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AMERICAN BAR ASSOCIATION
SECTION OF INTERNATIONAL LAW AND PRACTICE
SECTION OF CRIMINAL JUSTICE
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES
ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

RECOMMENDATION

- 1 RESOLVED, That the American Bar Association recommends that the United States
2 Government accede to the Rome Statute of the International Criminal Court.

REPORT**I. INTRODUCTION**

The American Bar Association recommends that the United States Government accede to the Rome Statute of the International Criminal Court.¹ The Rome Statute, adopted by 120 countries on July 17, 1998, is a major advancement in the rule of law. For the first time, a permanent, internationally constituted court will try individuals accused of genocide, war crimes and crimes against humanity that would otherwise escape prosecution.

The ABA has not yet gone on record in support of the text of the Rome Statute. Prior to the adoption of the Rome Statute, the American Bar Association had issued recommendations endorsing the concept of an international criminal court ("ICC"). Most recently, on February 2, 1998, five months before the adoption of the Rome Statute, the House of Delegates adopted a recommendation urging the United States Government to continue to play an active role in negotiating and drafting a treaty embodying certain principles. The ABA also adopted recommendations endorsing an international criminal court in 1992 and 1994. 29 Int'l Law. 293, 300 (Summer 1995); 27 Int'l Law. 257 (Spring 1993).

The Rome Statute will "enter into force," and the ICC will come into existence, once sixty countries ratify or accede to the Rome Statute. As of November 28, 2000, twenty-three countries have ratified and 115 countries have signed. All the members of the European Union have signed the Rome Statute, as have all NATO members except the United States and Turkey. Italy, France, Belgium, Spain, Germany and New Zealand are among the countries that have ratified. The ICC is likely to begin operating by 2002.

Once the Statute enters into force, an "Assembly of States Parties" will be convened. The Assembly will elect the ICC's judges and senior staff, provide a budget and administrative arrangements, approve the Elements of Crimes and Rules of Procedure and Evidence that have already been negotiated, and exercise continuous oversight and discipline of the Court. If the United States has not ratified or acceded to the Rome Statute, it will not be a voting member of the Assembly and therefore will not be able to participate in the adoption of the Rules of Procedure and Evidence and the Elements of Crimes, the definition of aggression, or play a role in the selection the ICC's judges. As the participation of the United States will be critical to the ICC's success, this recommendation urges the United States to accede to the Statute.

Due to the technical requirements of the Statute, the recommendation calls for accession, rather than signature or ratification. Article 125 of the Rome Statute provides that the Statute shall remain open for signature only until December 31, 2000. If a state has not signed the Statute by that date, Article 125(3) provides that "accession" is the appropriate course. Under international law, accession – in addition to ratification, acceptance and approval -- is one of the means by which a state establishes its consent to be bound by a treaty. Vienna Convention on the Law of Treaties, art. 2(b). Since neither signature nor ratification appear to be options for the United States after December 31, 2000, the recommendation is for accession.

¹ Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9, reprinted at 37 ILM 998 (1998). The Rome Statute, as well as further information about the Statute and the ICC, may be found at www.un.org/law/icc and at www.iccnw.org.

II. THE ROME STATUTE AND THE STRUCTURE OF THE ICC

The 128 articles of the Rome Statute, prefaced by an eloquent Preamble, describe the composition and operation of the International Criminal Court. The seat of the ICC will be The Hague but trials elsewhere are permitted. The Court will consist of four organs: (1) the Presidency, composed of three judges, serving an administrative role with respect to judicial functions; (2) an Appeals Division, a Trial Division and a Pre-Trial Division; (3) a Prosecutor's Office; and (4) a Registry, the administrative arm. There will be eighteen judges, serving nine-year non-renewable terms. Judges, nominated by countries that ratify the ICC Statute ("States Parties") and elected by a two-thirds vote, shall be "persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices."

The Rome Statute describes a court with limited jurisdiction, and it contains broad safeguards against frivolous or politically motivated prosecutions. Its jurisdiction can only be exercised in limited circumstances involving genocide, war crimes and crimes against humanity, and when no national criminal justice system has the ability or the will to prosecute. The ICC is not intended to replace national systems but to permit the exercise of jurisdiction in the absence of any national prosecution.

The ICC will not be a court of universal jurisdiction; instead, the exercise of its jurisdiction is constrained by preconditions, discussed below. Cases will reach the ICC either through (1) a referral by the United Nations Security Council acting under Chapter VII of the United Nations Charter; or (2) with regard to cases initiated by a State Party or the ICC Prosecutor, when there has been a consent to the prosecution by the country on whose territory the crime occurred or the accused's country of origin.

The Pre-Trial Chamber, which essentially serves as a check on the powers of the Prosecutor, is an institution that derives from the civil law tradition, although many of its functions are similar to that of a grand jury in the common law system. The Pre-Trial Chamber reviews evidence submitted by the Prosecutor and authorizes arrest warrants if "reasonable grounds" exist that the person has committed a crime within the ICC's jurisdiction. Once a defendant appears before the Court, the Pre-Trial Chamber must conduct a "confirmation hearing" in order to examine the evidence and "determine whether there is sufficient evidence to establish substantial grounds to believe that the person has committed each of the crimes charged."

An ICC investigation may be commenced either by the Security Council, a state party or by the Prosecutor acting under the so-called *proprio motu* power. Judicial safeguards, however, limit investigations initiated by a state party or the Prosecutor which, due to the binding nature of Security Council resolutions under international law, do not apply to cases initiated by the Security Council. For example, before launching a *proprio motu* investigation, the Prosecutor must submit to the Pre-Trial Chamber a "request for authorization," which may be granted if the Pre-Trial Chamber determines both that there is a "reasonable basis to proceed" and that "the case appears to fall within the jurisdiction of the Court." In addition, the Security Council is afforded the power to stop, for renewable one-year periods, investigations or prosecutions.

The ICC's exercise of jurisdiction is circumscribed by a complex set of provisions relating to "admissibility" and state consent. The admissibility provisions ensure that the ICC functions only with respect to the most serious international crimes when national courts are unavailable or unwilling to prosecute. A case is "inadmissible" if a state with jurisdiction is already investigating (unless that state "is unable or unwilling genuinely to carry out the investigation"); or if a state has made a good faith decision not to investigate; or if the accused has already been tried for the conduct alleged. A case is also inadmissible if it is "not of sufficient gravity to justify further action by the Court." Admissibility may be raised during the initial investigation. Thus, if a state notifies the Court that it is investigating or already has investigated the alleged crimes, the Prosecutor is required to defer to that state unless the Pre-Trial Chamber authorizes the investigation. Once an arrest warrant has been issued, the admissibility of a case may be raised by the Court, by the accused, by a state with jurisdiction over the crime, or by a state from which acceptance of jurisdiction is required. Challenges to admissibility are referred to either the Pre-Trial Chamber (prior to confirmation) or to the Trial Chamber (after confirmation) and may in all cases be appealed to the Appeals Chamber.

State consent provisions provide another significant check on the ICC's exercise of jurisdiction. (Advance consent is given by the act of ratification of the Rome Statute, although non-party states may consent by filing a formal declaration accepting the ICC's jurisdiction in a particular case.) The consent provisions require that, in investigations launched by a state party or the Prosecutor, the ICC must have the consent of either: (1) the state on whose territory the crime occurred; or (2) the state of the nationality of the accused.

There are further protections against intrusion on state sovereignty. States cannot be required to divulge matters affecting state security. If a state has competing obligations to deliver a suspect under extradition treaties or Status of Forces Agreements, it may honor those obligations in preference to an ICC arrest warrant.

The ICC will try individuals accused of genocide, war crimes and crimes against humanity. Genocide is defined consistently with the 1949 Genocide Convention. With regard to war crimes, the Rome Statute provides that war crimes must be "committed as a part of a plan or policy or as part of a large-scale commission of such crimes." War crimes committed in internal, as well as international, armed conflicts are within the jurisdiction of the Court, and include "forced pregnancy" (defined as "the unlawful confinement, of a woman made forcibly pregnant, with the intent of affecting the ethnic composition of any population"), rape and other forms of sexual violence. Crimes against humanity must be "widespread or systematic," part of a plan or policy and directed against civilians. Specific acts included as crimes against humanity are murder, extermination, enslavement and enforced disappearances. The crime of aggression is nominally included, but prosecutions for aggression are barred until the Statute can be amended by states parties to provide for an adequate definition.

The Statute also contains comprehensive provisions protecting the rights of defendants. Among other rights, persons under investigation have the right to remain silent, a presumption of innocence, the right to legal assistance and the right to be questioned only in the presence of counsel. There will be no death penalty or trials in absentia.

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The final draft texts of the ICC's Rules of Procedure and Evidence and the Elements of Crimes were completed in July 2000 by the United Nations Preparatory Commission for the International Criminal Court. These texts will be submitted to the Assembly of State Parties for final approval when the Statute enters into force.

III. THE UNITED STATES AND THE ICC

Notwithstanding its current opposition to the Rome Statute, the United States has consistently favored the prosecution of international crimes by international tribunals. The United States, of course, helped create the landmark Nuremberg tribunal, and in the early 1950's helped draft a draft ICC statute and was among the staunchest advocates of an international criminal court. The United States played leading roles in creating and operating the Yugoslavia and Rwanda ad hoc international criminal tribunals, and the United States Congress has voted in favor of significant funding for these tribunals year after year. In Cambodia, Iraq, Sierra Leone and East Timor, the United States has argued in favor of enforcement of international criminal law by international tribunals. As recently as October 1997, the United States UN Ambassador stated that "[t]he time has come to create an international criminal court that is fair, efficient and effective, and that serves as a deterrent and a mechanism of accountability in the years to come."²

In the years before the Rome Statute, the United States participated vigorously in the painstaking drafting sessions on the statute. During the Rome Diplomatic Conference, the US delegation was responsible for many of the most critical aspects of the Rome Statute. For example, the US delegation successfully argued that genocide and war crimes could be committed in internal as well as in international conflicts and that crimes against humanity could be committed in times of peace. The US also led the negotiations with regard to the Rome Statute's provisions on indictments, penalties, gender crimes and due process.

The United States nevertheless was one of seven nations to vote against the final text of the Rome Statute. Joining the United States in opposition were Iran, Iraq, China, Israel, Libya and Sudan. Since the Rome Statute, the United States has expended significant diplomatic resources in order to achieve its goal of a 100% exemption for US service members and government agents acting in the course of their official duties. In this regard, the United States has abandoned efforts to try to modify the text of the Rome Statute, and instead is concentrating on achieving this goal through related agreements, particularly the Relationship Agreement between the UN and the ICC. For the reasons discussed below, the United States should abandon this effort to exempt US service members and government agents from the reach of the ICC. In addition, we discuss specific criticisms of the Rome Statute that have been offered in opposition.

² Statement by Ambassador Bill Richardson, United States Representative to the United Nations, on Agenda Item #150, the Establishment of an International Criminal Court, in the Sixth Committee, October 23, 1997, U.S.U.N. Press Rel. #188-(97) (Oct. 23, 1997).

A. The ICC May Exercise Jurisdiction Over Citizens of Non-Party States

The US position derives from what it presents as a first principle: the ICC cannot have jurisdiction over the official acts of citizens of countries that have not ratified the Statute.³ From this principle, the US argues that there should be a prohibition against the “surrender” of indicted individuals to the ICC without the consent of the accused’s country of origin, if that country has not ratified the Rome Statute. In furtherance of this principle, the US informally circulated during the Preparatory Commission the following proposed text:

“The United Nations and the International Criminal Court agree that the Court may seek the surrender or accept custody of a national who acts within the overall direction of a U.N. Member State, and such directing state has so acknowledged, only in the event (a) the directing State is a State Party to the Statute or the Court obtains the consent of the directing State, or (b) measures have been authorized pursuant to Chapter VII of the U.N. Charter against the directing state.”

For the following reasons, the ABA believes that any proposal along these lines would be unwise, both as a matter of international law, and as a matter of practicality and justice.

First, the exemption would not only exempt United States nationals, but also the nationals from rogue states which are most likely to produce or harbor war criminals in the future and are the least likely to consent to their nationals being tried by the ICC. The exemption would mean that the most notorious war criminals would be immune from the jurisdiction of the new court.

Second, most of our allies, including all the NATO and European Union countries, have found the United States proposal unacceptable. This was true, for example, when the proposal was offered at the March and June 2000 meetings of the Preparatory Commission and there is little reason to expect that it will be found acceptable when offered again. From the European point of view, the US proposal is a virtual guarantee that the ICC would be unable to exercise jurisdiction over nationals of rogue states who are unlikely in any event to become parties to the Rome Statute.

Third, the US proposal seems to be based on the misconception that if the United States refuses to join, its nationals will be protected from being subjected to a foreign jurisdiction. In the absence of some kind of agreement, however, the jurisdiction of the state in which the offense is committed will prevail over any other claim of jurisdiction. Territorial jurisdiction, for example, prevails over jurisdiction based on nationality.

In World Wars I and II, the United States exercised exclusive court martial jurisdiction over its forces by agreement with its allies. After World War II, however, our NATO allies were not willing to grant exclusive jurisdiction in peacetime to United States forces stationed in Europe. The NATO Status of Forces Agreement was negotiated to solve this problem. It

³ For statements of the US position, see David J. Scheffer, International Criminal Court: The Challenge of Jurisdiction, Address at the Annual Meeting of the Amer. Soc. Int’l Law, Mar. 26, 1999 (available at www.state.gov/www/policy_remarks/1999/990326_scheffer_icc); David J. Scheffer, The United States and the International Criminal Court, 93 AJIL 12-22 (1999); David J. Scheffer, Developments at Rome Treaty Conference, Testimony Before the Senate Foreign Relations Committee, July 23, 1998 (available at www.state.gov/www/policy_remarks/1998).

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provides for a sharing of jurisdiction, which gives the sending state the first right to try its military personnel if the offense is performed as an official act or against another member of the armed forces. All other offenses fall to the primary jurisdiction of the host state.

The point is that without some agreement, the territorial sovereign has an unfettered right under customary international law to exercise jurisdiction over those who commit offenses against the law of the foreign sovereign in its territory. This derives from the most basic principle of international law, as stated in 1812 by Chief Justice Marshall, that:

“[t]he jurisdiction of the nation within its own territory is absolute and subject to no qualification except such as it has agreed to.”

The Schooner Exchange, 11 U.S. (7 Cranch) 116 (1812).

The same principle has been applied more recently by the Supreme Court in rejecting a 1957 challenge to the constitutionality of the Japanese Administrative Agreement which, following the NATO precedent, allows the United States to exercise jurisdiction over certain act-of-duty offenses committed in Japan. Without the Agreement, United States military personnel would be subject to the unfettered jurisdiction of Japan. Wilson v. Girard, 354 U.S. 524 (1957) (per curiam).

The Rome Statute provides a treaty-based alternative to the territorial jurisdiction of the foreign state with regard to the so-called “core crimes” of genocide, war crimes, and crimes against humanity. Under the Rome Statute’s complementarity regime, however, such offenses may be prosecuted by the ICC only if the state of nationality of the accused fails to assert its primary jurisdiction. These provisions are broadly framed. Thus, a US service member could only be subject to ICC prosecution if – assuming all other preconditions to jurisdiction are satisfied – the United States is “unwilling or unable” genuinely to investigate or prosecute the alleged crime. It is not to be expected that the United States will allow that theoretical contingency to arise. The US would be expected to always assert its own jurisdiction rather than allowing the ICC to act. The Rome Statute affords American military personnel the best available assurance of the benefits of an American trial.

Fourth, the US has argued that customary international law prohibits, or at least does not authorize, the exercise of jurisdiction over nationals who are engaged in official acts on behalf of a non-party State. This view of customary international law has been repeatedly asserted by Administration spokesmen in support of United States objections to the Statute, but it is a striking fact that the assertion has never been backed up by citation of legal authority, or by an opinion of the Legal Adviser of the State Department, or of the Attorney General of the United States. The Rome Statute, moreover, consistent with Nuremberg principles, provides in Article 27 that “official capacity as a Head of State or Government . . . or [as] a government official shall in no case exempt a person from criminal responsibility under this Statute.”

Most international lawyers, moreover, have rejected this view of customary international law on the simple grounds that while a non-party state is not itself bound to accept a jurisdiction over itself unless it has consented, the same is not true of its nationals if they commit offenses in the territory of a state which is a party. In the latter case, a national, whether a tourist, soldier or

government official, who commits an offense within the territory of any state is subject to that state's territorial jurisdiction. This would be true if there were no Statute at all. There is no rule of customary international law that prohibits the territorial sovereign from exercising its jurisdiction directly over the offender or from extraditing the offender to another country, even to a country of which the accused is not a national. The territorial sovereign alternatively would be free to extradite an accused to an international court, where the accused might receive a fairer trial than in the courts of the country in which the offense was committed. Indeed, that is clearly one of the principal advantages to be derived from becoming a party to the ICC. In most cases, international due process protections are likely to be more extensive than would be available to the accused if tried by an individual country exercising territorial jurisdiction in its national court.

B. The Protections in the Rome Statute are Consistent with the Bill of Rights

Another criticism of the Rome Statute is that it would deny service members of protections guaranteed by the United States Constitution, such as jury trial. This criticism is based on the false assumption that military personnel accused of crimes would be entitled to jury trial in the absence of the Rome Statute. The text of the Fifth Amendment, however, specifically excludes service personnel from the grand jury presentment clause. The Sixth Amendment guarantees jury trial only in the district "wherein the crime shall have been committed." By no stretch of reasoning could this provision be interpreted to apply extraterritorially. The Seventh Amendment guarantees jury trials in civil cases only. The Constitution therefore does not support the argument that a jury trial is available to service members, even as to crimes committed in the United States. The right to a jury trial clearly does not apply with respect to crimes committed outside the United States, whether by service personnel or by ordinary American citizens traveling abroad. The Supreme Court has confirmed that jury trial is not guaranteed to persons in military service. Middendorf, Secretary of the Navy, et al. v. Henry et al., 425 U.S.25 (1976).

Another criticism is that Americans will be denied the right of cross-examination as guaranteed by the Constitution if subjected to trial under the Rome Statute. But Article 67(i)(e) of the Rome Statute specifically guarantees the right "[t]o examine, or have examined, the witnesses against him or her." In addition, proposals to allow the testimony of anonymous witnesses, as is permitted in the Yugoslavia tribunal, were soundly defeated during the negotiation of the rules.

C. The Rome Statute Adequately Protects the Rights of the Accused

Every prior recommendation issued by the ABA on the ICC has been conditioned on the existence of due process protections for the accused. For this reason it is appropriate in this report, recommending final United States acceptance of the Rome Statute, to speak with great particularity of the due process protections for the accused as set forth in the Statute. These are:

- Presumption of innocence (Art. 66);
- Assistance of counsel (Arts. 67(1)(b), (d));
- Right to remain silent (art. 67(1)(g));
- Privilege against self incrimination (Art. 67(1)(g));

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Right to written statement of charges (Art. 61(3));
Right to examine adverse witnesses (Art. 67(1)(e));
Right to have compulsory process to obtain witnesses (Art. 67(1)(e));
Prohibition against ex post facto crimes (Art. 22);
Protection against double jeopardy (Art. 20));
Freedom from warrantless arrest and search (Arts. 57 bis(3), 58);
Right to be present at the trial (Art. 63);
Speedy and public trials (Art. 67(1)(a), (c))
Exclusion of illegally obtained evidence (Art. 69(7)); and
Prohibition against trials in absentia (Arts. 63, 67(1)(d))

The due process provisions of the Rome Statute are somewhat more detailed and more comprehensive than those found in the Bill of Rights, as shown in the Appendix hereto. They are derived almost verbatim from the Article 14 of the International Covenant on Civil and Political Rights, which the US has ratified. These rights are also substantively similar to the rights protected by the European Convention on Human Rights. Both of these post-World War II instruments were heavily influenced by the American Bill of Rights. It is safe to say that the list of due process protections contained in the Rome Statute is the most comprehensive which has so far been promulgated.

D. The Rome Statute Contains Safeguards Against Bad Faith Prosecutions

The Rome Statute contains many safeguards to prevent frivolous or politically motivated prosecutions. It is unlikely, therefore, that the ICC Prosecutor will become “the most powerful man in the world,” as some have claimed. The ICC Prosecutor, under the Rome Statute, has less authority than the typical County Prosecutor or District Attorney in the United States. The ICC Prosecutor will have no independent power to issue legal process or to open a formal investigation. Instead, the agreement of the three-member Pre-Trial Chamber must be obtained before legal process can be issued or an investigation commenced. Upon the application for such authorization, the Prosecutor must notify the nation of the nationality of the accused.

At this point, the nation of which the accused is a national has a right to assert its primary jurisdiction both as to investigation and as to trial. If primary jurisdiction is asserted by the nation of nationality, the prosecutor must abandon the request for authority from the Pre-Trial Chamber for authority to investigate or prosecute. And the Prosecutor must accept the conclusion reached by the state of nationality as to whether the case should be investigated or prosecuted by the state of nationality unless it can be proven that that state is “unable or unwilling” to do so. If the Prosecutor challenges the conclusion of the state of nationality, that state has a right under the Statute to contest the challenge in the Pre-Trial Chamber as well as a right to an emergency interlocutory appeal to the Appellate Chamber of the ICC. The Security Council also has the authority under the Rome Statute to stop any prosecution.

Moreover, the ICC first would have to gain custody of the service member or government official, as the ICC is prohibited from trying anyone in absentia. Thus, the custodial state, if not the United States, would have to transfer custody to the ICC before jurisdiction over a United States official could be exercised. To do that, any State Party would have to disregard the specific complementarity and other provisions of the Statute. It is more likely that if the

motivation was purely political, the custodial state, assuming it was also the territorial state, would decide to exercise its own territorial jurisdiction. That step is clearly within the power of any state with regard to genocide, war crimes and crimes against humanity, because the Rome Statute does not diminish the territorial state's jurisdiction. Indeed, ever since the "grave breaches" provisions were written into the Geneva Conventions of 1949, every State Party is treaty-bound to punish violations committed on its territory, or else extradite them to another State Party that is prepared to exercise its jurisdiction over those who commit grave breaches (which includes most war crimes under the Rome Statute).

The International Criminal Court takes no jurisdiction away from the territorial sovereign. It merely provides a treaty-based alternative to that sovereign's exercise of jurisdiction. If the territorial sovereign prefers not to exercise its jurisdiction, it can refer the matter to the ICC as provided in the Statute, in which case the prosecutor will have to follow the procedures set forth in the Statute, including jumping through all the hoops provided in the Rome Statute, such as including notice to the nation of nationality, who will have the right to claim primary jurisdiction under the "complementarity" procedures of the Statute.

These limitations on the Prosecutor's power, together with the preconditions to the exercise of jurisdiction, provide ample protection against frivolous or politically motivated prosecutions for US service members and government officials.

IV. CONCLUSION

The need for the International Criminal Court is beyond dispute. Too many atrocities have gone unpunished, and too many countries are without the resources or the will to investigate and punish clearly established international crimes. This lacuna is appropriately filled by the ICC. The Rome Statute also represents a milestone for the legal community.

The Rome Statute of the International Criminal Court is a triumph for the rule of law, that was made possible through the efforts of hundreds of international lawyers in five years of painstaking and technically demanding negotiations. A significant number of these lawyers were American diplomats, government officials, scholars, and representatives of nongovernmental organizations. The Rome Statute therefore in all its most critical provisions bears the imprint of the best of American legal professionalism, expertise and values. The security interests of the United States and of its service members and officials are as fully protected as reasonably could be provided for by an international treaty. Indeed, these national and individual interests are better protected if the US joins the ICC than if we reject it.

The Rome Statute should be acceded to by the United States Government.

Respectfully submitted,

Daniel B. Magraw, Jr.
Chair, Section of International Law and
Practice
February 2001

APPENDIX – COMPARISON OF ROME STATUTE WITH U.S. CONSTITUTION

Rome Statute	United States Constitution
Presumption of Innocence “Everyone shall be presumed to be innocent until proven guilty before the Court...” (Art. 66)	“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”
Speedy & Public Trial “...the accused shall be entitled to a public hearing ...” “the accused shall be entitled ... to be tried without undue delay; ...” (Arts. 67(1), 67(1)(c))	“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, ...” (Amendment IV)
Assistance of Counsel “... the accused shall be entitled ... to communicate freely with counsel of accused’s choosing ...” “... the accused shall be entitled ... to have legal assistance assigned by the Court where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it; ... “ (Art. 67(1)(b), (d))	“In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.” (Amendment VI)
Right to Remain Silent “... the accused shall be entitled ... not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence; ...” (Art. 67(1)(g))	“No person ... shall be compelled in any criminal case to be a witness against himself ...” (Amendment V)
Privilege Against Self-Incrimination “...the accused shall be entitled ... not to be compelled to testify or to confess guilt ...” (Arts. 54(1)(a), 67(1)(g))	“No person ... shall be compelled in any criminal case to be a witness against himself ...” (Amendment V)
Right to Written Statement of Charges “... the person shall be provided with a copy of the ... charges ...” (Art. 61(3))	In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation; ...” (Amendment VI)
Right to Examine or to Have Examined Adverse Witnesses “...the accused shall be entitled ... to examine, or to have examined...the witnesses against him or her...”	In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him; ...” (Amendment VI)

(Art. 67(1)(e))	
Right to Compulsory Process to Obtain Witnesses "...the accused shall be entitled...to obtain the attendance and examination of witnesses on his or her behalf..." (Art. 67(1)(e))	In all criminal prosecutions, the accused shall enjoy the right...to have compulsory process for obtaining witnesses in his favor,..." (Amendment VI)
Prohibition against Ex Post Facto Crimes "A person shall not be criminally responsible ... unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court." (Art. 22)	"No Bill of Attainder or ex post factor Law shall be passed." (Art. I, sec. 9, cl. 3)
Protection against Double Jeopardy "No person who has been tried by another court ... shall be tried by the Court with respect to the same conduct..." (Art. 20)	"...nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; ..." (Amendment V)
Freedom from Warrantless Arrest & Searches "...the Pre-Trial Chamber may ... issue ... warrants as may be required..." "...if it [the Pre-Trial Chamber] is satisfied that there are reasonable grounds to believe that the person has committed a crime...and the arrest of the person appears necessary ..." (Arts. 57 bis (3), 58))	"[N]o Warrants shall issue, but upon probable cause ..." (Amendment IV)
Right to be Present at Trial "The accused shall be present during the trial." (Art. 63)	"One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial." <u>Illinois v. Allen</u> , 397 U.S. 337, 338 (1970) (citing <u>Lewis v. United States</u> , 146 U.S. 370 (1892))
Exclusion of Illegally Obtained Evidence "Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible ..." (Art.69(7))	When evidence is obtained in violation of the Fourth Amendment, the judicially developed exclusionary rule usually precludes its use in a criminal proceeding against the victim of the illegal search and seizure. <u>Illinois v. Krull</u> , 480 U.S. 340, 347 (1987) (citing <u>Weeks v. United States</u> , 232 U.S. 383 (1914); <u>Mapp v. Ohio</u> , 367 U.S. 643 (1961))
Prohibition against Trials <i>in absentia</i> "The accused shall be present during the trial." (Art. 63)	When defendant knowingly absents himself from court during trial, court may "proceed with trial in like manner and with like effect as

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	if he were present.” <u>Diaz v. United States</u> , 223 U.S. 442, 455 (1912). The language, history, and logic of Rule 43 support a straightforward interpretation that prohibits the trial in absentia of a defendant who is not present at the beginning of trial. <u>Crosby v. United States</u> , 506 U.S. 255, 262 (1993)
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GENERAL INFORMATION FORM

Submitting Entity: Section of International Law and Practice

Submitted By: Daniel B. Magraw, Jr., Chair of the Section of International Law and Practice

1. Summary of Recommendation

Through this recommendation, the American Bar Association supports the accession by the United States Government to the Rome Statute of the International Criminal Court.

2. Approval by Submitting Entities

The Council of the Section of International Law and Practice approved the recommendation at its meeting in Santa Fe, NM on October 28, 2000.

The Council of the Section of Criminal Justice approved the recommendation at its meeting in Washington, DC, on November 18, 2000.

The Council of the Section of Individual Rights and Responsibilities approved the recommendation at its meeting in Washington, DC, on November 28, 2000.

The Association of the Bar of the City of New York approved the recommendation in New York, NY, on November 22, 2000.

3. Has this or a similar recommendation been submitted to the House or Board previously?

This recommendation has not has not been submitted previously to the House or the Board.

Previous Recommendations relating to in an International Criminal Court are:

- 1998 Recommendation of Section of International Law and Practice approved by the House.
- 1994 Recommendation of Section of International Law and Practice and the Standing Committee on World Order Under Law approved by the House.
- 1992 Recommendation submitted by Task Force on in an International Criminal Court and the New York State Bar Association approved by the House.
- 1991 Recommendation of the Section of International Law and Practice and the Milwaukee Bar Association deciding to establish a Blue Ribbon Committee on the Establishment of an International Criminal Court approved by the House.

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4. What existing ABA policies are relevant to this Recommendation and how would they be affected by its adoption?

This Recommendation is in conformity with existing policies. Specifically, the current recommendation is consistent with the most recent recommendation regarding the ICC adopted by the House in February 1998, as set forth below.

Recommendation adopted by ABA House of Delegated on Feb. 2, 1998	Rome Statute
RESOLVED, That the American Bar Association recommends the establishment of a permanent International Criminal Court (ICC) by multilateral treaty in order to prosecute and punish individuals who commit the most serious crimes under international law; and	Satisfied. Jurisdiction is limited to the most serious crimes.
FURTHER RESOLVED, That the American Bar Association recommends that the United States Government continue to play an active role in the process of negotiating and drafting a treaty establishing the ICC, and that the ICC treaty embody the following principles:	Satisfied. United States played a very active role in the negotiations and this role is continuing.
A.(1) The ICC’s initial subject matter jurisdiction should encompass genocide, war crimes, and crimes against humanity;	Satisfied. Subject matter jurisdiction fully encompasses genocide, and crimes against humanity. May ultimately cover war crimes after the seven year opt out provision expires, but many states will not exercise the option.
A.(2) The ICC should exercise automatic jurisdiction over these crimes, and no additional declaration of consent by states parties should be required;	Satisfied. Provides for automatic but not universal, subject matter jurisdiction over the three core crimes without further consent from states.
B. The jurisdiction of the ICC should complement the jurisdiction of national criminal justice systems;	Satisfied. The ICC may not exercise jurisdiction if a state which has jurisdiction is investigating or prosecuting the accused or has already done so. Only if that state is “unwilling or unable genuinely” to act may the ICC exercise jurisdiction.

C. The United Nations Security Council, states parties to the ICC treaty, and, subject to appropriate safeguards, the ICC Prosecutor should be permitted to initiate proceedings when a crime within the ICC's jurisdiction appears to have been committed; and	Satisfied. Proceedings may be initiated by the U.N. Security Council, states party, and the ICC Prosecutor. Prosecutor initiation is subject to a variety of safeguards which are deemed appropriate. See below.
D. The rights afforded accused persons and defendants under internationally recognized standards of fairness and due process shall be protected in appropriate provisions of the ICC's constituent instruments and rules of evidence and procedure."	Satisfied. Provides a full list of "internationally recognized standards of fairness and due process" based on the U.N. Covenant on Civil and Political Rights to which the United States and more than 130 other states are parties.

5. **What urgency exists which requires action at this meeting of the House?**

The ABA has not yet endorsed the final text of the Rome Statute of the ICC. Prior ABA recommendations were before the adoption of the Rome Statute. If the ABA, including its Government Affairs Office, is to have a meaningful voice in persuading the U.S. Government to join the Rome Statute, it is imperative that the ABA be on record as endorsing the Rome Statute. Finally, with a new administration taking office, there may be a reconsideration of policy toward the ICC and therefore it is important that the ABA's voice be heard at this time.

6. **Status of Legislation**

Not applicable.

7. **Cost to the Association**

None.

8. **Disclosure of Interest**

Not applicable.

9. **Referrals**

As of November 28, 2000, this report and recommendation had been referred to the following ABA Sections and entities: Section of Litigation; Section of Business Law; Section of Dispute Resolution; Government and Public Sector Lawyers Division; Judicial Division; Standing Committee on Law and National Security; and the Standing Committee on Legal Assistance for Military Personnel.

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