

The First Prosecution Under the War Crimes Act: Overview and International Legal Context

December 22, 2023

On December 6, 2023, the U.S. Department of Justice (DOJ) brought an [indictment](#) in the U.S. District Court for the Eastern District of Virginia against four members of the Russian armed forces or allied military units (Defendants) for violations of the [War Crimes Act of 1996](#)—the first in the almost three decades of the Act’s existence. DOJ brought the indictment just under a year after Congress enacted the Justice for Victims of War Crimes Act, which [amended](#) the War Crimes Act to [extend DOJ’s jurisdictional reach](#), in part in [response](#) to Russia’s invasion of Ukraine and allegations of war crimes being committed by its armed forces.

More indictments under the Act might be coming. When he announced the indictment, Attorney General Merrick Garland [stated](#) that the prosecution is “our first, and you should expect more.” He also suggested that DOJ’s work may not be limited to Ukraine, stating that “ Hamas murdered 30 Americans and kidnapped more” and DOJ is “investigating those heinous crimes and will hold those people accountable.” As U.S. prosecutions for war crimes proceed, it will provide Congress with the opportunity to evaluate and potentially respond to DOJ’s implementation of the Act.

A [previous Legal Sidebar](#) provides a summary of the various war crimes recognized under international law, with a focus on those punishable under U.S. law through the War Crimes Act. This Sidebar focuses on DOJ’s first indictment to enforce the War Crimes Act. More specifically, this Sidebar (1) explains the application of the relevant provisions of the War Crimes Act to the facts alleged in the four-count indictment; (2) examines the jurisdictional basis of the case as well as the expansion of jurisdiction under the 2023 amendment; (3) discusses the roles of the Act and prosecutions under it in enforcing international laws prohibiting war crimes; and (4) provides a discussion regarding considerations for Congress in light of DOJ’s first enforcement action under the Act.

The Charges

The War Crimes Act, codified at [18 U.S.C § 2441](#), makes certain war crimes under the body of international law known as international humanitarian law (IHL) federal criminal offenses. The Act

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derives its definition of “war crime” by reference to certain war crimes that are prohibited in various treaties to which the United States is a party: the [four 1949 Geneva Conventions](#), the [Hague Convention IV, Respecting the Laws and Customs of War on Land of 1907](#), and the [Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices](#).

The counts against the Defendants in the indictment brought by the United States are based on alleged violations of [Article 147 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War](#) (Fourth Geneva Convention or Convention). That article provides that grave breaches of the Fourth Geneva Convention include the following acts, when “not justified by military necessity and carried out unlawfully and wantonly,” committed against civilians:

- willful killing,
- torture or inhuman treatment,
- willfully causing great suffering or serious injury to body or health,
- unlawful deportation or transfer or unlawful confinement of a protected person,
- compelling a protected person to serve in the forces of a hostile power,
- willfully depriving a protected person of the rights of fair and regular trial,
- taking of hostages, and
- extensive destruction and appropriation of property.

As made clear by the Fourth Geneva Convention’s title, Article 147 and the other Convention provisions provide [special protections to civilians](#) during armed conflict. The indictment alleges that the victim of the grave breaches is a U.S. national, who at the time was living in a village located in a southern Ukrainian [oblast](#) (or province). As a civilian who the indictment alleges was not participating in the armed conflict between Russia and Ukraine, this victim (referred to as “V-1”) was a protected person during an international armed conflict for purposes of the Convention.

According to the indictment, the Defendants abducted V-1 from his home, severely beat him, and brought him to another location where they detained and interrogated him for 10 days. During the interrogation sessions, the indictment alleges that, among other things, the Defendants tortured V-1, degraded him by photographing him while he was naked, threatened him with sexual assault, and subjected him to a mock execution.

Based on these alleged facts, the indictment charges the Defendants with having committed offenses under the War Crimes Act, each based on a separate Article 147 grave breach: unlawful confinement, torture, and inhuman treatment. (The fourth count charges the Defendants with conspiracy to commit these War Crimes Act offenses in violation of [18 U.S.C. § 371](#).)

Jurisdiction

As originally enacted in 1996, the War Crimes Act’s punishments applied regardless of where the crimes took place, but only if [either the perpetrator of the grave breach or the victim was a U.S. national or member of the U.S. Armed Forces](#). In January 2023, President Biden signed into law the [Justice for Victims of War Crimes Act](#), which expanded the War Crimes Act’s jurisdiction to include offenses committed by *anyone* found on U.S. territory—[regardless of their or the victim’s nationality](#).

Before moving forward with a prosecution in a case in which the perpetrator or victim is a U.S. national or service member, the Act requires the Attorney General, the Deputy Attorney General, or an Assistant Attorney General to certify that the prosecution [“is in the public interest and necessary to secure substantial justice.”](#) For cases in which jurisdiction is based only on the presence of the alleged perpetrator on U.S. territory, the Act requires not only that the Attorney General or Deputy Attorney

General make this certification, but also that they consider “whether the alleged offender can be removed from the United States for purposes of prosecution in another jurisdiction” and the “potential adverse consequences for [U.S.] nationals, servicemembers, or employees of the United States.” Because V-1 is a U.S. national, DOJ did not utilize the War Crimes Act’s expanded jurisdiction based only on the offender’s presence in the United States for the current indictment.

Based on the facts alleged in the indictment, the federal district court has *authority* to exercise jurisdiction in the case; it remains uncertain, however, whether the court will be able to *in fact exercise* its jurisdiction or obtain physical custody over the Defendants because they are not currently present in the United States. For the court to do so, either Russia would have to agree to extradite its nationals to the United States to stand trial or the Defendants would have to travel to the United States or to [a country with which the United States has an extradition treaty](#). At this point and for the foreseeable future, [neither seems a likely prospect](#).

Even if the United States is unable to try these Defendants, however, the War Crimes Act as amended and this first indictment still have legal significance. Initially, if the Defendants ever travel to a country with which the United States has an extradition treaty—which, at a current [total of 116 countries](#), span a considerable portion of the globe—they would be doing so at their legal peril.

Furthermore, as explained in the following section, the War Crimes Act both (1) serves as means by which the United States meets its obligations under the Geneva Conventions and other IHL treaties and (2) is, along with extradition treaties [and other collaborative international legal mechanisms](#) such as [INTERPOL](#) that allow for transnational cooperation in criminal enforcement, part of the broader international legal structure for enforcing prohibitions on war crimes.

The Role of Domestic Legislation in Enforcing War Crimes Prohibitions Globally

The Geneva Conventions obligate parties to enforce war crimes prohibitions through their domestic law. In the Fourth Geneva Convention, this obligation is stated in [Article 146](#), which directs each Convention party to either prosecute persons who have committed “grave breaches” of the Convention, “regardless of their nationality,” or transfer those persons to another Convention party to stand trial.

In its [report](#) accompanying the 1996 legislation, the House Judiciary Committee stated that at the time of the Conventions’ ratification in 1955, the United States believed its existing laws “provided adequate means of [war crimes] prosecution” and satisfied its Convention obligations. The Committee report declared, however, that it had become clear in the following decades that those laws were inadequate, and legislation specifically enacted to authorize the prosecution of war crimes was necessary. To fill what the Committee identified as “major gaps” in existing U.S. laws, the War Crimes Act both defined “war crimes” as they are defined in certain IHL treaties and provided for U.S. jurisdiction regardless of where those crimes were committed, so long as the alleged offenders or victims were U.S. nationals.

At the time that Congress was considering the bill, the State Department and Department of Defense [recommended](#) that the legislation provide for jurisdiction regardless of where the war crime was committed or the nationality of the offender or victim, “as long as the perpetrator is present in the United States.” Then-President Clinton [expressed the same view](#) in signing the bill into law in 1996. Three decades later, Congress amended the War Crimes Act to provide for this jurisdictional expansion.

The 2022 amendment to the War Crimes Act provides the DOJ with the authority to prosecute a significantly broader category of persons than the original version of the statute that required either the offender or the victim to be a U.S. national. In doing so, the amendment establishes domestic legal

mechanisms for the United States to more robustly enforce the war crimes prohibitions of the Fourth Geneva Convention and other IHL treaties.

Considerations for Congress

This indictment under the War Crimes Act provides Congress with its first opportunity to observe the Act's implementation and consider what, if any, measures it might want to take in the future in light of recent developments. The prosecution was brought by the DOJ's [War Crimes Accountability Team](#), which Attorney General Garland established four months after Russia's invasion of Ukraine to "strengthen and centralize the Department's ongoing work to hold accountable those who have committed war crimes and other atrocities in Ukraine." At the press conference announcing the indictment, Garland characterized the prosecution as "an important step toward accountability for the Russian regime's illegal war in Ukraine" and stated that "[o]ur work is far from done."

It thus seems possible that Congress will soon have the opportunity to observe the implementation of the recent amendments to the Act in future indictments. In light of its assessment of the efficacy of the current statutory tools available to the DOJ to respond to atrocities committed during ongoing armed conflicts, Congress may, for example, consider enacting legislation that would further amend the War Crimes Act to include offenses beyond grave breaches that are also recognized under international law as war crimes, [such as those set forth in the Rome Statute of the International Criminal Court](#).

Additionally, Congress could consider [criminalizing "crimes against humanity,"](#) which, along with war crimes and genocide, have been [deemed "atrocity crimes" by the United Nations](#). Like many war crimes under the recently amended War Crimes Act, genocide is [codified](#) as a federal offense with a broad jurisdictional reach extending to offenders and victims of all nationalities. Although Congress has [provided](#) supplemental international security assistance to the State Department to assist Ukraine in "document[ing] and collect[ing] evidence of" crimes against humanity as well as war crimes, crimes against humanity are not currently codified as a federal offense under U.S. law.

Domestic prosecutions of war crimes face challenges that cannot entirely be avoided with new legislation—including not only the obstacles to bringing defendants to the United States to stand trial, but also the collection of evidence from a battlefield, the use of classified information, and the constitutional protections owed to all persons, regardless of nationality, who are prosecuted in U.S. civilian courts. In light of such difficulties, Congress may also want to view and assess the implementation of the War Crimes Act through a wider lens and consider it as part of a larger suite of accountability tools that Congress has established or could establish, which includes not only [numerous criminal laws with extraterritorial reach](#) but also nonjudicial mechanisms such as sanctions. Over the years, the executive branch has sometimes invoked the [International Emergency Economic Powers Act](#) to [sanction persons or entities](#) involved in human rights abuses or IHL violations. Congress has also provided the Executive with additional [authorities](#) to sanction individuals whom it determines are responsible for gross human rights violations. Although each tool within this suite differs in scope and effect, reviewing the suite holistically may provide insights for Congress as it considers ways the United States may seek to punish or deter war crimes.

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