

## AMERICAN BAR ASSOCIATION

REPORT TO THE  
HOUSE OF DELEGATES

## SECTION OF INTERNATIONAL LAW

## RECOMMENDATION

The Section of International Law recommends the following:

RESOLVED, that the American Bar association urges the United States State Department 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 Crime Against Diplomatic Agents and Other Internationally Protected Persons;

RESOLVED, further that the President of the American Bar Asso-

ciation or his designee be authorized to forward this Resolution and the

→ (d) crimes of murder and kidnapping defined in clause (c) when committed or directed against a group of 5 or more nationals of a state other than the state of the alleged perpetrator of the crime.

accompanying report to the State and Justice Departments and to the appropriate members of Congress.

RESOLVED, further that the American Bar Association requests that, during the drafting and negotiation process, both the U.S. Department of State and the Department of Justice consult with the designee of the President of the American Bar Association concerning the substantive phraseology of such a convention.

## REPORT

### I. Explanation of Recommendation

The Section of International Law recommends that the American Bar Association urge the State Department to begin negotiations for the establishment of an International Criminal Court whose jurisdiction would be expressly limited to international aircraft hijacking and crimes against diplomats. In view of the extent of these crimes, it believes there are ample reasons to justify the creation of an International Criminal Court of such limited jurisdiction. The Section also requests that during the drafting and negotiation process there be consultation by U. S. authorities with the designee of the President of the American Bar Association in working out the substantive language of such a Convention.

### II. Differences From Previous S. I. L. Recommendation

The Section of International Law submitted a previous recommendation and report which endorsed in principle the concept of an International Criminal Court. That recommendation was turned down by the House of Delegates in August of 1976, primarily because the House feared that the jurisdiction of such a court would be open ended.

This recommendation and report attempts to correct that defect by expressly limiting the Court's jurisdiction to aircraft hijacking, as defined in the Hague Convention on Aircraft Hijacking,<sup>1</sup> to violence aboard international aircraft as that concept is defined by the Montreal Convention on the Safety of Civil Aviation, 1a and to crimes against internationally protected persons, as defined in the Convention for Protection of Diplomats.<sup>1b</sup>

### III. The Matters Triable in an International Criminal Court Should Be Limited to Specific International Crimes.

The jurisdiction of an International Criminal Court should be limited to (a) international aircraft hijacking as defined in the 1970 Hague Convention

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- 1. Convention for the Suppression of Unlawful Seizure of Aircraft, 22 UST Part 2, 1941, 1644 (Dec. 16, 1970)
  - 1a. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 24 UST, Part 1, 568 (1973)
  - 1b. Convention on the Prevention and Punishment of Crimes Against Diplomatic Agents and Other Internationally Protected Person (14:4 Virginia Journal of International Law 703) (1974)

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; and 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.

International aircraft hijacking is defined in the Hague Convention for the Suppression of Unlawful Seizure of Aircraft as follows:

"Article 1

"Any person who on board an aircraft in flight:

(a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or

(b) is an accomplice of a person who performs or attempts to perform any such act  
commits an offence."

"Article 3.

"1. For the purposes of this Convention, an aircraft is considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation. \*\*\*

2. This Convention shall not apply to aircraft used in military, customs or police services.

3. This Convention shall apply only if the place of take-off or the place of actual landing of the aircraft on board which the offense is committed is situated outside the territory of the State of registration of that aircraft; \*\*\*

4. \*\*\* this Convention shall not apply if the place of take-off and the place of actual landing of the aircraft on board which the offense is committed are situated within the territory of the same state \*\*\*"

Violation aboard international aircraft is defined in the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation as follows:

"Article 1

1. Any person commits an offense if he unlawfully and intentionally:

- (a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or
- (b) destroys an aircraft in service or causes damage to such an aircraft which rendered it incapable of flight or which is likely to endanger its safety in flight; or
- (c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or
- (e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.

2. Any person also commits an offense if he:

- (a) attempts to commit any of the offenses mentioned in paragraph 1 of this article; or
- (b) is an accomplice of a person who commits or attempts to commit any such offense."

The Montreal Convention does not apply to aircraft used in military, customs or police service. It also applies only if the place of landing or take-off is outside the state of registration and only if the offense is committed outside the state of registration.

The 1973 Convention to prevent crimes against diplomats defines such offenses as follows:

"1. The intentional commission of:

- (a) a murder, kidnapping or other attack upon the person or liberty of an internationally protected person;
- (b) a violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his person or liberty;
- (c) a threat to commit any such attack;
- (d) an attempt to commit any such attack; and
- (e) an act constituting participation as an accomplice in any such attack shall be made by each State Party a crime under its internal law."

An internationally protected person means:

An internationally protected person means:

"(a) a Head of State, including any member of a collegial body performing the functions of a Head of State under the constitution of the State concerned, a Head of Government or a Minister for Foreign Affairs, whenever any such person is in a foreign State, as well as members of his family who accompany him;

(b) any representative or official of a State or any official or other agent of an international organization of an intergovernmental character who, at the time when and in the place where a crime against him, his official premises, his private accommodation or his means of transport is committed, is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity, as well as members of his family forming part of his household;<sup>2</sup>

Judges by interpretation may expand or restrict the scope of the above treaties, but the U. S. has far more to gain than it has to lose from the creation of an International Criminal Court that would have jurisdiction solely to try persons accused of the egregious crimes of aircraft hijacking and international terrorism.

#### IV. Reasons for the Need for a Convention.

##### 1. Increase in Aircraft Hijacking and International Terrorism.

In the ten-year period between 1952 and 1962, there were 293 attempted hijackings.<sup>3</sup> Many of the aircraft hijackings involved international crimes as distinguished from purely domestic crimes. For example, on December 17, 1973, five Palestinian terrorists en route from Madrid, Spain, entered a Rome airport transit lounge carrying submachine guns. They approached a security check-point leading to a Lufthansa Airlines boarding gate. Before boarding the Lufthansa aircraft, they threw hand grenades into a Pan American 707, killing 30 persons, then commandeered Lufthansa plane and flew to Damascus in Syria after an extended stopover i

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2. For further elaboration of the Convention on Crimes Against Diplomats, see note in 14:4 Virginia Journal of International Law, p. 703 (1974)

3. Flyin Scared, by Elizabeth Rich (1972)  
The Sky Pirates, by James A. Arey (1972)

Athens. In Damascus the terrorists were turned over to the Palestinian Liberation Organization which disclaimed any association with the terrorists.

International terrorism is also on the increase. During the period from 1967 through 1972, twenty-seven diplomats from eleven countries were kidnapped and three were killed.<sup>4</sup> In the words of John R. Stevenson, former legal advisor to the Department of State, "There has been an alarming increase of late in incidents of international terrorism. And they have not involved any one political cause or any one area of the globe."<sup>5</sup> Stevenson detailed how ninety people boarding an international flight in Sweden were made hostage and held for ransom by Croatian terrorists; how an Israeli diplomat was killed in London by a bomb sent through the mail; how shots were fired in the apartment of a member of the Soviet Mission to the United Nations; and how twenty-six tourists were slaughtered in an attack at Lod Airport in Israel, as a few examples of increase in terrorists' activity.<sup>6</sup> This led the Department of State in 1972 to propose a draft convention for the prevention and punishment of certain acts of international terrorism.<sup>7</sup>

## 2. The Extradition and Self-Help Problems.

If an individual hijacks an American plane over another country and escapes, there are often problems of apprehension and extradition. The recent proposed revision of the U. S. Criminal Code<sup>8</sup> attempts to deal with this question through the unilateral extension of the United States' jurisdiction. But this assertion of United States jurisdiction does not solve the problems of apprehension and extradition. It only means if the individual happens to be found in the United States after he commits such a crime, the U. S. Courts will have jurisdiction.

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4. Dept. of State Bulletin, December 4, 1972, p. 645
  5. Ibid. See also J. Paust, A Survey of Possible Legal Responses to International Terrorism: Prevention, Punishment and Cooperative Action, 5 Ga. J. Int'l & Comp. L. 431 (1975)
  6. See also Statement of Secretary William Rogers in 64 U. S. Dept. of State Bulletin 228; 70 U.S. Dept. of State Bulletin 274-78; and 67 U. S. Department of State Bulletin, 425-34.
  7. Department of State International Bulletin, October 16, 1972.
  8. Sec. 204, S. 1437 (95th Congress, 1st Session)

Numerous extradition treaties have been negotiated by the United States with other countries. Frequently, however, the application of those extradition treaties breaks down. They are either ignored, or the exception with regard to "political" crimes is raised by the country that apprehends the alleged offender.

Concerning reasons for the need for a convention, Bridge noted in his 1964 article:<sup>9</sup>

" . . . If the offense is not covered by an extradition treaty and negotiations for the criminal's surrender are unsuccessful the State wishing to try him will have to resort to self-help or allow him to evade justice. "

The likelihood of resort to illegal means of self-help was increased by the successful abduction of Adolph Eichman from Argentina. The District Court of Jerusalem stated in its judgment:

"It is an established rule of law that a person being tried for an offense against the laws of the State may not oppose trial by reason of the illegality of his arrest or of the means whereby he was brought within the jurisdiction of that State. "<sup>10</sup>

If an International Criminal Court were in existence, the countries involved might be more likely to submit to the jurisdiction of that Court and the problems of extradition and self-help in aircraft hijacking and international terrorism would then be lessened.

### 3. Twin Fears of Leniency and Denial of Due Process.

An International Criminal Court for hijacking and terrorism would lessen both the fear of excessive leniency and the fear of a denial of due process. In the case of the U. S. diplomat killed by terrorists in Sudan, the United States was afraid that the punishment meted out to those who killed the U. S. diplomat would be too lenient by the Sudanese Court. On

9. Bridge, The Case for an International Court of Criminal Justice and the Formulation of International Criminal Law. 13 Int'l & Comp. L.Q. 1255, 1258 (1964). See also footnote 5, supra.

10. 36 Int'l L. Rep. 5 (Israel, Dist. Ct. Jerusalem 1961)



the other hand, the Sudanese government, if it had extradited the individuals to a U. S. Court, would have been fearful that the Sudanese offenders would not receive a fair trial in the United States.

To put the matter in another context, the United States Government would be reluctant to extradite an American citizen who is accused of assassinating a Soviet official at the United Nations in New York, on the ground that the U. S. citizen would have difficulty obtaining a fair trial in the Soviet Union. On the other hand, the Soviet Union might fear excessive leniency by the U. S. Courts toward an American citizen convicted of assassinating a Soviet diplomat.

This dual problem of the victim state's fear of leniency on the part of the offender state and the offender state's converse fear of a lack of a fair trial being granted by the victim state can be obviated by the creation of an International Criminal Court of limited jurisdiction, in which both the state of the alleged offender and the state of the victim could have confidence.

#### 4. An Additional Deterrent.

The amount of aircraft hijacking and international terrorism has increased substantially over the past decade. This increase is due not merely to the increase in international transportation, but also in part to the lack of international criminal procedures to deal adequately with those crimes. If individuals know that there is a judicial system in existence to deal with crimes of an international nature, such crimes may become less likely. This will depend, of course, upon the effectiveness of the judicial system once it is created. But as long as no International Criminal Court exists at all, the chance for the international court system to be a deterrent is nil.

#### 5. Protection of U. S. Citizens Arrested Abroad.

One usually thinks of an International Criminal Court as trying a citizen from some other country. We forget that U. S. Citizens abroad are sometimes arrested, accused and tried by a foreign country. If the United States were party to a Convention establishing an International Criminal Court for hijacking and terrorism, U. S. citizens abroad accused of international terrorism would have the protection of an International Criminal Court instead of being tried by a foreign sovereign.

### V. History

Recommendations for the establishment of some kind of International

Criminal Court date all the way back both to the League of Nations and to the early history of the United Nations. After World War II and the Nuremberg Trials, the United Nations invited the International Law Commission to study the possibility of creating some kind of International Criminal Court. The Commission reported the matter favorably.<sup>11</sup>

The General Assembly then appointed a special committee in 1951, which prepared a draft statute for an International Criminal Court with jurisdiction over specified crimes to be established by separate conventions. In 1953, another special committee of the United Nations prepared a new draft convention for a criminal court with jurisdiction over "crimes generally recognized under international law." In 1954, the United Nations postponed further consideration of the draft convention for a criminal court pending the outcome of work on a draft code of offenses against the peace and security of mankind.

In 1971, a distinguished group of jurists met in Wingspread, Wisconsin, and proposed still a third draft convention for the International Criminal Court. A detailed analysis of these three drafts, together with the comments of the Section's Committee on International Courts, appears in an appendix to this report.

#### VI. Recent International Attempts to Outlaw International Terrorism and Aircraft Hijacking.

In 1972, the United Nations adopted the Convention for the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents. The United States became a party to this Treaty in 1976.<sup>12</sup>

In 1976, West Germany, in cooperation with the United States, also proposed in the United Nations an international convention that would provide for the punishment of persons who take innocent hostages.<sup>13</sup> On December 15, 1976, the U. N. General Assembly adopted a resolution creating a 35-member Ad Hoc Committee to draft such an international convention.

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11. Report of International Law Commission, June 5-June 29, 1950 Amer. Journal of International Law Supplement of Documents 44 (Oct. 1, 1950):125-34.
  12. Dept. of State Bulletin, LXXV, No. 1955, Dec. 13, 1976, at 723.
  13. U. N. Document A/31/430 and A/Res/31/103.

In the field of aircraft hijacking, the United States is a party not only to the Hague Convention, but also the 1963 Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft, and to the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.

VII. The Concept of an International Criminal Court Has Received Widespread Support.

In 1952, the Honorable John J. Parker, Chief Judge of the U. S. Court of Appeals for the 4th Circuit, wrote:

"The world community has become so integrated and its various nations so interdependent that world peace is endangered by individuals who commit crimes of an international character; and the time has come when a permanent international tribunal should be set up to try those who are guilty of such crimes.

"This requires that crimes against the laws of nations be defined, that jurisdiction to try persons guilty of such crimes be established by international agreement and that judicial machinery be provided for the exercise of the jurisdiction conferred." 14

John W. Bridge, a Lecturer at Law at the University of Exeter, in his article entitled "The Case for an International Court of Criminal Justice and the Formulation of International Criminal Law"<sup>15</sup> concludes:

"The administration of international criminal law will only become systematic, just and universal when the organ of its administration is a permanent international criminal court. Further, while international criminality is recognized, international criminal law does not exist in any material sense.

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14. "An International Criminal Court: The Case for Its Adoption," 38 Amer. Bar Assoc. Journal 641-43 (1952)

15. 13 International and Comparative Law Quarterly, p. 1255 etc. (1964)

Authoritative texts of international crimes backed by sanctions are needed for the proposed international criminal court to apply. An international criminal code, though a desirable goal, is not a sine qua non for the establishment of an international criminal court. The gradual formulation of crimes in international conventions is the only practicable way in which progress may be made."

"The existence of international crimes, even in their present amorphous state, logically suggests that there should be an international criminal court. It is obvious that at the present time such a court would be far from perfect. For the time being jurisdiction would have to be on a voluntary basis; compulsory jurisdiction would only be possible if and when we have some sort of world state. But it is surely not too much to expect that if adequate judicial machinery were set up, it would in time so commend itself to world opinion that its jurisdiction would come to be automatically accepted by States."<sup>16</sup>

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16. Additional support for the concept of an International Criminal Court can be found in "International Criminal Jurisdiction" by Arthur K. Kuhn (41 American Journal of International Law 430-33 (1947)), and in "International Criminal Law - Facts and Illusions" by F. B. Schick (11 American Law Review 290-305 (1948)); "The Proposed International Criminal Court" by Hudson (32 Amer. Journal of International Law 549-55); "Far Beyond Nuremberg: Steps Toward International Jurisdiction" by Richard I. Miller (61 Kentucky L.J. 925-30 (1973)); "Towards an International Criminal Court," 44 American Journal of International Law 37-68 (1950). A contrary view is expressed in "An International Criminal Court: The Case Against Its Adoption," by George A. Finch (38 Amer. Bar. Assn. Journal 644 (1952); and "A Proposal for an International Criminal Court: A Critique and an Alternative" by Robert B. Ely, III (57 Dickenson Law Review 46-60 (1952)). The World Peace Through Law Center has studied in depth the concept of creating an International Criminal Court. Thus, at its Washington Conference in 1963, Daniel Wilkes presented a paper entitled "Courts of International Criminal Jurisdiction" (World Peace Through Law, Wash. Conf. 792-810). In 1967 Professor Robert Woetzel presented a paper entitled "Toward a Convention on Crimes Against Humanity" (World Peace Through Law, Geneva Conf. 103-106). At the same conference, Professor Julius Stone of Australia presented a paper entitled "An International Criminal Court." In 1971, it adopted a resolution endorsing the concept of an International Criminal Court. In 1977, it endorsed the current proposal of a special International Criminal Court for aircraft hijacking and international terrorists.

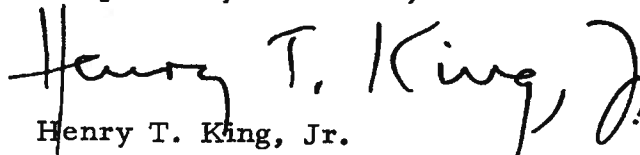
Charles S. Rhyne, former President of the American Bar Association, in his book entitled "International Law," states:

". . . The need for an international judicial body to try violations of criminal law has been recognized for many years . . . Numerous conferences since the last war have favored the creation of an international criminal court . . . In spite of the emphasis by writers and by specialists at conferences and in legal journals and the generally accepted view of the importance of its creation to the development of adequate international legal machinery, no permanent international criminal court has, to date, been established." (pp. 257, 258)

#### VIII. CONCLUSION

For the reasons set forth in this report, the Section of International Law urges the adoption of this Recommendation with the Report urging the State Department to negotiate a Convention for the establishment of an International Criminal Court limited in jurisdiction to international aircraft hijacking, violence aboard international aircraft, and crimes against diplomats, and requesting the State and Justice Departments to consult with the American Bar Association on the substantive phraseology of such a Convention.

Respectfully submitted,



Henry T. King, Jr.

Chairman

Section of International Law

February, 1978

APPENDIXANALYSIS AND COMMENTS ON THE DIFFERENCES  
AMONG THE THREE DRAFT STATUTES FOR AN  
INTERNATIONAL CRIMINAL COURT

The Committee which prepared the foregoing report has submitted the following analysis of the substantive differences between the 1951 U. N. Committee Draft Statute, the 1953 U. N. Committee Draft Statute, and the 1972 Bellagio-Wingspread Draft of the Foundation for an International Criminal Court:

1. Jurisdiction.

The 1951 U. N. Draft Statute gives jurisdiction to the International Criminal Court to try persons "accused of crimes under international law, as may be provided in conventions or special agreements among states parties to the present statute". The 1953 Statute is much broader, giving jurisdiction to "crimes generally recognized under international law". The 1972 Bellagio-Wingspread Draft also refers to "crimes under international law". The Section Resolution limits the jurisdiction of the proposed Court to aircraft hijacking, violence aboard international aircraft, crimes against diplomats.

2. Applicable Law.

There is no difference in any of the Draft Statutes with respect to applicable law. All of them refer to the Court applying "international law, including international criminal law, and where appropriate, national law". The Committee suggests that applicable law should be more narrowly defined by reference to the Hague Convention on aircraft hijacking, the Montreal Convention on Violence Aboard Aircraft, and the Convention on Crimes Against Diplomats.

### 3. Number of Judges.

The 1951 U. N. Draft and the 1972 Wingspread Draft provide for nine judges. The 1953 U. N. Draft provides for fifteen judges. The Committee prefers the Drafts that provide for nine judges.

### 4. Nationality and Qualifications.

All three drafts provide that no two judges may be nationals of the same state. The Committee concurs with this limitation. All three Drafts provide for the election of judges from among persons of high moral character who possess qualifications required in their respective countries for appointment to the highest judicial office and have recognized competence in international criminal law. The Committee has no objection to these qualifications.

### 5. Method of Nomination and for Procedure of Election.

The 1951 Draft Statute provides for the election of judges at a meeting of representatives of states parties to the Statute by an absolute majority of those present and voting. Each state has the right to submit not more than four candidates by way of nomination. Nominations are to be made three months before the date of the election. The Draft Statute also provides that the electors are to bear in mind that the judges are to represent the main forms of civilizations and the principal legal systems of the world.

The 1953 Draft Statute provides for a second alternative, namely, the election by members of the United Nations and by those non-member states who have conferred jurisdiction upon the Court, by absolute majority of those present and voting. Candidates are to be nominated by members of the United Nations as well as by non-member states who have conferred jurisdiction upon the Court.

The Wingspread Draft, however, follows the 1951 Statute in limiting nominations and elections to the states who are parties to the convention creating the International Criminal Court. The Committee believes it would be unfair to have the Court balanced in favor of those members of the United Nations who are not parties to the Statute creating the Court. It suggests that both nominations and election be limited to those states who are parties to the convention creating the Court. It also suggests that a degree of geographical and ideological balance be imposed on the Court's composition.



## 6. Terms of Office and Vacancies.

The 1951 Statute provides for a nine-year term with the right of re-election. Terms are to be staggered at three-year intervals. The 1953 U. N. Committee Draft as well as the Wingspread 1972 Draft are practically identical with the 1951 Draft. The Committee, therefore, feels that no comment is necessary. The Wingspread Draft also adds a provision with regard to vacancies being elected in the same manner as originally with the person filling a vacancy filling merely an unexpired term.

## 7. Miscellaneous Provisions.

The three Statutes are identical in indicating that judges should not engage in occupations that would interfere with their judicial functions and may not participate in proceedings relating to cases which they had previously taken part in in any other capacity. Judges are also to receive diplomatic privileges and immunities. Parties to proceedings may ask that a judge be disqualified, in which event the judge himself may disqualify himself or may have the Court decide in the event there is a disagreement. No judge may be dismissed unless, in the unanimous opinion of the other judges, he has ceased to fulfill the conditions required for his continuance in office. All three Statutes also provide that the Court itself shall elect its own president and vice president for a three-year term. The three Statutes are silent as to the permanent seat of the Court, but all provide that the Court may sit and exercise its functions elsewhere if the Court considers it desirable.

## 8. Finances.

All three Statutes provide that the states parties to the Statute shall create and maintain a fund to pay the costs of maintaining and operating the Court. The two U. N. Committee Statutes also provide for expenses for the defense and for operating a Board of Clemency and Parole.

## 9. Rules of the Court.

All three Statutes enable the Court to adopt rules of procedure to carry out its functions. The two U. N. Statutes also include in the rule-making power the authority to prescribe general principles governing the admission of evidence. The Committee is of the view that the Court should have the right to adopt general rules of evidence.



10. Competence of the Court.

All three Statutes provide that the Court shall be competent to judge natural persons whether they be rulers, public officials or private individuals. They also provide that jurisdiction may be conferred upon the Court by the states parties to the Statute by convention, by special agreement, or by unilateral declaration. All three Statutes also provide that 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 or by the state or states in which the crime is alleged to have been committed. The Wingspread Draft also adds that jurisdiction may be conferred by the state having custody of the person if it is unable to prosecute or extradite him. The Committee urges that the jurisdiction of the Court in the first instance be limited to aircraft hijacking, violence aboard international aircraft, and crimes against internationally protected persons, and expanded thereafter only by separate treaty agreed to by the signatories.

The 1953 Draft also permits a state to withdraw its conferment of jurisdiction, which takes effect one year after delivery of the notice to the Secretary General of the United Nations. Neither the Wingspread Draft nor the 1951 Draft have a similar provision. The Committee favors the withdrawal concept.

All three Statutes provide for challenges to the jurisdiction of the Court by any party to the proceedings or by any state that has conferred jurisdiction. Such challenges are to be made at the beginning of the trial and to be decided by the Court at once. The Committee favors the right of any state or party to make such challenges.

The 1951 Draft also provides that no jurisdiction may be conferred upon the Court without the approval of the General Assembly of the United Nations. This does not appear in the Wingspread or the 1953 Draft. The Committee feels that this is an unnecessary encumbrance. The 1951 Draft also provides that proceedings before the Court may be instituted by the General Assembly of the United Nations, by any organization of states authorized by the General Assembly of the United Nations, or by a state party to the Statute which has conferred jurisdiction upon the Court. While these provisions do not appear in the other drafts, the Committee does not oppose these provisions provided the subject matter of the Court's jurisdiction is limited to aircraft hijacking and international terrorism.

# 11. Assistance of States and Penalties.

All three Statutes provide that the Court may request national authorities to assist it in the performance of its duties and provide that states parties to the Statute are obliged to render such assistance.

Both the 1951 and 1953 Drafts authorize the Court to impose upon the accused, upon conviction, such penalty as the Court may determine subject to any limitations described in the instrument conferring jurisdiction upon the Court. The Wingspread Statute, however, allows capital punishment, imprisonment or fine or any other sentence, including payment of damages, provided the sentence may not exceed the penalties applicable to the crime or crimes of which the accused has been found guilty, prescribed by either the state referring the case to the Court or the state having custody of the accused. The Committee is of the view that the Wingspread Draft is preferable but should be limited further so that the penalties do not exceed those prescribed by the state where the crime was committed. 17

# 12. Committing Authority and Prosecuting Attorney.

The 1951 and 1953 U. N. Committee Drafts provide for a prosecuting attorney and a committing chamber which reviews the evidence and decides whether or not the accused should be bound over for trial. The 1951 Statute talks of a committing authority composed of nine members possessing the same qualifications as the judges and elected in the same manner. The 1953 Statute provides for a committing chamber composed of five judges appointed by a majority of the Court itself.

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17. One member, however, favors the approach taken in Article VII of the Convention on International Crimes of the First International Criminal Law Conference held in September, 1971. This provision prescribed maximum sentences for each level of offense (life for offenses against the peace or offenses causing death or serious bodily injury, twenty years for offenses causing injury less than death or serious bodily injury, ten years for the destruction or damage of property, and five years for other offenses). He argues that if a crime is considered to be of such international significance that countries can agree upon its designation as an offense and the need for an International Criminal Court, there should be less difficulty in agreeing to the gravity of the sentence. Such a provision would reduce the possibility of inconsistent sentences coming about as a result of reference to maximum sentences imposed by various nations.

Both Statutes indicate the function to be to examine the evidence offered by the complainant to support the complaint and to determine whether or not there is sufficient evidence for the case to continue. The Wingspread Draft creates a commission of inquiry which performs a similar function. The commission of inquiry is appointed under methods to be determined by the Court itself. Said commission under the Wingspread Draft has authority to dismiss the Complaint, to re-mit the case to the prosecution with instructions, to draft an indictment and certify the case for trial, or to make arrangements for the disposition of the case if both parties are agreeable. The Committee favors the commission of inquiry route but believes that the manner of selecting the commission should be made more specific in the Statute.

### 13. Public Defender.

The Wingspread Draft provides for a public defender to represent accused persons before the commission of inquiry and before the Court where counsel is not otherwise designated by the accused. The Committee believes that this is a worthwhile addition to the Statute.

### 14. The Indictment.

All three Statutes provide for an indictment which is to contain a precise statement of the facts which constitute each alleged offense and the specific reference to the law under which the accused is charged. All three Statutes provide that the Court shall bring the notice of the indictment to the attention of the accused and of the state of which the accused is alleged to be a national, and of the state in which the crime is alleged to have been committed. All Statutes provide that the Court shall not proceed with the trial unless it is satisfied that the accused has had the indictment and any amendment thereof served upon him and has had sufficient time to prepare his defense.

### 15. Lack of Jury Trial.

All three Statutes provide for a trial before the Court itself without a jury. The lack of the right of trial by jury has been the most frequent target of the critics of an International Criminal Court. The majority of the Committee does not favor use of a jury in such a court. As they visualize it, the judges themselves are the finders of fact, and their international composition guarantees the best type of jury. Indeed, they constitute the only practical jury possible. Suppose a trial of Arab terrorists charged with destroying an Israeli plane. Do we have an Arab jury, an Israeli jury, a French jury? To ask the question is to answer it, for no jury

system is practicable. To repeat, the judges themselves constitute the impartial body needed to find the facts. To further guarantee impartiality, the Committee would raise the requirements for conviction to a three-fourths vote. Thus, if nine judges sat, the vote of seven would be required to convict. If seven judges sat, the votes of six would be needed to convict.

16. Rights of the Accused.

All three Statutes provide for extensive rights of the accused in the event of trial. They are similar with a few minor deviations. We believe the 1953 Statute is the best of the three and, accordingly, because of its importance, repeat herein Article 38, in full:

"RIGHTS OF THE ACCUSED

- "1. The accused shall be presumed innocent until proved guilty.
- "2. The accused shall have a fair trial and, in particular:
  - (a) The right to be present at all stages of the proceedings;
  - (b) The right to conduct his own defense or to be defended by counsel of his own choice, and to have his counsel present at all stages of the proceedings;
  - (c) The right to have reasonable expenses of his defense charged to the fund referred to in article 23 in so far as the Court is satisfied that the accused is unable to engage the services of counsel;
  - (d) The right to have the proceedings of the Court, including documentary evidence, translated into his own language;
  - (e) The right to interrogate in person or by his counsel, any witness and to inspect any document or other evidence introduced during the trial;
  - (f) The right to adduce oral and other evidence in his defense;

- (g) The right to the assistance of the Court in obtaining access to material which the Court is satisfied may be relevant to the issues before the Court.

- "3. The accused shall have the right to be heard by the Court, but shall not be compelled to speak. His refusal to speak shall not be relevant to the determination of his guilt. Should he elect to speak, he shall be liable to questioning by the Court and by counsel. He shall not be compelled to take an oath.
- "4. If the Court considers it impossible to ensure a fair trial, the Court may, by a decision supported by reasons, suspend the proceedings and, if they are not resumed within a time limit determined by the Court, dismiss the case. If the case be dismissed, the accused shall be automatically released."

17. Publicity of Hearings.

All three Statutes provide for the Court to sit in public unless exceptional circumstances indicate that public sittings might prejudice the interests of justice. Deliberations of the Court, under all three Statutes, are to take place in private and not be disclosed.

18. Warrants of Arrest and Provisional Liberty of the Accused.

All three Statutes provide for the Court to have power to issue warrants of arrest and to decide whether the accused shall remain in custody during the trial or be provisionally set at liberty under specified conditions. All Statutes also provide that the Court shall have the necessary authority to require the attendance of witnesses and the production of documents and other evidence and material and to rule out irrelevant issues, evidence and statements and to maintain order at the trial.

19. Dismissal of Case and Withdrawal of Prosecution.

The 1951 Statute gives the Court the power to dismiss the case at any time during the proceedings. The Wingspread Draft provides for the Court to grant a dismissal upon request of the prosecutor. The 1951 Statute has a similar provision as does the 1953 Statute. The Committee is of the view that the Court should have the power, on its own motion or on the motion of the Prosecutor or the defense, to dismiss a case at any stage of the proceeding.

20. Quorum and Required Majority.

The 1951 Statute provides for a quorum of seven of the nine judges. The 1953 Statute provides for seven of the fifteen; and the Wingspread Draft provides for a quorum of six of the nine. The Committee believes that the 1951 Statute providing for seven of the nine to be present is preferable.

The 1951 and 1953 Statutes provide for a majority vote of the judges participating. The Wingspread Draft provides that all questions shall be decided by a two-thirds majority of the judges participating in the trial. The Committee believes that a three-fourths majority is preferable.

21. Miscellaneous Post-Judgment Provisions.

All three Statutes provide for the judgment to state the reasons upon which it is based and for any judge who wishes to dissent or concur to render a separate opinion. They also provide for the judgment to be read in open court and for the judgment to be final and without appeal. The Committee feels that the State Department should propose regional International Criminal Courts with a right of appeal to a higher review court.

22. Double Jeopardy.

All three Statutes contain safeguards against double jeopardy, that is, persons being tried for the same offense in any Court within the jurisdiction of any state which has conferred jurisdiction upon the Court with respect to such offense. The Wingspread Draft, however, contains a provision that a person who has been tried in a national Court may be tried again for the same offense before the International Criminal Court, provided a sentence served pursuant to the first conviction shall be deducted from the second sentence. The Committee disagrees with the Wingspread Draft and believes that the double jeopardy safeguard should apply in either situation.



23. Revision of Judgment.

All three Statutes provide that the accused who has been found guilty may apply to the Court for revision of judgment based upon an unknown fact that would have been decisive. The Committee concurs with this provision.

24. Execution of Sentence.

The 1951 and 1953 Statutes provide for the execution of the sentence in accordance with conventions agreed upon by the parties. The Wingspread Draft is silent in this connection. The Committee favors the convention route.

25. Clemency and Parole.

All three Statutes provide for a Board of Clemency and Parole with such Board having the powers of pardon and parole and of suspension, reduction and other alteration in the sentence of the Court. The Wingspread Draft and 1953 Statute provide, however, that before deciding on a petition for clemency or parole, the Board must request the advice of the Court. The Committee believes that this is a good provision.

26. Special Tribunals.

All three Statutes provide that nothing in the Statute should prejudice the right of two or more states from conferring jurisdiction upon another special tribunal set up to try crimes over which each of such states has jurisdiction according to the general rules of international law. The Committee has no objection to such a provision.

27. Ratification.

The Wingspread Statute provides that the Statute shall not enter into force until 30 days after the deposit of the tenth instrument of ratification. The Committee believes the Wingspread provision with regard to ratification is a good one.

28. Texts.

The full text of the Draft Statute for an International Criminal Court proposed by the United Nations Committee on International Criminal Jurisdiction during its Session held August 1 to August 31, 1951, the full text of the Revised Draft Statute for an International Criminal Court proposed by the 1953 United Nations Committee on International Criminal Jurisdiction during its Session held July 27 to

August 20, 1953, and the full text of the 1972 Bellagio-Wingspread Drafts of the Statute for an International Criminal Court are available on request to the Section of International Law. Also available on request are the full texts of the Hague Convention on Aircraft Hijacking, the Montreal Convention on violence aboard aircraft, the Convention on Crimes Against Diplomatic Agents,



To Be Appended to  
Reports with Recommendations  
To the House of Delegates

102c

Section or Committee proposing the Recommendation:

Submitted by:

Section of International Law

Henry T. King, Jr.  
Chairman

Financial Information

Will the adoption of the recommendation result in expenditures? \*Yes ( ) No (X)

\*If "yes" answer 1 and 2:

(1) Approximately how much? \_\_\_\_\_

- (2) How are the funds expected to be provided?
- a. by the Association ( )
  - b. by outside private or public funding ( )
  - c. by subscription ( )

Conflict of Interest (SEE POLICY AND PROCEDURES HANDBOOK, page 72)

We have reviewed the background of the proponents of the recommendation and find a potential conflict of interest. \*Yes ( ) No (X)

\*If yes answer:

The following proponents of the recommendation, including members of the Section Council ( ) or Committee ( ), have a material interest in the subject matter of the recommendation by reason of specific employment or representation of clients.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Referrals

The recommendation was referred to the following sections and committees for their review and comment on April, 1977 :  
(Approximate Date)

Sections of Criminal Justice and Individual Rights and Responsibilities  
and Standing Committee on World Order Under Law.

Responses from the following entities have been received thus far:  
(If none, please so state. If any, please summarize.)

Approved by Sections of Criminal Justice and Individual Rights and  
Responsibilities and by the Standing Committee on World Order Under Law.

Date Submitted: January 5, 1978