

AMERICAN BAR ASSOCIATION
ADOPTED BY THE HOUSE OF DELEGATES
August 11-12, 1992

RECOMMENDATION

BE IT RESOLVED, That the American Bar Association recommends that the U.S. Government work toward finding solutions to the numerous important legal and practical issues identified in the accompanying reports of the Task Force on an International Criminal Court and the New York State Bar Association, with a view toward the establishment of an international criminal court, considering the following principles and issues:

- A. Jurisdiction of the court shall be concurrent with that of member states. It may cover a range of well established international crimes, but member states shall be free to choose by filing a declaration of the crimes they shall recognize as within the court's jurisdiction.
- B. No person shall be tried before the court unless jurisdiction has been conferred upon the court by the state or states of which he is a national and by the state or states in which the crime is alleged to have been committed.
- C. The fundamental rights of an accused shall be protected by appropriate provisions in the court's constituent instruments and in its rules of evidence and criminal procedure.
- D. The obligations of states under the court's constituent instruments shall be enforced by sanctions.

AMERICAN BAR ASSOCIATION
TASK FORCE ON AN INTERNATIONAL CRIMINAL COURT

REPORT

In February, 1991, the House of Delegates of the American Bar Association decided to establish a Blue Ribbon Task Force on the Establishment of an International Criminal Court. The House of Delegates further decided that the President of the American Bar Association, in consultation with the Chairman of the Section of International Law and Practice and the Section of Criminal Justice, should determine the structure, composition and mandate of the Task Force. Benjamin R. Civiletti was appointed chairperson. The other members of the Task Force are, in alphabetical order, Donald B. Ayer, Stuart H. Deming, Edward S. G. Dennis, Jr., Helen M. Eversberg, Robert B. Fiske, Jr., Jerome J. Shestack, Melvyn Tannenbaum, Michael E. Tigar, and Bruce Zagaris. On November 1, 1991, Professor John F. Murphy became reporter for the Task Force.

The mandate of the Task Force called for submission of its report to the Board of Governors and the House of Delegates in time for their August 1991 meetings. For a variety of reasons, including delay in deciding on the composition of the Task Force and in appointing its reporter, it has not been possible to meet this deadline.

In the course of its work, the Task Force held four meetings. The Task Force also exchanged views by letter and telephone. In particular, members of the Task Force commented on a discussion paper and on drafts of this report prepared by the reporter.

The Task Force also benefitted from the participation in one or more meetings of the following representatives of the Office of the Legal Adviser, Department of State: Edwin D. Williamson, Legal Adviser; Jamison M. Selby, Deputy Legal Adviser; and Michael P. Scharf, Attorney-Adviser. Drew Arena, Director, and John Harris, Deputy Director, Office of

International Affairs, Criminal Division, Department of Justice, participated in one meeting of the Task Force. The Office of the Legal Adviser also kindly supplied the Task Force with various documents relevant to an international criminal court and provided written comments on the draft report.

In an effort to gain further insights, the chairperson of the Task Force wrote to distinguished members of the legal profession requesting their views on the establishment of an international criminal court. A number of these persons responded, and their views have been taken into account by the Task Force.

Because of the diversity of views represented on the Task Force, it proved impossible to achieve agreement on all the propositions set forth in this report. To the extent possible, where there has been a sharp disagreement of view, this has been noted in the report. Every effort has been made to give a fair hearing to the full range of opinions. Association with the report as a member of the Task Force does not necessarily signify complete agreement in every particular, but rather general agreement with the report's substance.

This report is organized as follows. It begins with a brief background of efforts to establish an international criminal court. Next the report turns to an examination of arguments for and against an international criminal court. The report then explores, in separate sections, the nature and scope of the court's jurisdiction and the structure and functioning of the court.

I. BRIEF BACKGROUND OF EFFORTS TO ESTABLISH AN INTERNATIONAL CRIMINAL COURT

As Professor Cherif Bassiouni has suggested, the first *ad hoc* international criminal court may have been established in 1474 in Breisach, Germany, where 27 judges of the Holy Roman Empire judged and condemned Peter von Hagenbach for his violations of the "laws of God and Man" by allowing his troops to rape and kill innocent civilians and pillage their property.¹ Proposals to create a permanent international criminal court are of more recent vintage. In 1937, the League of Nations adopted a convention to create an international criminal court, but only India ratified it before the outbreak of World War II, and it never came into force.

Subsequent to the Nuremberg and Tokyo trials, which were held before *ad hoc* international military tribunals, the United Nations began work on a Draft Code of Offenses Against the Peace and Security of Mankind as well as on a draft statute for an international

¹ Bassiouni, *The Time Has Come for an International Criminal Court*, 1 INDIANA INTERNATIONAL & COMPARATIVE LAW REVIEW 1 (1991).

criminal court.² A draft statute for such a court was prepared in 1951,³ and a revised text in 1953.⁴ By 1954 the Draft Code of Offenses Against the Peace and Security of Mankind had been developed by the International Law Commission. Both the Code and the Statute, however, were tabled pending definition of the crime of "aggression." In 1974 the General Assembly adopted by consensus a resolution defining aggression. In 1981 the Draft Code was placed again on the agenda of the Sixth (Legal) Committee of the General Assembly and in 1982 the International Law Commission (ILC) resumed work on it. At this writing the ILC has adopted a Draft Code on first reading and sent it to member states of the United Nations for their comments. Work on the Draft Statute was not resumed. There also have been a number of proposals by nongovernmental organizations or by scholars regarding the establishment of an international criminal court.⁵

Despite these efforts, until recently, the idea of an international criminal court was regarded by many as of academic interest only. Several recent developments, however, have stimulated renewed interest in the possibility of an international criminal court. First, in September, 1987, General Secretary Mikhail S. Gorbachev, in a letter to the United Nations,⁶ proposed that a tribunal should be established under United Nations auspices to investigate acts of international terrorism. Second, by letter of August 21, 1989, the Permanent Representative of Trinidad and Tobago to the United Nations requested the Secretary-General to include as a supplementary item on the agenda of the forty-fourth session of the General Assembly the possibility of establishing an international criminal court with jurisdiction over illicit trafficking in narcotic drugs across national frontiers and other transnational criminal activities.⁷ At this writing, the International Law Commission has issued two reports on the proposal to create an

² For background to attempts to create an international criminal court, see Bassiouni, Introduction to the History of Establishing an International Criminal Court, III INTERNATIONAL CRIMINAL LAW--ENFORCEMENT 181-85 (Bassiouni, ed. 1987); FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE 36-90 (1980).

³ Draft Statute for an International Criminal Court (Annex to the Report of the Committee on International Criminal Jurisdiction, August 31, 1951), 7 GAOR Supp. 11, UN Doc. A/2136 (1952), at 23.

⁴ Revised Draft Statute for an International Court (Annex to the Report of the Committee on International Criminal Jurisdiction, August 20, 1953), 9 GAOR Supp. 12 UN Doc. A/2645 (1954), at 21.

⁵ For discussion of some of these proposals, see Bassiouni, supra, Note 1.

⁶ See Quigley, Perestroika and International Law, 83 AMERICAN JOURNAL OF INTERNATIONAL LAW 788, 794 (1988).

⁷ UN Doc. A/44/195 (August 21, 1989). See also GA Resolution 44/39 (December 4, 1989) referring the matter to the International Law Commission.

international criminal court,⁸ and the Sixth Committee of the General Assembly has twice addressed the issue.⁹ Third, the U.S. 1988 Anti-Drug Abuse Act called for the start of negotiations on the creation of an international criminal court with jurisdiction over the prosecution of persons accused of engaging in international drug trafficking.¹⁰

Congress continued to address the issue in 1989, when Congressmen Jim Leach and Robert Kastenmeier introduced House Concurrent Resolution 66, which stated the sense of Congress to be that the United States "should pursue the establishment of an International Criminal Court to assist the international community in dealing more effectively with those acts of terrorism, drug trafficking, genocide, and torture that are condemned as criminal acts in the international conventions cited in the preamble...."¹¹ In the final days of the 101st Congress, as a result of amendments proposed by Senator Arlen Specter to the Foreign Operations Appropriations bill for the 1991 fiscal year, House Concurrent Resolution 66 was revised and adopted by Congress. In pertinent part the legislation provides:

(b) It is the sense of Congress that--

(1) the United States should explore the need for the establishment of an International Criminal Court on a universal or regional basis to assist the international community in dealing more effectively with criminal acts defined in international conventions; and

(2) the establishment of such a court or courts for the more effective prosecution of international criminals should not derogate from established standards of due process, the rights of the accused to a fair trial and the sovereignty of individual nations.

(c) The President shall report to the Congress by October 1, 1991, the results of his efforts in regard to the establishment of an International Criminal Court to deal with criminal acts defined in international conventions.

⁸ See, Report of the International Law Commission on the work of its forty-third session, 29 April-19 July 1991, General Assembly Official Records: Forty-Sixth Session, Supplement No. 10(A/46/10).

⁹ See, United Nations Press Release, GA/L/2718, Committee Discusses Feasibility of Setting Up International Criminal Court, 5 November 1991.

¹⁰ Pub. L. 100-690, Nov. 18, 1988, 102 Stat. 4181.

¹¹ Con. Res. 66, 101st Cong., 1st Sess. at par. 2 (1989). The preamble refers to existing conventions involving air transportation, narcotic drugs, and genocide as well as occasions where there has been an international effort to study, create, or use international tribunals to redress criminal conduct. *Id.* at pp. 1-3.

(d) The Judicial Conference of the United States shall report to the Congress by October 1, 1991, on the feasibility of, and the relationship to, the Federal judiciary of an International Criminal Court.¹²

For its part the American Bar Association's concern with the issue of establishing an international criminal court dates back to 1978. During that year the House of Delegates adopted a resolution urging the Department of State to:

... open negotiations for a Convention for the establishment of an International Criminal Court with jurisdiction expressly limited to (a) international aircraft hijacking as defined in the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft; (b) violence aboard international aircraft as defined in the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation; (c) crimes against diplomats and internationally protected persons as defined in the 1972 Convention on the Prevention and Punishment of Crimes Against Diplomatic Agents and Other Internationally Protected Persons; and (d) the crimes of murder and kidnapping, defined in clause (c), when committed or directed against any group of five or more nationals of a state other than the state of the alleged perpetrator of the crime; ...¹³

In July, 1990, the Section of International Law and Practice prepared a report with recommendations which proposed conferring on an international criminal court jurisdiction limited to crimes specified in the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. However, the House of Delegates had before it also a report of the Milwaukee Bar Association with a broader recommendation supporting House Concurrent Resolution 66, and, because the two recommendations overlapped, the Board of Governors sent them back for reconciliation. Lastly, as noted previously, the House of Delegates, in February, 1991, adopted a resolution, proposed by the Milwaukee Bar Association and the Section of International Law and Practice, establishing a Blue Ribbon Task Force on an International Criminal Court.

¹² 142 Cong. Rec. S16216 (daily ed. Oct. 19, 1990) (statement of Sen. Specter). A complete version of the resolution is set forth in the portion of the Congressional Record included among the accompanying materials at Appendix B. A printed version of the legislation has yet to be issued in its final form. However, Senator Specter's staff has confirmed that no modifications were made to Amendment 3068 prior to its passage.

¹³ ABA House of Delegates Resolution Regarding an International Criminal Court (Feb. 13, 1978).

II. ARGUMENTS FOR AND AGAINST AN INTERNATIONAL CRIMINAL COURT

Numerous arguments, both for and against, have been advanced regarding the establishment of an international criminal court. Because the arguments pro and con are closely intertwined, and often are responsive to each other, they are considered together.

The primary goal of any civilized criminal process is to punish criminals for their crimes in a manner consistent with the protection of the fundamental rights of the accused. Fulfilling this goal has not been easy, especially with respect to those who commit international crimes, i.e., acts that the world community has defined, in several international conventions, as giving rise to individual criminal liability. All too often persons who have committed such acts and who have fled the boundaries of the country where they committed their crimes have effectively escaped any threat of punishment. In some cases where they have been returned to the requesting country, and have been prosecuted and punished, the method of rendition employed or the proceedings at trial have raised serious questions of violation of human rights.¹⁴

A primary argument, perhaps the primary argument, in favor of the establishment of an international criminal court is that it would facilitate prosecution of international criminals in accordance with fundamental principles of human rights. On the other hand, some contend that the presence of an international criminal court would do no such thing.¹⁵ While admitting that there have been a "few instances" where there has been an unwillingness to extradite international criminals to the United States, these persons argue that, in such instances, countries unwilling to extradite to the United States would also be unwilling to turn the accused over to an international criminal court.

In response to this contention, others note that problems of extradition of international criminals have arisen not only in the situation where the United States is seeking the extradition of an alleged offender, or where another country is seeking the extradition of an alleged offender from the United States, but in a number of extradition cases involving countries other than the United States. For a whole host of reasons, extradition of international criminals has often proven to be exceedingly difficult.¹⁶ It should be noted, however, that extradition procedures have proven more effective in recent years.

¹⁴ For discussion of these problems as they arise in the terrorism context, see J.F. MURPHY, *PUNISHING INTERNATIONAL TERRORISTS* (1985).

¹⁵ See e.g., Letter from Janet G. Mullins, Assistant Secretary for Legislative Affairs, U.S. Department of State, to Dan Quayle, President of the Senate and Thomas S. Foley, Speaker of the House of Representatives (October 2, 1991).

¹⁶ For discussion, see Scharf, *The Jury Is Still Out on the Need for an International Criminal Court*, 1991 *DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW* 135, 149-156.

Difficulties with extradition have resulted in the increased use of other measures of rendition. These include deportation and exclusion, as well as kidnappings or abductions. Use of these measures has raised allegations of violations of U.S. Constitutional law, international human rights law, and fundamental UN Charter norms prohibiting the threat or use of force against the political independence or territorial integrity of states.¹⁷ Nor has the "extradite or prosecute" approach necessarily resolved the issue. Although it has worked in some cases,¹⁸ in some instances the requested country has been unwilling or unable, because of legal or other reasons, to prosecute the alleged offender. Moreover, even when the requested country prosecutes, problems may arise. At the least the refusal to extradite may strain relations between the requesting and the requested country. Moreover, the requesting country may believe, and the facts may in some instances support this belief, that the requested country will inadequately pursue the prosecution, with the result that the accused will be acquitted or will receive a too lenient sentence.¹⁹

The question remains whether an international criminal court might help to resolve some of the difficulties that have arisen with respect to the "extradite or prosecute" approach. It is noteworthy that a number of Caribbean and Latin American countries, including especially Trinidad and Tobago and Colombia, both of which have had special problems, have indicated that they would like to have a third option to trial in domestic courts or extradition.²⁰ The reluctance of such countries to extradite persons, especially their nationals, to the United States is due not only to the fear of attack from criminal organizations. It also reflects sentiment in these countries, especially Colombia, that their citizens should not be extradited to and tried in the United States, a country whose culture and legal traditions differ substantially from their own, and, in the case of drug trafficking, whose people are the primary users of cocaine.²¹ A neutral forum might well be attractive to these countries, especially if that forum consisted of prominent jurists of high professional reputations and utilized procedures adequate to protect the human rights of an accused. Some Caribbean and Latin American nations have been concerned that the United States, in frustration over its inability to prosecute drug traffickers, would engage in military actions or abductions to apprehend such persons. The U.S. invasion

¹⁷ See, e.g., Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law Continued*, 84 AMERICAN JOURNAL OF INTERNATIONAL LAW 444 (1990).

¹⁸ See Scharf, *supra*, note 16, at 149.

¹⁹ *Id.*, at 151-52.

²⁰ For discussion, see Patel, *Crime Without Frontiers: A Proposal for an International Narcotics Court*, 22 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 709 (1990).

²¹ *Id.*, at 718.

of Panama to seize General Noriega and recent abductions from Mexico, the legality of which are currently before U.S. courts,²² have increased their concern.

Some are skeptical that the presence of an international criminal court would help to resolve the problems faced by these Caribbean and Latin American countries. In their view, these countries are unwilling or unable to agree to the prosecution of drug traffickers -- in their own courts, in the courts of the United States, or before an international criminal court -- because of the threat posed or influence wielded by the drug cartels or other criminal organizations. Support for the establishment of an international criminal court by these countries, according to this view, is therefore purely rhetorical.

With respect to a less politically charged situation, the availability of an international criminal court might help to resolve problems arising where two or more states have concurrent jurisdiction over an alleged offender. An international criminal court might also be a desirable alternative when a country lacks an interest in prosecution yet has the alleged offender in custody, or when it lacks the evidence to conduct an effective prosecution, and when extradition to a state with an interest in prosecution is impossible because of lack of an extradition treaty, or because provisions in an applicable extradition treaty bar extradition, or because of concerns about the fairness of the requesting country's criminal justice system. Indeed, the availability of an international criminal court might be one way to resolve the debate that has arisen over the so-called rule of non-inquiry, which precludes a national court from entertaining allegations by an accused that a requesting country is seeking him for purposes of persecution on the basis of his race, religion, nationality, or political opinions or that he would be denied a fair trial because of these factors.

Some have suggested that the establishment of an international criminal court could also have considerable symbolic importance, as a demonstration of a collective international interest in and commitment to the prosecution and punishment of offenses of intense concern to the world community. United States' participation and leadership in such efforts would be in keeping with dramatic trends of recent years, including the strong movement toward the rule of law and the restructuring of societies along democratic lines.

There are several other arguments against the establishment of an international criminal court. For example, it has been contended, *inter alia*, that the creation of an international criminal court would undermine efforts to strengthen the extradite or prosecute approach and to improve the administration of justice systems in a number of countries, especially in Latin America; that there is grave danger that the court would be a highly politicized body; that it would develop unacceptable definitions of international crimes; and that it might release

²² The U.S. Supreme Court has agreed to decide the issue. N.Y. Times, Jan. 11, 1991, at 6, col. 5.

criminals or give them excessively lenient sentences which would then preclude their being prosecuted and punished elsewhere because of principles of double jeopardy.²³

The argument that efforts to establish an international criminal court would undermine the extradite or prosecute approach and attempts to strengthen national systems of justice is unpersuasive to most members of the Task Force. Under the jurisdictional arrangements considered in the next section of this report, an international criminal court would be a supplementary rather than a competitive approach to prosecution of international criminals. It would not necessarily demand an enormous amount of time and resources, especially if the initial efforts were of a modest nature.

The Task Force is in full accord that the creation of an international criminal court should be complementary in nature. Care must be taken to assure that ongoing efforts at mutual legal assistance are not undermined. Structures must be created that supplement and reinforce existing schemes. The rule of law must be strengthened and not eroded as a result of the creation of an international criminal court.

The concern that the court might be a politicized body was emphasized by representatives of the Office of the Legal Adviser, Department of State. The Task Force recognizes that, in light of the political dimensions of many international crimes, the risk of politicization is great. Some members of the Task Force believe, however, that the risk is much less than it might have been five or ten years ago when ideological conflict in the United Nations and other international institutions was at its height. At a minimum the selection process would have to be such as to ensure that judges on the court would be disinterested and of the highest professional competence and integrity. This report examines some possible selection procedures in a later section.

As many commentators have noted, there would be, in addition to issues of jurisdiction addressed in the next section of this report, a number of complex questions to be resolved in the creation of an international criminal court. These would include, for example, the composition of the court and the rules of evidence and procedure it would apply; mechanisms it would employ for obtaining evidence, access to witnesses, and custody over offenders and for conducting investigations and prosecuting the accused; where alleged offenders would be incarcerated before, during, and after trial; appropriate penalties for the specified crimes; funding for the court; and the constitutional issues concerning U.S. participation in an international court.

Some members of the Task Force believe that these issues must be thoroughly examined before the American Bar Association will be in a position to recommend to the U.S. Government whether it should support the establishment of an international criminal court. In their view,

²³ Letter from Janet G. Mullins, *supra*, note 15, at 1-2.

these are not merely administrative details to be worked out down the road. Rather they are fundamental to the decision to go ahead with plans to establish such a court. They stress, moreover, that creating a defective institution could have a variety of serious consequences, especially since international institutions tend to take on a permanence, and mistakes in their constituent instruments tend to magnify over time. Although some of these issues are addressed later in this report, the Task Force recognizes that time constraints have precluded exhaustive inquiry into and resolution in this report of these and other issues.²⁴ These issues will be addressed later by the Task Force, assuming approval of its recommendation in August 1992 by the House of Delegates.

III. NATURE AND SCOPE OF THE COURT'S JURISDICTION

The issue of the appropriate nature and scope of jurisdiction for an international criminal court raises complex questions deserving of extensive consideration, and the International Law Commission has spent considerable time on this issue. Concerning the nature of an international criminal court's jurisdiction, there would appear to be four possibilities: (1) exclusive; (2) concurrent; (3) transfer of proceedings, i.e., the state with original jurisdiction would not lose jurisdiction but merely transfer the criminal proceedings to the court, which would apply the substantive law of the transferring state, including its provisions on penalties; or (4) appellate review jurisdiction.

Under the exclusive jurisdiction approach, states would relinquish their jurisdiction over crimes coming within the jurisdiction of the international criminal court. States would agree that their national courts would not exercise jurisdiction regarding crimes over which the international criminal court has jurisdiction. The primary argument in favor of such an approach is that, at least in theory, "a single court with exclusive jurisdiction would [be] conduc[ive] to the development of a coherent and consistent body of law...."²⁵ Few countries, however, would be willing to relinquish, in advance, their authority to undertake domestic prosecutions concerning certain categories of crimes.

Among the many difficulties it would raise, a transfer of proceedings approach would probably violate Article III, Section I of the U.S. Constitution, which provides:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior courts, shall hold their

²⁴ The need to resolve such issues was emphasized in The Report of the Judicial Conference of the United States on the Feasibility of and the Relationship to the Federal Judiciary of an International Criminal Court (October 28, 1991).

²⁵ Statement by Patrick Robinson, Representative of Jamaica to the UN Sixth Committee, on November 7, 1990, at 13-14, quoted and cited in Sharf, *supra*, note 16, at 160.

Offices during good behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Under a transfer of proceedings approach the international criminal court would exercise the judicial power of the United States and apply U.S. law, although it would not be a tribunal established by Congress, its judges would not be appointed by the President with the advice and consent of the Senate, and they would not be assured of life tenure and undiminished compensation.

Appellate review jurisdiction by an international criminal court would raise similar constitutional difficulties for the United States and presumably for other states as well. Further, except for perhaps contributing to the development of a coherent and consistent body of law, it would not afford any of the benefits that an international criminal court might provide.

The Task Force would favor a system of concurrent jurisdiction between the court and nation states. As suggested by our recommendations, the court's jurisdiction should depend upon the consent of both the state where the crime is alleged to have been committed and the state of which the accused is a national. Other states might have jurisdiction under international law to try the accused, but the state where the crime is committed and the state of nationality would appear to be the states with the strongest interest in the crime and only their consent should be required for the court to exercise jurisdiction. In some cases the crime may be committed in more than one state. For example, narcotic offenses involving Colombians have often been committed in Colombia but the effects of these crimes have been felt in the United States and have constituted crimes under United States law. In such instances the United States may have the greater interest in the prosecution of the crime, especially if the crime did not cause much injury in Colombia. As a practical matter, it would also be necessary to obtain the consent of the state where the alleged offender was apprehended, if that was a state other than the territorial state or the state of nationality, since the state with custody would be the one that would transfer the alleged offender to the court's jurisdiction.

One member of the Task Force disagrees with the proposal that the court's jurisdiction should depend upon the consent of both the state where the crime is alleged to have been committed and the state of which the accused is a national. In that member's view, if the state where the offense is committed is willing to punish the offender, then it should do so. If not, then the offender should be rendered to somebody else. As to the state of nationality the member points out that there are many regimes who not only condone but encourage international lawlessness by their nationals, and suggests that one purpose of an international court is to deal with such situations. Examples cited include the Letellier/Moffitt murders sponsored by Chile and the sabotage by French agents against Greenpeace that resulted in a death. One might add, as a further example, Libya, which currently is refusing to extradite two

Libyan intelligence agents who allegedly were responsible for the bombing of Pan Am Flight 103 and a French airliner to Britain, France, or the United States.

The majority of the Task Force members disagrees with this reasoning. With respect to the state where the offense is committed, it is correct that, if it is willing to punish the offender, then it should do so. In many instances, however, it may be unable to do so because it lacks custody of the offender. The state which has custody, moreover, may be unable (because of lack of an extradition treaty, for example) or unwilling to extradite or otherwise render the offender to the state where the crime was committed. Under such circumstances, the state where the crime was committed might be willing to allow an international criminal court to exercise jurisdiction, especially if the state of custody was unable or unwilling to prosecute.

As to the state of nationality, the Task Force would suggest that an international criminal court is not an appropriate mechanism for dealing with the problem of state sponsorship of international crimes. In such cases the primary problem is not the inability to prosecute and punish the alleged individual offenders. Rather, the problem is how to deal with the state sponsoring lawlessness, to induce it to cease and to hold it responsible for such sponsorship.²⁶

Moreover, the Task Force would suggest that few, if any, states would be willing to agree to the jurisdiction of an international criminal court with the authority to try their nationals without their consent. The proposal that the court's jurisdiction should depend on the consent of both the state where the crime is committed and the state of nationality of the accused is based on provisions found in the United Nations draft statute of 1953.²⁷ Our reading of the recent debates in the International Law Commission and the Sixth Committee lead us to conclude that most states would still demand these limitations on the court's jurisdiction.

It should be noted that it would be highly unlikely that the United States would be willing to allow an international criminal court to have jurisdiction in a situation where it was the state in whose territory the crime was alleged to have been committed and it had custody of the alleged offender. For the United States to cede jurisdiction to an international criminal court under these circumstances would raise profound and perhaps insurmountable constitutional issues (such as the right to a jury trial). However, in a situation where the accused was a U.S. national who allegedly had committed the crime abroad, the United States, depending upon

²⁴ See Report of the Special Working Committee on Responses to State-Sponsored Terrorism, in *NONVIOLENT RESPONSES TO VIOLENCE-PRONE PROBLEMS* 9-65 (B.H. Oxman and J.F. Murphy, Chairs, 1991).

²⁷ Revised Draft Statute for an International Criminal Court, *supra*, note 3. Article 27 of the Draft Statute provided:

No person shall be tried before the Court unless jurisdiction has been conferred upon the Court by the State or States of which he is a national and by the State or States in which the crime is alleged to have been committed.

circumstances, might greatly prefer that he be tried before an international criminal court rather than by the courts of the territory in which the crime was committed. Also, in a situation where the United States was seeking extradition of an accused and the state where he was apprehended was resisting extradition, an international criminal court might present a compromise alternative.

It is debatable whether there would be U.S. constitutional objections to such an approach. In the situation where the U.S. national had committed the crime abroad and the United States agreed to his prosecution before an international criminal court sitting outside the United States and imposing punishment outside of the United States instead of prosecution before the courts of the country where he committed the crime, arguably there would be no grounds for constitutional objection merely because the United States might cooperate in the prosecutorial effort - such cooperation also might occur if he were tried before the courts of the territorial state. There might be a closer question in the situation where the United States was seeking extradition of a U.S. national, the requested country refused to extradite and instead proposed transferring the alleged offender to the jurisdiction of an international criminal court. Here the United States would be giving up jurisdiction it was entitled to exercise over the accused. Unlike the transfer of proceedings situation, however, it would not have the accused in custody in the United States, and it would have made a determination that it would not be able to obtain such custody. Under these circumstances the choice might be between no prosecution of the alleged offender or prosecution before an international criminal court. It is possible but by no means certain that it would be within the foreign affairs powers of the President to opt for the latter alternative.²⁸ This is an issue that requires further analysis.

Another key aspect of the jurisdiction of an international criminal court would be its appropriate scope. Here, at least four alternatives appear to present themselves. First, the jurisdiction of the court might include all crimes listed in an international criminal code, perhaps along the lines of the code that the International Law Commission has sought to develop for some time now. This would seem to be an exceedingly ambitious and questionable enterprise, especially since it has so far proven impossible to reach agreement on such a code, and we would counsel against it.

Second, the court's jurisdiction might be limited, at least in the first instance, to international drug trafficking. This is the approach favored in the 1990 resolution and report adopted by the Section of International Law and Practice. Upon reflection some members of the Task Force concluded that this "modest initiative" is too modest. In their view, a court whose jurisdiction was limited to international drug trafficking would focus on a crime of surpassing concern to the United States but would have nothing to do with the prosecution and punishment of a wide range of equally significant international crimes also of great concern to

²⁸ For a brief discussion of some of these issues, see L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 198-201 (1972).

the United States as well as other countries. Moreover, it is quite possible that an international court whose jurisdiction was so limited would find itself with little or nothing to do.

Other members of the Task Force would continue to favor the establishment of a court on a regional basis with its jurisdiction limited to international drug trafficking. They point out that a number of Caribbean and Latin American countries, which have been unable or unwilling to prosecute or extradite major drug traffickers, have indicated interest in establishing an international criminal court as a third option to prosecution or extradition. In their view, many of the more thorny problems of a full-blown international criminal court with expansive jurisdiction would be lessened or avoided in a scaled-down regional court with jurisdiction limited to offenses defined in the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. They contend that, if a full-blown court is ever to be feasible, it makes sense first to experiment with a more limited international criminal court of this type.

Third, the jurisdiction of the court might be somewhat more expansive and include drug trafficking plus a few crimes as to which there seems to be widespread agreement on the need for their prosecution and punishment. Trinidad and Tobago, for example, has suggested that the court's jurisdiction cover genocide, torture, crimes against diplomats and international trafficking in illicit and narcotic drugs.²⁹ This approach might meet some of the arguments raised against the proposal that the court's jurisdiction be limited to drug trafficking.

Other members of the Task Force would favor the so-called "accordion or Chinese menu" approach to jurisdiction. That is, State A might agree to the court's jurisdiction over one crime, say, drug trafficking. In contrast, State B might agree that the court could exercise jurisdiction over a lengthy list of international crimes. This is the approach long favored by the Foundation for an International Criminal Court, and might allow for maximum flexibility and for room to experiment. The "Chinese menu" from which states would select might be quite lengthy but would be limited to crimes already covered by widely ratified international conventions.

Supporters of this approach admit that it would allow the court to exercise jurisdiction - at least if the territorial state and the state of nationality gave their consent - over some politically charged crimes, for example, genocide, torture, war crimes, and such manifestations of "terrorism" as hijacking of or attacks against aircraft, attacks against internationally protected persons, including diplomats, and international hostage taking. However, they contend, there is now a strong international consensus that such crimes should be punished regardless of the motivation or affiliation of the perpetrator, and a strong argument can be made that they should be central to the role of an international criminal court.

²⁹ Statement of Ms. Marjorie R. Thorpe, The Permanent Representative of the Republic of Trinidad and Tobago, in the Sixth Committee, November 19, 1989, at 1 (copy on file with the Task Force's Reporter).

Opponents of the "Chinese menu" approach point out that it differs little from any blanket recognition of jurisdiction, since the consent of the states of nationality and of offense are required to proceed in that context as well.

IV. THE STRUCTURE AND FUNCTIONING OF AN INTERNATIONAL CRIMINAL COURT

As previously noted in this report, there are numerous issues that have been raised regarding the structure and functioning of an international criminal court. We have tried to identify some of the more important of these below.

A. Composition of the Court and the Risk of Politicization

There is no arrangement that could absolutely guarantee that an international criminal court would not become politicized, but the risk of politicization would probably be less than in the case of the International Court of Justice (ICJ), where only states are parties before the Court, and, on several occasions, cases before the ICJ have involved the vital interests of states. Even in the case of the ICJ, despite charges of bias on the part of its judges, recent research has concluded that, with few exceptions, the judges on the ICJ have acted in an impartial and independent manner.³⁰

Even assuming that the charges of bias on the part of ICJ judges are not well-founded, or are exaggerated, the fact remains that the process whereby the judges are chosen raises the risk of politicization of the court. Under procedures set forth in the Statute of the ICJ,³¹ members of the court are elected simultaneously by the General Assembly and by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration or, in the case of member states of the United Nations not represented in the Permanent Court of Arbitration, by national groups appointed for this purpose by their governments. Election to the court requires an absolute majority of votes in both the General Assembly and the Security Council. For a number of reasons, including the requirement in the Court's statute that the Court represent the "main forms of civilization and...the principal legal systems of the world,"³² the Court has increasingly become geographically diverse in recent

³⁰ See, Weiss, *Judicial Independence and Impartiality: A Preliminary Inquiry*, in *THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS* 123-54 (Lori F. Damrosch, ed. 1987).

³¹ Statute of the International Court of Justice, articles 4-13.

³² *Id.*, article 9.

years. Although geographic diversity has enhanced the political balance of the court, "it also has undermined the perception of the Court as a judicial rather than a political body."³³

Accordingly, the Task Force would recommend that the judges on an international criminal court not be chosen in the same manner as the judges on the ICJ. Rather, the court should be established by an international convention, with its statute annexed thereto, and states parties to the convention should decide who the judges on the court will be by a super majority (say, two-thirds) or even a unanimous vote. States parties would nominate candidates for election to the court, and they should be eminent jurists with expertise in international criminal law. It might also be useful to limit the number of judges to, say, five to nine and the length of their service to a single term of nine years. The court might sit in panels of judges of two to three, where composition would be agreed upon by the territorial state or states and the state of nationality. One possible procedure would be for each state to pick one judge and then the judges chosen would pick the third judge on the panel as in arbitration. There would be an appeal available on alleged errors of law to the full tribunal whose judgment would be final.

One argument that has been made in favor of limiting the jurisdiction of an international criminal court to drug trafficking is that this would minimize the risk of a politicized court. Even drug trafficking, however, is not a crime free of political dimensions, as the case of General Noriega graphically illustrates. Moreover, by their very nature, most international crimes have a high political visibility. The best safeguard, therefore, against politicization of the court is to ensure the integrity and high professional competence of its judges.

Some have suggested that establishing an international criminal court on a regional basis outside of the United Nations would minimize the risk of politicization. Models most often mentioned include the European Court of Human Rights and the Inter-American Court of Human Rights, and it is indeed likely that such regional courts would raise less risk of politicization. Others have questioned, however, whether there is much of a need for a regional international criminal court. In Europe the extradite or prosecute approach appears increasingly to work well, and various forms of international judicial assistance are far advanced and effective in the European context. This is less the case in the Americas and, as we have seen, states in the Americas have expressed interest in an international criminal court. Some contend, however, that the primary need for an international criminal court is to remedy the deficiencies that exist in the extradite or prosecute approach between states from different legal systems and legal cultures, where international judicial assistance may be embryonic or non-existent. As noted previously, under certain circumstances, an alternative forum for the prosecution and punishment of international crimes might be attractive to such states. Lastly, a proposal for the establishment of an international criminal court is currently before the United Nations.

³³ Leigh and Ramsey, *Confidence in the Court: It Need Not Be a "Hollow Chamber"*, in *THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS*, *supra*, note 30, at 106, 109.

Others doubt the feasibility of establishing an international criminal court under United Nations auspices or on a worldwide basis. They point to the many years that the International Law Commission of the United Nations has spent attempting to reach agreement on a Code of Crimes Against the Peace and Security of Mankind as an example of the difficulties faced in the UN context. They also suggest that the greater the disparity of legal systems and cultures, the greater the obstacles presented to the creation and successful implementation of an international criminal court, particularly where even lesser forms of cooperation have not been achieved.

To minimize the expense of a permanent international criminal court, its statute could provide that it would sit only when seized of an offense within its jurisdiction. The court would operate under a standby procedure and would be convened only at the mutual request or consent of the particular states involved. Precedents for this facilitative arrangement would include the Permanent Court of Arbitration and the International Centre for the Settlement of Investment Disputes.

B. Institution of Proceedings Before the Court: Applicable Law

In its deliberations the International Law Commission has considered various possible candidates for the right to institute proceedings before the court, including, for example, states, the Security Council and the General Assembly of the United Nations, non-governmental organizations, individuals, and an independent prosecutor's office associated with the court.³⁴ The Special Rapporteur for this item has proposed that only states be authorized to institute proceedings before the court but that, in the case of crimes of aggression or threat of aggression, criminal proceedings should be subject to prior determination of those crimes by the Security Council.

In addition, the Special Rapporteur has proposed, as a condition precedent for institution of proceedings by the state with custody of an alleged offender, that the state in which the crime had been committed agree to the court's jurisdiction. He would also require agreement by the state whose nationals had been victims of the crime and the state of nationality of the alleged offender, but only if the domestic legislation of these states would permit their courts to exercise jurisdiction over the crime. As indicated earlier in this report, the Task Force would favor an approach that would require the consent only of the state in whose territory the crime was committed and of the state of nationality of the alleged offender.

The Task Force would suggest that an international criminal court not apply the national law of states as some have proposed. The problem with this suggestion is that law on international crimes may vary from state to state and judges on an international criminal court might fail to understand and apply the national law correctly. It would be better to agree on the

³⁴ See Report of the International Law Commission on the work of its forty-third session, *supra*, note 8, at 227-35.

definition of the crimes and to set these definitions forth in a statute for the court as was done in the London Charter for the Nuremberg tribunal.

Although the Task Force is of the opinion that only states should have the right to institute proceedings before the court, it would be desirable for there to be an independent prosecutor's office. The office should have a subpoena power that would be recognized and carried out by states parties to the court's statute, with appropriate safeguards for sources of information and for criminal investigations in progress in states parties along the lines of provisions in Mutual Legal Assistance Treaties (MLATS). Some members of the Task Force have serious concerns that the investigative abilities of any international body will be limited by the cooperation and effectiveness of the member states. They stress that any proposal for such a court should spell out the responsibilities of constituent states to provide investigative assistance and cooperate with investigative efforts. There would seem to be no need for a defender's office, but an accused should have a right to counsel and state parties should provide the funds for counsel if an accused is unable to do so.

Some members of the Task Force were of the opinion that the use of an investigatory magistrate along the civil law model would be preferable to the U.S. system of a grand jury. The grand jury system in the United States has come under sharp criticism because only the prosecutor presents the case to the grand jury and the defendant is not represented. Most civilian law authorities regard the grand jury system as affording inadequate protection to an accused. The investigatory magistrate might be a subordinate officer of the court.

C. Proceedings at Trial

The Task Force has, as yet, given little consideration to the issue of proceedings at trial. The reporter offers the following thoughts as a basis for further discussion.

Because the jury system as it is employed in the United States is basically unknown to the civil law world, it is likely that only trial by the court would be feasible. Also, the impracticability of attempting to empanel a jury before an international criminal court would seem an insurmountable obstacle to its use.

There are substantial procedural differences between the conduct of a trial under Anglo-American law and that under civil law. The common law model of a criminal trial as an adversary proceeding before a jury, in which the judge is a moderator between combatant counsel, contrasts sharply with the civil law model that views the criminal trial as an inquest to solve a crime, conducted by the court as an active inquisitor. An international criminal court might combine certain aspects of the common law and civil law models, perhaps drawing as well from provisions on human rights in the International Covenant on Civil and Political Rights.

In particular, it would be necessary to reach agreement on the contents of an indictment, the role that the prosecutors and judges would play, the rights of defendants, substantive defenses available to defendants, the admissibility of evidence, and voting procedures for judges on the court and other aspects of trial procedure. The experience at the Nuremberg Trials may serve as a partial guide to resolving these issues.³⁵

With respect to the contents of an indictment, in the civil law view, the American practice of providing an accused with only a bare bones statement of charges and denying access to significant evidence, such as witness statements, until trial, does not give an innocent person fair opportunity to prepare for trial and may cause a guilty one to contest charges to which he might plead guilty if he knew the government's evidence. Accordingly, at Nuremberg, the Soviet Union proposed that the indictment should inform the court and the defendants of all of the evidence, including statements of all witnesses and all documents relied on by the prosecution. In the result a compromise was reached. The indictment would contain much more than it would in an American court, but would give the defendants much less information than they would be given in a civil law court. A similar compromise should be possible for an international criminal court.

Under the civil law model the prosecutor and judge work together as a team in pursuit of the truth. In accordance with this approach the Soviet Union suggested at Nuremberg that the Tribunal should play the major role in presenting the case with the prosecutors as subordinates. The Tribunal would decide what witnesses to call, as well as what documents to put in evidence, and would examine the witnesses and interrogate the accused. On this point, however, the common law model was largely followed. That is, the examination of witnesses was left almost entirely in the hands of counsel, and the judges did not play the inquisitorial part they normally assume in the civil law.

Under the civil law model the defendant is subject to a preliminary examination, but he is not put under oath or subject to cross examination. Failure of an accused to respond may result in a court drawing adverse inferences of guilt from his failure to testify. By contrast, under the American common law model the defendant may refuse to take the stand, and an American prosecutor may not invite a jury to draw inferences of guilt from his refusal to testify. If an accused does take the stand to testify, he does so under oath and is often subject to withering cross examination.

Again, at Nuremberg, a compromise was reached. Article 16 of the London Charter provided for a preliminary examination of a defendant. Those defendants who testified for themselves, which included most defendants, did so under oath and were subject to cross

³⁵ For discussion, see Murphy, *Norms of Criminal Procedure at the International Military Tribunal*, in *THE NUREMBERG TRIAL AND INTERNATIONAL LAW* 61 (G. Ginsburgs and V.N. Kudriavtsev, eds. 1990).

examination. Each defendant was also permitted to make a final statement, and this time he was not subject to an oath or cross examination.

A major difference between common law and civil law legal systems is that the latter does not employ exclusionary rules of evidence. Rather, the approach of the court is to allow most evidence in, exclude it only if it is clearly irrelevant or prejudicial, and then decide on how persuasive it is. The American attitude at Nuremberg was that, since the common law rules of evidence were developed for use in jury trials, there was no need to insist that they be used in this trial. As a consequence, Article 19 of the London Charter provided that the Tribunal would not be bound by technical rules of evidence and would "admit any evidence which it deems to have probative value." The Task Force would suggest a similar approach be taken with respect to an international criminal court.

At Nuremberg all decisions were taken by majority vote, with the Tribunal president having the power to break a tie, except for decisions regarding a conviction and sentence. These required affirmative votes of at least three members of the four member Tribunal. With a view to protecting the rights of an accused, an international criminal court might take a similar approach.

Further as to the rights of an accused the standard an investigatory magistrate should employ in deciding whether to indict an alleged offender should be probable cause; the standard for conviction by the court should be beyond a reasonable doubt, and an accused should be presumed innocent until proven guilty.

An accused also should be entitled to be present at proceedings, to have proceedings translated into the accused's own language, to interrogate witnesses and inspect evidence, to adduce oral and other evidence, to receive the court's assistance in obtaining relevant materials, to be heard by the court, to decline to testify, and to have no negative inferences drawn from the failure to testify.³⁶

The court might be given the power to issue arrest warrants if there is a "strong suspicion and belief on reasonable and probable grounds"³⁷ that the accused has committed the crime. The state party where an accused is located might have the responsibility to exercise the arrest warrant.

³⁶ These issues are highlighted in Report of the Judicial Conference of the United States on the Feasibility of and the Relationship to the Federal Judiciary of an International Criminal Court, *supra*, note 24.

³⁷ Article 37, International Law Association Draft Statute for an International Criminal Court, in Report of the Sixtieth Conference 454, 461 (Montreal 1982).

The court should be empowered to require the attendance of witnesses and the production of evidence. States parties to the court's statute should be obligated to assist the court in compelling the attendance of witnesses or the production of evidence. The court should be authorized to grant immunity for testimony, and to assure immunity from arrest for witnesses en route to court proceedings.

The court's statute should contain a double jeopardy provision providing that one who has been tried in the international criminal court may not subsequently be tried for the same offense in the national courts of any state party. Conversely, no one who has been tried in a national court should be tried again in the international criminal court.³⁸

D. Imposition of Sentence and Incarceration

The court should itself impose the sentence under a schedule of penalties specified by the court's statute. The penalties imposed would be severe but they would not include the death penalty. The United States is in a distinct minority, at least among developed states, when it comes to imposition of the death penalty (Some representatives to the International Law Commission also oppose life imprisonment). The court should have discretion, within a range of penalties set up by its statute, in imposing sentences.

As to incarceration, at the pre-trial stage an accused could be incarcerated in the state where he was apprehended. During the trial, however, for logistic reasons if no other, he would have to be detained in a temporary jail facility located at the site of the court. The sentence might be served in the country where the crime was committed, subject to any prisoner transfer arrangements that state might have with other states.

It would seem neither feasible nor desirable to set up a "Devil's Island" type of permanent detention center for persons convicted of crimes within the court's jurisdiction.

Respectfully submitted,

Benjamin R. Civiletti
Chairperson

³⁸ *Id.*, article 45.

General Information Form

Submitting Entity: Task Force on an International Criminal Court

Submitted By: Benjamin R. Civiletti

1. Summary of Recommendations(s)

That the ABA recommend that the U.S. Government work toward finding solutions to the numerous issues identified in the accompanying report, with a view toward the establishment of an international criminal court, subject to three understandings.

2. Approval by Submitting Entity

This recommendation was approved by the Task Force at its meeting on January 10, 1992.

3. Previous Submission to the House or Relevant Association Position

This recommendation with report was submitted late to the House at its February, 1992, meeting, and subsequently voluntarily withdrawn before action by the House to allow sufficient time for careful study and consideration by all Sections and Divisions.

4. Need for Action at This Meeting

Action at this meeting will enable the Administration to take the ABA's position into account during its deliberations on this issue.

5. Status of Legislation

N/A

6. Cost to the Association

None

7. Disclosure of Interest

None

8. Referrals

This report was referred by overnight delivery to every section and division of the ABA on June 1, 1992. In mid-June, this report was also referred to the StC on World Order Under Law, and all state and local bar associations represented in the House of Delegates.