

Section of International Law and Practice (Report No. 301) at Annual Meeting 1993

BE IT RESOLVED, That the American Bar Association supports the establishment by the Security Council of the United Nations under Chapter VII of the U.N. Charter of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("the Tribunal").

BE IT FURTHER RESOLVED, That the American Bar Association recommends that the United States Congress promptly adopt appropriate implementing legislation to enable the President to give full support to the Tribunal, and including provisions which would:

- (a) limit the discretion of courts under current U.S. law to deny assistance to the Tribunal in the service of documents and the collection of evidence;
- (b) recognize the obligation of the United States under Chapter VII of the U.N. Charter to arrest accused persons and to surrender them to the Tribunal.

BE IT FURTHER RESOLVED, That the American Bar Association recommends that the United States urge the United Nations to make every effort, through the rules of evidence and procedure to be adopted by the Tribunal and, if appropriate, through supplementary decisions of the Security Council, to ensure due process for the accused and adequate protection for victims and witnesses by such measures as the following:

- (a) implementation of the principle of *nullum crimen sine lege* (no crime without law) by specifying (1) that offenses in violation of the laws or customs of war include those acts especially forbidden by the Hague Regulations of 1907; (2) that the phrase "other inhumane acts" in the description of crimes against humanity includes acts prohibited in common article 3 of the Geneva Conventions of 1949; and (3) that the description of rape includes enforced prostitution, enforced pregnancy, and other widespread sexual offenses;
- (b) prevention of conflicts of interest within the Tribunal and the provision of institutional balance through the establishment of an Office of Defense Counsel and a prohibition against service by an indicting judge on the panel that hears the case at trial;
- (c) the participation by the U.N. Security Council of the rules of evidence and procedure of the Tribunal prior to their adoption by the judges;
- (d) the assurance of the right of confrontation and the prohibition of the use of *ex parte* affidavits as evidence at trial against the accused, except in highly specialized circumstances;
- (e) the assurance that the Prosecutor's standard of proof at trial is at least the functional equivalent of "beyond a reasonable doubt;"
- (f) the reconciliation of the defendant's right to cross-examination with the protection of victims and witnesses through special arrangements;
- (g) the recognition of the defense of superior orders in cases where a defendant acting under military authority in armed conflict did not know the orders to be unlawful and a person of ordinary sense and

understanding would not have known the orders to be unlawful, but treating superior orders as grounds for mitigation of punishment only in cases of duress;

- (h) the protection against double jeopardy by permitting only the person convicted, and not the Prosecutor, to request an appeal after final judgment or a review proceeding;
- (i) the guarantee of the rights of the accused consistent with the International Covenant on Civil and Political Rights;
- (j) the assurance of uniform standards concerning the treatment of prisoners by States in which they are imprisoned and for the review of requests for pardon or commutation once the Tribunal is no longer in existence.