

The Justice for Victims of War Crimes Act: A Fill-in for International Failings or an Impediment to International Justice?

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Introduction

On January 5th, 2023, President Biden signed into law the Justice for Victims of War Crimes Act.¹ Passed by a unanimous vote in the House and Senate, this Act (hereinafter Justice Act) expanded the nation's war crimes statute to enable the prosecution of war criminals in the United States, regardless of the location or targets of their atrocities ("present-in jurisdiction.")² In theory, this act will permit prosecution of non-U.S. national war criminals found in the United States even if the criminal had never targeted U.S. Nationals.³ At the same time, this new legislation removes the statute of limitations for specific war crimes.⁴

These changes bring the United States closer to the international standards set by treaties and customary law.⁵ While the Justice Act could be seen as a commitment to the standards set under international war crimes law, other factors of this Act weigh against this conclusion. The United States could have signed and ratified the Rome Statute of the International Court (hereinafter Rome Statute), which would have given the U.S. an established avenue to deal with War Crimes.⁶ Instead, after signing the Rome Statute, the United States

¹ JUSTICE FOR VICTIMS OF WAR CRIMES ACT, PL 117-351, January 5, 2023, 136 Stat 6265. (hereinafter Justice Act).

² See Press release, David V. Cicilline, House of Representatives, House Sends Bipartisan, Bicameral Bill to Broaden War Crimes Jurisdiction to President's Desk (Dec. 22, 2022), <https://cicilline.house.gov/press-release/house-sends-bipartisan-bicameral-bill-to-broaden-war-crimes-jurisdiction-to-president-s-desk> [<https://perma.cc/QA9C-PE66>].

³ *Id.*

⁴ *Id.*

⁵ Esti Tambay and Sarah Yager, *Finally, a Better U.S. War Crimes Bill. Now What?*, HUMAN RIGHTS WATCH (Sep. 21, 2022), <https://www.hrw.org/news/2022/09/21/finally-better-us-war-crimes-bill-now-what> [<https://perma.cc/AF6D-FS4E>].

⁶ See Scheffer, David, and Ashley Cox. "The Constitutionality of the Rome Statute of the International Criminal Court." *The Journal of Criminal Law and Criminology* (1973-), vol. 98 JSTOR 983, 983–1068 (discussing how the United States could easily ratify the Rome Statute without constitutional issues) <http://www.jstor.org/stable/40042792>. *But see* Cong. Rsch. Serv., RL31495, U.S. POLICY REGARDING THE U.S. POLICY

declared that it would not ratify it.⁷ Under certain periods, the United States has adopted an outright hostile reaction to the International Criminal Court (ICC) created by the Rome Statute.⁸ While this relationship may have improved, even this Justice Act explicitly cuts off any connection to the Rome Statute, noting, “Nothing in this section shall be constructed as- (1) support for ratification or accession to the Rome Statute... .”⁹

This report will divide the discussion into three parts. Part I will briefly examine the Rome Statute, the ICC, and war crimes. Part II will examine the earlier War Crimes Act and its relationship with International legal standards. Part III will discuss how the Justice Act changed this relationship. While there are other avenues through which the United States has (rarely) handled war criminals found within the United States¹⁰, this paper will focus only on 18 U.S.C 2441 due to its connection to standards found in the Geneva Conventions and Hague Conventions.¹¹

Discussion

I. War Crimes under International Law

REGARDING THE INTERNATIONAL CRIMINAL COURT (ICC) 6 (2006) (noting that the ICC may not be constitutional on a variety of grounds, including the lack of certain Due Process Rights granted to U.S. Citizens).

⁷ Esti Tambay and Sarah Yager, *Finally, a Better U.S. War Crimes Bill. Now What?*, HUM. RTS. WATCH (Sep. 21, 2022), <https://www.hrw.org/news/2022/09/21/finally-better-us-war-crimes-bill-now-what> [<https://perma.cc/AF6D-FS4E>].

⁸ *Q&A: The International Criminal Court and the United States*, HUM. RTS. WATCH (Sep. 2, 2020), <https://www.hrw.org/news/2020/09/02/qa-international-criminal-court-and-united-states#6> (discussing actions taken under President Bush and Trump, such as failing to find in the ICC any authority over the U.S. or U.S. nationals) [<https://perma.cc/98HC-BK3T>].

⁹ JUSTICE FOR VICTIMS OF WAR CRIMES ACT, PL 117-351, January 5, 2023, 136 Stat 6265 (to be codified 18 U.S.C 2441(i)).

¹⁰ Richard J. Wilson, *War Crimes History, Basic Concepts, and Structures*, Crim. Just., Fall 2022, at 6 (discussing how the Department of Justice and Homeland Security have used their own laws to deal with war crimes).

¹¹ *See id.*

In 2002, the Rome Statute came into force.¹² With this came the creation of the International Criminal Court (ICC).¹³ This court serves as a permanent international tribunal to deal with four international crimes, and this includes a class titled “War Crimes.”¹⁴ This international court, to all ratified state parties, has “jurisdiction in respect of war crimes.”¹⁵ While war crimes are violations of humanitarian law found in international customary law, the Rome Statute also defines War Crimes into four broad definitions:

- (i.) Grave breaches of the 1949 Geneva Conventions, related to international armed conflict;
- (ii.) Other serious violations of the laws and customs applicable in international armed conflict;
- (iii.) Serious violations of Article 3 common to the four 1949 Geneva Conventions, related to armed conflict not of an international character;
- (iv.) Other serious violations of the laws and customs applicable in armed conflict not of an international character.¹⁶

Jurisdiction only applies to geographic areas where at least one of the States is a party to the Rome Statute or has accepted the jurisdiction of the Court otherwise.¹⁷ The Rome Statute may exercise its jurisdiction only with respect to crimes committed after the entry into force of the statute to the state, unless the state notes otherwise.¹⁸

This problem of individual state certification is that many nation states have not yet ratified the Rome Statute.¹⁹ In perhaps the most salient example, Russia and Ukraine, two states

¹² Q&A: *The International Criminal Court and the United States*, HUM. RTS. WATCH (Sep. 2, 2020), <https://www.hrw.org/news/2020/09/02/qa-international-criminal-court-and-united-states#6> [<https://perma.cc/98HC-BK3T>].

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, art. 8.

¹⁶ *See id.*

¹⁷ *See id.* art. 11.

¹⁸ *Id.*

¹⁹ Iryna Marchuk and Aloka Wanigasuriya, *The ICC and the Russia- Ukraine War*, 26 *Amer. Soc. Of Int’l L.* 1, 1 (2022).

involved in a conflict since at least 2014, are both unratified states to this agreement.²⁰ The overall structure of the Rome Statute has contributed to a gap in accountability standards. Even given that Ukraine has accepted the ad hoc jurisdiction of the ICC²¹, there are still challenges to achieving any just outcome through the ICC. Russia is currently hostile to the court, so it would not almost certainly not work with the ICC to transfer individuals outside of Russia and it has not even bothered responding to requests from the ICC regarding any war crimes committed in Ukraine.²²

This problem is not exclusive to Russia. Israel, Iran, and Syria are some of the other countries on the list of the thirty-one nations that have not ratified the Rome statute.²³ While the ICC may have some limited universal jurisdiction that can be conferred through a Security Council Referral, this is not guaranteed.²⁴ When the Security Council attempted to activate such jurisdiction for Syria, Russia and China vetoed that motion.²⁵ Especially considering the current politics of the Security Council, the ICC has limited ability to deal with non-ratified nations like Russia and Syria beyond investigating.²⁶

II. The War Crimes Act

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 2.

²³ *Signatories Which Have Not Ratified*, PARLIAMENTARIANS FOR GLOBAL ACTION (Jan. 16, 2022), <https://www.pgaction.org/ilhr/rome-statute/signed-but-not-ratified.html> [<https://perma.cc/CGV6-AQTF>].

²⁴ *In Hindsight: The Security Council and the International Criminal Court*, SECURITY COUNCIL REPORT (July 31, 2018), https://www.securitycouncilreport.org/monthly-forecast/2018-08/in_hindsight_the_security_council_and_the_international_criminal_court.php [<https://perma.cc/2MSN-EADJ>].

²⁵ *Id.*

²⁶ Iryna Marchuk and Aloka Wanigasuriya, *The ICC and the Russia- Ukraine War*, 26 *Amer. Soc. Of Int'l L.* 1, 3-4 (2022).

In 1996, the United States passed the War Crimes Act.²⁷ When it was passed, it was thought that this Act would fulfill certain obligations under the Geneva Conventions.²⁸ However, although the Act referenced the Geneva Conventions and Common Article 3 to define war crimes, the main purpose of this law was to prosecute North Vietnamese soldiers who had tortured and imprisoned U.S. military personnel during the Vietnam War.²⁹ There has never actually been a successful prosecution under this act.³⁰ How this Act became “dead letter” law can be attributed to a multitude of factors. Primarily, there is the fact that the War Crimes Act requires a high burden to prove a narrow case.³¹ The prima facie case under 18 U.S.C. 2441 prior to 2022 was as follows. First, the defendant or victim had to be a U.S. citizen or member of the U.S. Armed forces.³² Second, the defendant had to engage in prohibited conduct in violation of the War crimes Statute.³³ At the same time, the defendant had not to be eligible for one of the broad statutory defenses.³⁴ The War Crimes Act was filled with potential loopholes for non-U.S. residents committing acts outside of the U.S.

This loophole in War Crime accountability in the United States was not only recognized but used. In 2006, Marko Boskic was found living in Massachusetts. He was accused of having aided in the murder of thousands of Bosnian Muslims during the Bosnian war.³⁵ However,

²⁷ Hamed Adibnatanzi, *The U.S. Codification of War Crimes: 18 USCA §2441*, 14 Ann. Surv. of Int’l & Compar. L. 151, 156 (2008) [hereinafter Codification].

²⁸ *Id.*

²⁹ *Id.*

³⁰ Richard J. Wilson, *War Crimes History, Basic Concepts, and Structures*, Crim. Just., Fall 2022, at 3, 6.

³¹ Codification, *supra* note 27, at 168 (discussing how, through parts of the Act such as the definitions and exceptions clauses, it becomes difficult to use this statute).

³² Codification, *supra* note 27, at 156-57 (citing 18 U.S.C.A 2441(b).)

³³ *Id.* at 157.

³⁴ *Id.* at 158.

³⁵ Alastair Jamieson, *Srebrenica Genocide: U.S. Prosecutors Vow Suspects Will Face Justice*, NBC NEWS (July 11, 2015),

<https://www.nbcnews.com/news/world/srebrenica-genocide-u-s-prosecutors-vow-suspects-will-face-justice-n388636> [<https://perma.cc/D2KV-PSCC>].

because he was a foreigner who had only committed a war crime against foreigners, the United States could not try him for a war crimes violation.³⁶ Instead, Boskic was found and deported through Immigration and Customs (ICE) and sent back to Bosnia and Herzegovina, where he was jailed for ten years.³⁷ Boskic was not the only person with such protections from the War Crimes Act.³⁸ Such a bizarre circumstance, a “Boskic” case, was not lost on individuals and human rights organizations, and they pushed for Congress to amend the War Crimes Act.³⁹

III. The Justice for War Crimes Victims Act (Justice Act)

As noted in the Introduction, this Act brings forth two clear changes: present-in-jurisdiction and a lack of a statute of limitations.⁴⁰ While there is an argument that Congress sought to match certain international standards⁴¹, it is not politically insignificant that this Act was passed by the House and Senate during Zelensky’s visit.⁴²

While it is impossible to know the future with certainty, this Act will likely be used to target Russian officials and actors responsible for war crimes committed in Ukraine, the future “Boskics.” Where the ICC would almost always require the cooperation of the related state

³⁶ See Press release, Dick Durbin, Senate, Durbin Delivers Opening Statement During Senate Judiciary Committee Hearing on Ukraine and Accountability for War Crimes and Crimes Against Humanity (Sep. 28, 2022), <https://www.durbin.senate.gov/newsroom/press-releases/durbin-delivers-opening-statement-during-senate-judiciary-committee-hearing-on-ukraine-and-accountability-for-war-crimes-and-crimes-against-humanity> [https://perma.cc/E4RH-PK52].

³⁷ *Id.*

³⁸ Elise Baker, *Closing the Impunity Gap for War Crimes*, JUST SECURITY (Jan. 12, 2023), <https://www.justsecurity.org/84737/closing-the-impunity-gap-for-war-crimes/> (discussing the case of Camara, a leading member of an armed group responsible for over 18,000 human rights) [https://perma.cc/QR85-8WXK].

³⁹ See e.g., David Scheffer, *Shield America from crimes against humanity*, THE HILL (Dec. 23, 2015) <https://thehill.com/blogs/congress-blog/homeland-security/264007-shield-america-from-crimes-against-humanity/> [https://perma.cc/N66C-EYUX].

⁴⁰ Elise Baker, *Closing the Impunity Gap for War Crimes*, JUST SECURITY (Jan. 12, 2023), <https://www.justsecurity.org/84737/closing-the-impunity-gap-for-war-crimes/> [https://perma.cc/QR85-8WXK].

⁴¹ *See id.*

⁴² *Id.*

parties, this Justice Act does not. However, this is far from a perfect solution, and it is arguably more harmful to the international legal system than the approach the United States has taken.

The very limitations set in place by the Justice Act itself limit its practicability. First, the judicially enforced lack of private right of the War Crimes Act is now expressed statutorily with the statement, “No prosecution for an offense described... shall be undertaken by the United States except on written certification of the Attorney General, the Deputy Attorney General, or an assistant Attorney General... ”⁴³ In addition, for the defendants under “present-in” jurisdiction, a written certificate is required by the Attorney General or Deputy Attorney General to prove that prosecution is in the “public interest.”⁴⁴ There is a list of relevant factors provided for consideration, such as, “potential adverse effects for nationals, servicemembers, or employees of the United States.”⁴⁵ It would seem that the applicability of the Justice Act to target international war criminals could be limited based on how the Attorney General interprets these factors. If the United States prosecutes only certain war criminals, an argument of bias selectivity could be made.⁴⁶ Finally, even if a “Boskic” type case were to meet all of the requirements set in this Act, it is unclear whether anyone under this new category (non-US nationals) could be charged for actions committed prior to the signing of the Act.⁴⁷ War criminals who committed acts prior to January 5th 2023 may still be safe in the U.S.

⁴³ JUSTICE FOR VICTIMS OF WAR CRIMES ACT, PL 117-351, January 5, 2023, 136 Stat 6265 (to be codified 18 U.S.C 2441(f)(1)).

⁴⁴ *Id.* (to be codified 18 U.S.C 2441(f)(2))

⁴⁵ *Id.*

⁴⁶ Hemi Mistry, *Prosecuting War Crimes Symposium – Justice for Victims of [Some] War Crimes Act?*, Liber Inst. W. Point (Feb. 15, 2023),

<https://lieber.westpoint.edu/justice-victims-war-crimes-act-reflections-from-across-the-pond/>

[<https://perma.cc/9PEB-WLVC>].

⁴⁷ See Elise Baker, *Closing the Impunity Gap for War Crimes*, JUST SECURITY (Jan. 12, 2023),

<https://www.justsecurity.org/84737/closing-the-impunity-gap-for-war-crimes/> (noting that this act still must consider the ex post facto clause) [<https://perma.cc/QR85-8WXK>].

Conclusion

At a surface glance, this Act is pushing the United States closer to a uniform international system of dealing with war crimes. Upon further examination, however, it seems more likely that this Act is instead a parallel development that attempts to place the United States in line with international standards. The United States, in an attempt to secure justice for War Crime victims, has effectively and explicitly elected to ignore the current international structure established to deal with this issue. Only time will tell if this was a success, or if this will be another “dead letter” law like the War Crimes Act prior.