” and that the Act will enable “the Department to prosecute alleged war criminals who are found in the United States. In the United States of America, there must be no hiding place for war criminals and no safe haven for those who commit such atrocities.”²⁸ The

¹⁹ *Id.* (codified at 18 USC § 2441(f)(2)).

²⁰ *Id.* (codified at 18 USC § 2441(g)).

²¹ *Id.* (codified at 18 USC § 2441(h)).

²² 18 USC §§ 3281–3282.

²³ 2023 Act, *supra* note 1, Sec. 2(1) (codified at 18 USC § 2441(e)).

²⁴ U.S. Const., Art. I, Sec. 9, cl. 3.

²⁵ *See, e.g.*, Senate Committee on the Judiciary, Hearing: From Nuremberg to Ukraine: Accountability for War Crimes and Crimes Against Humanity, at 53:00, at <https://www.judiciary.senate.gov/meetings/from-nuremberg-to-ukraine-accountability-for-war-crimes-and-crimes-against-humanity> [hereinafter Senate Committee Hearing] (statement of Eli Rosenbaum).

²⁶ Cong. Rec., 117th Cong., 2d sess., H9969, H9971 (Dec. 21, 2022).

²⁷ Cong. Rec., 117th Cong., 2d sess., H10012, H10013 (Dec. 22, 2022); *see also* Cong. Rec., 117th Cong., 2d Sess., S9755 (Dec. 21, 2022) (statements of Sens. Durbin and Grassley).

²⁸ U.S. Dep’t of Justice Press Release, Attorney General Merrick B. Garland Statement on the Passage of the Justice for Victims of War Crimes Act (Dec. 22, 2022), at <https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-statement-passage-justice-victims-war-crimes-act> [<https://perma.cc/3BVG-GABD>].

United States, which has accused Russian forces and officials of crimes of aggression,²⁹ war crimes,³⁰ and crimes against humanity,³¹ has been working with Ukraine, other countries, and international organizations since the early days of the war to support accountability mechanisms.³² In March 2023, Garland announced that “the United States has . . . opened criminal investigations into war crimes in Ukraine that may violate U.S. law.”³³

The 2023 Act did not go as far as some would have liked. It did not criminalize crimes against humanity, though administration officials advocated for that change.³⁴ It did not remove the distinction in the 1996 Act between international and non-international armed conflict, as was also recommended by the administration.³⁵ It did not expand liability to those who have superior responsibility, as human rights groups have suggested.³⁶ It did not allow victims to file civil lawsuits in U.S. courts, as some senators would have liked.³⁷ And it did not change U.S. law concerning cooperation with the International Criminal Court (ICC), though the United States has said that it “supports” the ICC’s investigation of atrocity crimes committed in Ukraine³⁸ and a Senate resolution “encourage[d] member states to petition the ICC or other appropriate international tribunal to take any appropriate steps to investigate war crimes and crimes against humanity committed by the Russian Armed Forces and their proxies and President Putin’s military commanders, at the direction of President Vladimir Putin.” However, the Consolidated Appropriations Act, 2023, which was passed

²⁹ U.S. Dep’t of State Press Release, Ambassador Van Schaack’s Remarks at United for Justice Conference (Mar. 3, 2023), at <https://www.state.gov/ambassador-van-schaacks-remarks-at-united-for-justice-conference> [<https://perma.cc/LZ2X-SAZD>] [hereinafter Van Schaack’s Remarks].

³⁰ U.S. Dep’t of State Press Release, War Crimes by Russia’s Forces in Ukraine (Mar. 23, 2022), at <https://www.state.gov/war-crimes-by-russias-forces-in-ukraine> [<https://perma.cc/5TMU-MPR9>].

³¹ U.S. Dep’t of State Press Release, Crimes Against Humanity in Ukraine (Feb. 18, 2023), at <https://www.state.gov/crimes-against-humanity-in-ukraine> [<https://perma.cc/FA5J-YL6D>].

³² U.S. Dep’t of State Press Release, Launch of the Atrocity Crimes Advisory Group (ACA) for Ukraine (May 25, 2022), at <https://www.state.gov/launch-of-the-atrocity-crimes-advisory-group-aca-for-ukraine> [<https://perma.cc/M4KD-S3TD>]; U.S. Dep’t of Justice Press Release, Attorney General Merrick B. Garland Delivers Remarks in Lviv, Ukraine (Mar. 3, 2023), at <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-lviv-ukraine> [<https://perma.cc/N74N-M884>] [hereinafter Garland Remarks].

³³ Garland Remarks, *supra* note 32.

³⁴ See, e.g., U.S. Department of State, Office of Global Criminal Justice Ambassador-at-Large Van Schaack Testimony for the Record Senate Judiciary Committee Hearing “From Nuremberg to Ukraine: Accountability for War Crimes and Crimes Against Humanity” (Sept. 28, 2022), at <https://www.judiciary.senate.gov/imo/media/doc/Ambassador%20Van%20Schaak%20Testimony%20for%20the%20Record%20Sept%2028%20SJC%20hearing%20FINAL%20Submitted.pdf> [<https://perma.cc/49U4-4YR6>].

³⁵ See Senate Committee Hearing, *supra* note 25, at 1:52:35 (statement of Eli Rosenbaum).

³⁶ See, e.g., Esti Tambay & Sarah Yager, *Finally, a Better U.S. War Crimes Bill. Now What?*, HUM. RTS. WATCH (Sept. 21, 2022), at <https://www.hrw.org/news/2022/09/21/finally-better-us-war-crimes-bill-now-what> [<https://perma.cc/UC6B-825V>].

³⁷ See, e.g., Office of Sen. Dick Durbin Press Release, Following the Atrocities in Bucha, Durbin to Introduce Legislation to Hold Russian War Criminals Accountable (Apr. 5, 2022), at <https://www.durbin.senate.gov/newsroom/press-releases/following-the-atrocities-in-bucha-durbin-to-introduce-legislation-to-hold-russian-war-criminals-accountable> [<https://perma.cc/Y7ML-NLZ9>].

³⁸ Van Schaack’s Remarks, *supra* note 29; see also, e.g., U.S. Mission to the United Nations Press Release, Remarks at a UN Security Council Arria-Formula Meeting on Ensuring Accountability for Atrocities Committed by Russia in Ukraine (Apr. 27, 2022), at <https://usun.usmission.gov/remarks-at-a-un-security-council-arria-formula-meeting-on-ensuring-accountability-for-atrocities-committed-by-russia-in-ukraine> [<https://perma.cc/FLV7-EY47>].

the day after the 2023 Act, did amend Section 2015 of the American Servicemembers' Protection Act of 2002 to permit the government, to "render[] assistance to the International Criminal Court to assist with investigations and prosecutions of foreign nationals related to the Situation in Ukraine."³⁹

³⁹ Consolidated Appropriations Act, 2023, Pub. L. 117-328, Sec. 7073(b) (Dec. 29, 2022) (amending 22 USC § 7433). Though now permitted, the Department of Defense has reportedly blocked the government from sharing with the ICC evidence of atrocities in Ukraine. See Charlie Savage, *Pentagon Blocks Sharing Evidence of Possible Russian War Crimes with Hague Court*, N.Y. TIMES (Mar. 8, 2023), at <https://www.nytimes.com/2023/03/08/us/politics/pentagon-war-crimes-hague.html>.