

AMERICAN BAR ASSOCIATION
SECTION OF
INTERNATIONAL LAW AND PRACTICE

RECOMMENDATION

- BE IT RESOLVED, that the American Bar Association recommends that the United States Government take an active role in the establishment of an international criminal court that would be based on the following principles: 1
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- A. The consensual jurisdiction of the international criminal court should be based on the consent of the state having custody over a person accused of a crime specified in an international convention which 4
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- (1) adequately defines the crime; 7
- (2) has been widely accepted by states representing all of the world's major legal systems; and 8
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- (3) contains the extradite or prosecute obligation. 10
- B. The mandatory jurisdiction of the international criminal court should be based on a decision by the Security Council issued pursuant to its powers under Chapter VII of the United Nations Charter: 11
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- (1) determining that any person or category of persons who have participated in an activity that the Security Council had determined endangers international peace and security and have been accused of having committed a crime which is recognized by the international community as a gross violation of a rule of customary international law widely accepted by states representing all the world's major systems as giving rise to personal responsibility, should be subject to possible prosecution and trial in accordance with the statute of the court; or 14
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| (2) | transferring to the court for possible prosecution and trial any person | 22 |
| | who has participated, or is participating, in an activity which the | 23 |
| | Security Council determined endangers international peace and security | 24 |
| | and who is accused of having committed a crime under general | 25 |
| | international law or an international treaty in force, when a state where | 26 |
| | the accused person is found refuses to try or extradite that person. | 27 |

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REPORT

This recommendation is the second in a series of five recommendations which deal with important issues of international law that are crucial to the maintenance of international peace and security and justice. They have been developed by the Section of International Law and Practice, through its Working Group on Improving the Effectiveness of the United Nations, as a contribution of the American Bar Association to the 50th Anniversary of the United Nations, in fulfillment of the American Bar Association's Goal 8 -- to advance the rule of law in the world. This recommendation addresses the issue of the establishment of an International Criminal Court for the punishment of individuals responsible for gross violations of international law.

Since the American Bar Association (ABA) considered the first report of the ABA Task Force on an International Criminal Court (Task Force) and the report of the International Law and Practice Section's (Section) Task Force on the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia (War Crimes Task Force), the International Law Commission (ILC) of the United Nations has issued a new report, the U.S. Commission on Improving the Effectiveness of the United Nations (U.S. Commission) has issued its report, and the United States and other countries are expected to make submissions for the upcoming session of the ILC. The final report of the ABA Task Force has also presented some additional comments on the ILC's report. All of these documents cite new and critical issues which require an adjustment and elaboration of positions previously taken by the ABA.

It is vitally important for the United States to take an active role in the establishment of an international criminal court able to contribute to the maintenance of the rule of law, without which there can be no just peace. If the United States does not take a leading role in the formation of the new institution, it may evolve in a direction that departs widely from concepts that are fundamental to a system of justice.

For these reasons, the Section strongly believes that any proposal for an international criminal court should be comprehensive in addressing issues fundamental to its effective operation. The United States should not support a vague proposal which would leave open for future action the development of jurisdictional and procedural issues. In particular, sufficiently detailed rules of evidence and procedure are fundamental to the integrity of any system of criminal justice, and are necessary to ensure the rights of the accused and the victim and to prevent the politicization of the tribunal. The salient aspects of the structure of a tribunal and its procedures may be subject to comment by the Section in a future report.

Consensual Jurisdiction

The Section is of the view that the parties to the statute of an international criminal court should have two means of invoking its jurisdiction: consensual and mandatory. In the first

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instance, offenders would be voluntarily surrendered by states. A party to the statute of an international criminal court would be entitled to refer the case of an alleged criminal found in its territory to the tribunal instead of trying or extraditing that person, either on its own initiative, or on request of the state where the crime has been committed or of the state of the accused person's nationality. An international tribunal would, in effect, serve as a third alternative to states currently having only the choice to prosecute or extradite international criminals found within their country.

The Section does not support the inclusion of a provision that would preclude reference of a case to an international criminal court when there has been a request by another state for extradition of an accused. The only alternative to extradition would be for the requested country to submit the accused to its prosecutorial authorities. This would undermine a fundamental purpose of having an international criminal court, which is to maximize possible prosecutorial options in respect to international crimes.

In this regard, the Section would support the position taken in the commentary to Article 63 of the ILC's draft statute as to whether a state party that decided not to surrender an accused to the court should also be allowed as an alternative to prosecution to extradite him to another state for prosecution. Allowing a state party three options -- prosecution, extradition to another state, or surrender to the court -- would seem the approach most compatible with the view that the court should complement, rather than compete with, prosecution before national tribunals. The Section concurs with the position taken by the U.S. Commission that the establishment of an international criminal court "should be viewed not as a substitute for but a complement to national criminal systems and other modalities of bilateral and multilateral cooperation in penal matters."

Under its consensual jurisdiction, reference to an international criminal court should be made on a case-by-case basis. As to whose consent should be required for the court to have jurisdiction, consent should be required only of the state with custody over an accused, provided that the state of custody would have a basis under the pertinent international convention for exercising jurisdiction. It is recognized that this position is inconsistent with the first report of the ABA Task Force and the ILC's draft statute, where the consent of the state or states of which the accused is a national would also have been required. However, it is consistent with the positions taken by the Task Force in its final report and by the ILC's working group.¹

What the Section now recommends is not different from the status quo today where the consent of the state having custody controls. Under existing conventions, normally the state of custody is obliged to establish its jurisdiction over the offense so it can submit an accused to prosecution if it does not extradite him to either the territorial state or the state of

¹For further discussion, see the *Final Report of the American Bar Association Task Force on an International Criminal Court* at 21-26.

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nationality. Since neither the state in which the crime occurred, nor the state of nationality, nor the state of custody requires the consent of any other state to submit an accused to prosecution before its national courts, such consent should not be required for such states to submit an accused to an international criminal court.

Subject-Matter Jurisdiction

While the Section supports an international criminal court with broad subject-matter jurisdiction, it recognizes that the breadth of subject-matter jurisdiction may ultimately be dictated by political developments. Depending upon the circumstances, a more modest and incremental approach may have a greater likelihood of success. Accordingly, the subject matter of consensual jurisdiction would initially be limited to international conventions that are widely accepted by states representing all of the world's major legal systems and that are subject to an extradite or prosecute obligation. A list of such conventions is contained in Article 22 of the ILC's draft statute.

In terms of which crimes a state is prepared to recognize as within the court's jurisdiction, an "opting in" system along the lines set forth in alternative A of Article 23 of the ILC's draft statute is preferred. A state party to the court's statute could "by declaration lodged with the Registrar, at any time accept the jurisdiction over one or more of the crimes referred to in article 22." This approach would be the most flexible and the one most commensurate with the concept that the court would serve as a supplemental forum to national courts for the prosecution of international crimes.

The Section recommends against inclusion of the crime of "aggression," which is not defined in any international convention. The only officially adopted definition of aggression is that contained in General Assembly Resolution 3314, adopted in 1974, which though considered by many as a generally accepted interpretation of the U.N. Charter, is considered by others as intended only as a political guide and not a suitable definition for purposes of prosecution. In a similar regard, apartheid is another issue which may have more political than legal content and raise the risk of politicization of the court. Finally, the Section recommends against reference to the Code of Crimes Against the Peace and Security of Mankind in Article 21 of the ILC's draft statute as a possible addition to the list. Some items in that code have engendered strongly negative reactions.

The Section is of the view that drug-related crimes should be considered for inclusion in the court's subject-matter jurisdiction. However, drug-related crimes, including the crimes referred to in the 1988 United Nations Convention against Illicit Traffic in Narcotics and Psychotropic Substances, do not at present qualify for inclusion in the ILC's draft statute because of a lack of adequate definition. If such crimes are to be included, they should be more precisely defined in the court's statute.

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In terms of what crimes should be added to the subject-matter jurisdiction of the court, the Section would encourage the addition of torture to Article 22 of the draft statute of the ILC. Consideration should also be given to crimes covered by the Convention on the Physical Protection of Nuclear Material and to crimes against UN peacekeepers and humanitarian workers under proposed new treaty law.

Mandatory Jurisdiction

Unlike the U.S. Commission, the Section considers that provision should be made for a second means of invoking the jurisdiction of the international criminal court. It would be mandatory in nature and would require a mandate from the Security Council issued pursuant to its powers under Chapter VII of the United Nations Charter:

- a. determining that any person or category of persons who have participated in an activity that the Security Council had determined endangers international peace and security and have been accused of having committed a crime which is recognized by the international community as a gross violation of a rule of customary international law widely accepted by states representing all the world's major systems as giving rise to personal responsibility should be subject to possible prosecution and trial in accordance with the statute of the court; or
- b. transferring to the court for possible prosecution and trial any person who is participating in an activity which the Security Council had determined endangers international peace and security and who is accused of having committed a crime under general international law or an international treaty in force, when a state where the accused person is found refuses to try or extradite that person.

Respectfully submitted,

James H. Carter
Chairman

August 1994

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GENERAL INFORMATION FORM

Submitting Entity: Section of International Law and Practice
Submitted By: James H. Carter, Chair of the Section of
International Law and Practice

1. Summary of Recommendation.

The Recommendation urges that the American Bar Association in anticipation of the fiftieth anniversary of the United Nations and the Decade of International Law adopt a policy that deals with the establishment of an International Criminal Court for the punishment of individuals responsible for gross violations of international law. This issue is crucial to the maintenance of international peace, security and justice, and to the fulfillment of Goal VIII of the ABA -- the advancement of the rule of law in the world.

2. Approval by Submitting Entity.

This Recommendation was approved by the Council of the Section of International Law and Practice at its meeting on April 30, 1994 in Washington, D.C.

3. Has This or A Similar Recommendation Been Submitted to the House or Board Previously?

No.

4. What Existing Association Policies Are Relevant to This Recommendation and How Would They Be Affected by Its Adoption?

In 1992, the ABA recommended that the U.S. work toward finding solutions to issues concerning such a court. No existing policies would be affected by approval of this Recommendation.

5. What Urgency Exists which Requires Action at This Meeting of the House?

Approval of this Recommendation and Report by the House of Delegates at this Meeting is needed in order to influence the discussion which will take place beginning early in 1995 in conjunction with the fiftieth anniversary of the United Nations.

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6. Status of Legislation.

Not applicable.

7. Cost to the Association.

None.

8. Disclosure of Interest.

None.

9. Referrals.

This Report and Recommendation was referred to all other ABA Sections and entities and to the New York State Bar Association and the Milwaukee Bar Association.

10. Contact Person.

The principle contact people in the Section of International Law and Practice are:

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12. Contact Person Regarding Amendments to This Recommendation.

No proposed amendments have been received. The people to contact concerning proposed amendments are:

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