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The Crimes Against Humanity Act: Another Step Toward "Universal Jurisdiction"

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Until recently, it was fashionable for the political left to argue that the United States should not serve as the "world's policeman." The international human rights community, heavily dominated by Europeans and other Europhiles, has lobbied so hard for so long to change that school of thought that the left is now trying to empower prosecutors and judges in the U.S.—and by extension in every other nation—to serve as international policemen. The latest example of this ideological transformation is the Crimes Against Humanity Act of 2009, which is currently being considered by the U.S. Senate Judiciary Committee.[1] The act would grant free-wheeling power to ideology-driven federal prosecutors and judges to punish individuals who are neither citizens nor residents of the U.S. for conduct that occurred outside of the U.S. even if it had no direct effect on the citizens, residents, or interests of the U.S.

When the title of proposed legislation declares that it protects against something all reasonable persons abhor, such as genocide or crimes against humanity, it can be daunting to peel back the rhetoric and see what the real effects of the law would be. Indeed, the Crimes Against Humanity Act includes provisions addressing inherently dangerous and wrongful conduct such as murder, kidnapping, forced labor, and sex trafficking. But in addition to trying to extend U.S. law enforcement power to the four corners of the globe, the act defines new criminal offenses (punishable in certain instances by up to life imprisonment) using such vague, overbroad language that they could put U.S. soldiers and military officials at risk of criminal prosecution.

New Vague, Overbroad Criminal Offenses. The first set of problems with the act emerges when one scrutinizes the definitions of these new crimes. For example, the act would make the new crime of "arbitrary detention" punishable by imprisonment of up to 20 years.[2] But the act's definition of "arbitrary detention" includes conduct that has always been permissible under the law of armed conflict:

> The term "arbitrary detention" means imprisonment or other severe deprivation of physical liberty except on such grounds and in accordance with such procedure as are established by the law of the jurisdiction where such imprisonment or other severe deprivation of physical liberty took place.

In other words, the Crimes Against Humanity Act would make virtually every seizure of enemy combatants in a theater of war a crime unless the capture complies with all of the applicable laws and procedures in the country where the combatant is captured. If that nation has rules of criminal procedure akin to U.S. Miranda rights or Fourth

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Amendment rights against unreasonable seizure, a member of a legitimate military organization—including the U.S. military—could be prosecuted unless he had complied with all of the foreign nation's applicable laws.

Another new offense, to which the act gives the heinous-sounding title of "national, ethnic, racial, or religious cleansing," is defined in a similarly vague and overbroad manner. Any federal prosecutor could use the provision to charge almost any soldier or military official involved in wartime actions resulting in the creation of a refugee population.

It would be up to the defendant to prove that the displacement was in accordance with only those "applicable laws of armed conflict" that permit displacements to ensure a population's security or else to prove that the displacement was demanded by "imperative military reasons." This is a daunting burden for a criminal defendant to bear, especially a defendant facing any ideologically motivated federal prosecutor or judge.

Stepping Toward Universal Jurisdiction. A second and more troublesome problem with the act is that its provisions purport to confer almost universal jurisdiction over the conduct prohibited by the act. One provision of the act asserts federal criminal jurisdiction over prohibited conduct if "the alleged offender is present in the United States, regardless of the nationality of the alleged offender." Thus, a federal prosecutor, perhaps motivated by politics or ideology, could detain and prosecute a foreign national for alleged violations engaged in entirely within a foreign country as long as that person sets foot in the U.S.

Indeed, nothing would prevent a prosecutor in the U.S. from indicting a foreign national for committing a crime against humanity even when that foreign national is not physically in the U.S. or where the alleged crime was not committed against U.S. nationals or otherwise jurisdictionally connected to any U.S. interest.

Having such provisions in federal law greatly undermines the ability of the U.S. to issue protests against similar exercises of "universal" jurisdiction by foreign prosecutors and judges. One example of such a judge is Spanish Central Criminal Court Judge Baltasar Garzón, who is apparently considering a criminal case against former officials of the George W. Bush Administration, including former Attorney General Alberto Gonzales, several officials in the Department of Defense, and the chief of staff to Vice President Dick Cheney.[3]

The jurisdictional provisions of the act mirror the stated agenda of the international human rights community: the creation of a system of universal jurisdiction that disregards national sovereignty and national borders. For example, Amnesty International describes its campaign to promote universal jurisdiction as follows:

> Amnesty International campaigns for all governments to empower their national courts to take on this important role by enacting and using legislation providing for universal jurisdiction. Such legislation should enable national authorities to investigate and prosecute any person suspected of the crimes, regardless of where the crime was committed or the nationality of the accused and the victim and to award reparations to victims and their families.[4]

Amnesty International is campaigning for all nations of the world to create universal jurisdiction over six crimes, including (1) genocide, (2) crimes against humanity, (3) war crimes, (4) torture, (5) extrajudicial executions, and (6) enforced disappearances. Universal jurisdiction over one of these

1. "Crimes Against Humanity Act of 2009," S. 1346, 111th Cong., 1st Sess.
2. If a single person dies as a result of "arbitrary detention," under the act anyone associated with the arbitrary detention would face imprisonment for life.
3. Marlise Simons, "Spanish Court Weighs Inquiry on Torture for 6 Bush-Era Officials," *The New York Times*, March 28, 2009, at *http://www.nytimes.com/2009/03/29/world/europe/29spain.html* (April 21, 2010).
4. Amnesty International, "Universal Jurisdiction," at *http://www.amnesty.org/en/international-justice/issues/universal-jurisdiction* (April 21, 2010).

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crimes—genocide—was created in the U.S. when President Bush signed the Genocide Accountability Act in December 2007. Federal prosecutors have attained universal jurisdiction over other crimes as well, including through the Child Soldiers Accountability Act and the Trafficking in Persons Accountability Act.

Down a Slippery Slope. For centuries, the U.S. has respected the principle that each nation has the authority and responsibility to police criminal conduct within its own borders while maintaining the ability to prosecute crimes against its citizens and interests abroad. The recent passage of legislation in 2007 and 2008—such as that regarding genocide, child soldiers, and human trafficking—signals a major step away from traditional notions of state sovereignty and a step toward the acceptance of universal jurisdiction as a norm.

Passage of legislation that creates universal jurisdiction over persons who have committed crimes in foreign nations opens the door to demands of reciprocity from other nations that seek to prosecute U.S. military personnel and government officials for alleged criminal acts committed anywhere in the world—and particularly in places like Iraq, Afghanistan, and Guantanamo Bay, Cuba.

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