

**AMERICAN BAR ASSOCIATION**  
**SECTION OF INTERNATIONAL LAW AND PRACTICE**  
**ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK**  
**SECTION OF CRIMINAL JUSTICE**  
**SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES**  
**STANDING COMMITTEE ON WORLD ORDER UNDER LAW**

**RECOMMENDATION**

**RESOLVED**, That the American Bar Association recommends the establishment of a permanent International Criminal Court (ICC) by multilateral treaty in order to prosecute and punish individuals who commit the most serious crimes under international law; and

**FURTHER RESOLVED**, That the American Bar Association recommends that the United States Government continue to play an active role in the process of negotiating and drafting a treaty establishing the ICC, and that the ICC treaty embody the following principles:

- A. (1) The ICC's initial subject matter jurisdiction should encompass genocide, war crimes, and crimes against humanity;
- (2) The ICC should exercise automatic jurisdiction over these crimes, and no additional declaration of consent by states parties should be required;
- B. The jurisdiction of the ICC should complement the jurisdiction of national criminal justice systems;
- C. The United Nations Security Council, states parties to the ICC treaty, and, subject to appropriate safeguards, the ICC Prosecutor should be permitted to initiate proceedings when a crime within the ICC's jurisdiction appears to have been committed; and
- D. The rights afforded accused persons and defendants under internationally recognized standards of fairness and due process shall be protected in appropriate provisions of the ICC's constituent instruments and rules of evidence and procedure.

## REPORT

Through this recommendation the American Bar Association endorses the creation of a fair and effective permanent international criminal court (ICC). A permanent, treaty-based court is needed to end impunity for international criminals; to serve as an alternative for prosecution when national courts are unavailable or ineffective; to promote peace and justice through individual accountability; to redress the numerous inadequacies of reliance on national systems and on ad hoc tribunals; to apply clearly established international criminal law; and to deter future atrocities.

Following a summary of the recommendation, the report describes the 1992 and 1994 ABA recommendations on the ICC. The report then states the reasons a new ABA recommendation is required. Next, the position of the United States government regarding the ICC is discussed. The balance of the report examines the recommendation's positions on subject matter jurisdiction, consent requirements, complementarity, trigger mechanism and the rights of defendants.

### I. SUMMARY

The recommendation endorses a fair and effective ICC created by multilateral treaty. The recommendation further endorses a continuing active role for the United States government in the process of negotiating and drafting an ICC treaty embodying the following principles.

- ▶ The initial subject matter jurisdiction of the ICC should encompass the "core crimes" -- genocide, war crimes and crimes against humanity.
- ▶ The ICC's exercise of jurisdiction over the core crimes should be automatic, meaning that no additional declaration of consent (other than ratification of the ICC treaty) should be required.
- ▶ The jurisdiction of the ICC should complement, not supersede or replace, the jurisdiction of national criminal justice systems.
- ▶ The UN Security Council, states parties to the ICC treaty, and, with appropriate safeguards, the ICC Prosecutor should be permitted to initiate proceedings.
- ▶ Rights afforded accused persons and defendants under internationally recognized standards of fairness and due process shall be protected by the ICC.

### II. THE ABA AND THE ICC

The American Bar Association issued recommendations endorsing the creation of an international criminal court in 1992 and 1994. A new ABA recommendation is required, however, due to rapidly unfolding events that may lead to an ICC by the close of this century. These developments are summarized in the next section.

The current recommendation differs in certain respects from the 1992 and 1994 recommendations, and these differences are explained in the report. To the extent previous recommendations are inconsistent, the 1998 recommendation is intended to take precedence.

**The 1992 recommendation.** The 1992 recommendation was developed by the ABA Task Force on an International Criminal Court.<sup>1</sup> The Task Force, chaired by Benjamin R. Civiletti, issued a report and recommendation which was approved by the House of Delegates at the 1992 Annual Meeting.

A reconstituted Task Force, also chaired by Benjamin R. Civiletti, continued its work and issued a Final Report which updated and expanded the first report. The Final Report did not reexamine the arguments for and against the ICC, however, because "these arguments [had] largely been overtaken by recent developments."<sup>2</sup>

**The 1994 recommendation.** In August 1994, citing "new and critical issues which require an adjustment and elaboration of positions previously taken by the ABA,"<sup>3</sup> the House of Delegates adopted a new recommendation and report on the ICC. The Section of International Law and Practice developed the 1994 recommendation through its Working Group on Improving the Effectiveness of the United Nations.

### III. THE NEED FOR A NEW RECOMMENDATION

A new recommendation is required due to a series of critical developments that have galvanized support for the ICC.<sup>4</sup> These events include the scheduled June 1998 diplomatic

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1/ The Task Force was created pursuant to a resolution adopted by the House of Delegates in February 1991. Its 1992 recommendation, developed with the New York State Bar Association, urged the United States government to find solutions to issues identified in its report "with a view toward the establishment of an international criminal court[.]" American Bar Association Task Force on an International Criminal Court and New York State Bar Association, Joint Report with Recommendations to the House of Delegates: Establishment of an International Criminal Court, 27 Int'l Law. 257, 257 (Spring 1993) (hereinafter "1992 recommendation").

The ABA endorsed an international criminal court even prior to 1992. The House of Delegates adopted a resolution in 1978 urging the Department of State to "open negotiations for a Convention for the establishment of an International Criminal Court with jurisdiction expressly limited to" multilateral treaties on aircraft hijacking, violence aboard international aircraft and crimes against diplomats. *Id.* In July 1990, the Section of International Law and Practice prepared a recommendation and report proposing an ICC with jurisdiction limited to the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. *Id.*

2/ Report of the Task Force on an International Criminal Court of the American Bar Association 3 (1995).

3/ Working Group on Improving the Effectiveness of the United Nations, Report on Improving the Effectiveness of the United Nations in Advancing the Rule of Law in the World, 29 Int'l Law. 293, 300 (Summer 1995) (hereinafter "1994 recommendation").

4/ A permanent international criminal court has been endorsed by the Association of the Bar of the City of New York; the International Bar Association; the International Law Association -- American Branch; the International Association of Lawyers; the American Jewish Congress; the Parliamentary Assembly of the

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conference, the United Nations Preparatory Committee meetings, further proceedings of the ad hoc international tribunals for the former Yugoslavia and Rwanda, and the International Law Commission's 1994 Draft Statute for an ICC.

**Diplomatic Conference in June 1998.** Most important, a diplomatic conference has been scheduled for June 1998 in Italy to finalize and adopt a treaty establishing a permanent international criminal court. Although difficult issues will likely remain unresolved until the diplomatic conference, the ICC could be operational by the close of the century.

**The UN Preparatory Committee.** The current round of negotiations began in December 1995<sup>5</sup> when the United Nations General Assembly created the Preparatory Committee on the Establishment of an International Criminal Court.<sup>6</sup> The Preparatory Committee's mandate is ambitious: the "drafting of texts, with a view to preparing a widely acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries."<sup>7</sup> The General Assembly reaffirmed the mandate of the Preparatory Committee in

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Council of Europe; the European Parliament; and the International Committee of the Red Cross. See also Committee on International Law & Committee on International Human Rights, Report on the Proposed International Criminal Court, 52 The Record of the Association of the Bar of the City of New York 79, 82-94 (Jan.-Feb. 1997) (discussing reasons for "recent momentum in favor of the ICC"). More than 200 nongovernmental organizations have formed the New York-based NGO Coalition for an International Criminal Court, which disseminates documents and reports relating to the ICC via a website ([www.igc.apc.org/icc](http://www.igc.apc.org/icc)).

5/ In December 1994, the General Assembly established the Ad Hoc Committee on the Establishment of an International Criminal Court, which met for a total of four weeks in 1995 and allowed governments to express views and create a framework for further discussion. See Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, 50 U.N. GAOR Supp. No. 22, U.N. Doc. A/50/22 (1995).

6/ See G.A. Res. 50/46 (1995). The Preparatory Committee has been chaired by Adriaan Bos of the Netherlands. The United States delegation to the Preparatory Committee is led by Ambassador David J. Scheffer, who in August 1997 was sworn in as Ambassador-at-Large for War Crimes Issues, a newly created post.

Nongovernmental organizations have produced extensive commentaries on the Preparatory Committee process. See, e.g., Lawyers Committee for Human Rights, Establishing an International Criminal Court (1996) and Fairness to Defendants at the International Criminal Court (1996); Amnesty International, Making The Right Choices - Parts I, II & III (1997); Association Internationale de Droit Pénal, The International Criminal Court: Observations and Issues Before the 1997-98 Preparatory Committee; and Administrative and Financial Implication, 13 *Nouvelles Études Pénal* 159, 163 (M. Cherif Bassiouni ed., 1997); Human Rights Watch, Commentary for the Preparatory Committee on the Establishment of an International Criminal Court (1996).

7/ Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN GAOR, 51st Sess., Supp. No. 22, Vols. 1 & 2, UN Doc. A/51/22, ¶ 6 (1996).

a resolution adopted by consensus in December 1996<sup>8</sup> which scheduled meetings through 1998 on the jurisdiction, structure and operation of the proposed ICC.<sup>9</sup> Between March 1996 and August 1997, the Preparatory Committee convened for a total of eight weeks, and additional sessions are scheduled for December 1997 and March 1998.

**The Ad Hoc International Tribunals.** The International Tribunals for the former Yugoslavia and Rwanda have operated under enormous political, financial and logistical pressures. The pace of justice has been slow and state cooperation has often been lacking. Nevertheless, the continued functioning of these tribunals has been a crucial factor in the progress toward a permanent court.

Among the key events was a landmark decision by an Appeals Chamber in October 1995 that clarified the rules of international criminal law relating to the role and jurisdiction of the tribunal.<sup>10</sup> It was followed in May 1997 by the Tadić judgment, the first judgment by an international criminal tribunal since the Nuremberg and Tokyo verdicts following World War II. And in October 1997, an Appeals Chamber quashed a subpoena issued by a Judge of the Tribunal to the Republic of Croatia. The Appeals Chamber held that the Tribunal may issue "binding orders" -- but not subpoenas -- to states.<sup>11</sup>

**The ILC's 1994 Draft Statute.** A Draft Statute issued by the International Law Commission subsequent to the 1994 ABA recommendation has been the Preparatory Committee's point of departure.<sup>12</sup> The Draft Statute -- sixty articles plus extensive commentary by the ILC -- describes the structure, staffing, jurisdiction and operation of the proposed court.

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8/ G.A. Res. 51/207 (1996).

9/ The "like-minded countries," a large group of states dedicated to the early creation of an independent and effective ICC, have been at the forefront of the recent negotiations. See Christopher Keith Hall, The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court, 91 Am. J. Int'l L. 177, 186-87 (Jan. 1997).

10/ The Prosecutor v. Duško Tadić a/k/a/ "Dule", Case No. IT-94-I-AR72, ¶¶ 129, 134, 137 (Int'l Trib. Yugo.App.Ch. Oct. 2, 1995) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (35 I.L.M. 32).

11/ Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-AR108bis (Int'l Trib. Yugo.App.Ch. Oct. 29, 1997) (Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997).

12/ See Report of the International Law Commission on the work of its forty-sixth session, 49 U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/19 (1994) (hereinafter "Draft Statute"). The International Law Commission is an independent body of legal experts created in 1947 by the UN General Assembly. The 1994 Draft Statute reflected comments received by the ILC from governments on an earlier draft.

The debates since 1994 have been extensive, and over the course of the Preparatory Committee process numerous revisions have been proposed. The leading current proposals are collected in the "draft consolidated text of a convention for an international criminal court."<sup>13</sup>

It is worthwhile to briefly describe the ICC's framework under the ILC's 1994 Draft Statute. The Draft Statute provides for a permanent ICC, created by a multilateral treaty, which "shall act when required to consider a case submitted to it."<sup>14</sup> The Court becomes operational once its constituent treaty has entered into force, which occurs upon ratification by a certain number of states specified in the ICC treaty.

Eighteen judges are elected to single nine-year terms by a majority vote of states parties. Judges shall be "persons of high moral character, impartiality and integrity" who are eligible for appointment to "the highest [national] judicial offices," and who have criminal trial experience or "recognized competence in international law." Every three years one-third of the judges are elected. Panels of five Trial Chamber judges try cases, and appeals are to a seven-judge Appeals Chamber.<sup>15</sup>

Under the Draft Statute, the judges elect from among themselves a Presidency, consisting of a President, two Vice-Presidents and alternates, to perform a number of administrative and procedural functions including review of indictments and the constitution of the Trial Chambers.<sup>16</sup>

The Prosecutor and Deputy Prosecutors form the Procuracy, which investigates complaints and conducts prosecutions. The Prosecutors must be "persons of high moral character and have high competence and experience in the prosecution of criminal cases," hold office for renewable five-year terms, and are nominated by states parties and elected by a majority of states parties.<sup>17</sup>

The Registry, headed by a full-time Registrar elected by the judges, is the administrative organ of the ICC. Among other duties, it acts as a channel for communications with states.

The Prosecutor has the burden of establishing guilt beyond a reasonable doubt, and there is a presumption of innocence. Trial and appellate judgments are rendered by the Court without dissents or concurring opinions. The ICC may impose sentences of imprisonment or fines, but neither the

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13/ See Decisions Taken by the Preparatory Committee at Its Session Held From 4 to 15 August 1997, U.N. Doc. A/AC.249/1997/L.8/Rev.1 (Aug. 14, 1997) (collecting reports of Working Group on Complementarity and Trigger Mechanism and Working Group on Procedural Matters). The February 1997 "PrepCom" also divided into two open-ended groups: the Working Group on the Definition of Crimes and the Working Group on General Principles of Criminal Law. The February and August 1997 PrepCom sessions were considered to be enormously productive. For a list of the numerous written proposals submitted by governments during the 1996 August PrepCom see Preparatory Committee Report, *supra* note 6, ¶ 13.

14/ Draft Statute, *supra* note 12, art. 4(1).

15/ Draft Statute, *supra* note 12, arts. 6-9.

16/ Draft Statute, *supra* note 12, arts. 9-12. Many of the functions assigned to the Presidency in the Draft Statute have been given to a similar entity referred to in the consolidated working text as the "Pre-Trial Chamber."

17/ Draft Statute, *supra* note 12, art. 12.

death penalty nor reparations for victims may be ordered. Finally, both the Prosecutor and the defendant are permitted to appeal following a judgment of acquittal or conviction.<sup>18</sup>

#### IV. THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT

The recommendation is largely consistent with the positions expressed by the United States in the Preparatory Committee. As explained in Part VIII *infra*, the principal difference relates to the role of the ICC Prosecutor.

The United States endorses the creation of an international criminal court.<sup>19</sup> Ambassador Bill Richardson, the United States Representative to the United Nations, stated in October 1997 that "individuals -- of whatever rank in society -- who participate in serious and widespread violations of international humanitarian law must no longer act with impunity. The time has come to create an international criminal court that is fair, efficient, and effective, and that serves as a deterrent and a mechanism of accountability in the years to come."<sup>20</sup>

Support for the ICC is consistent with longstanding government policy in favor of prosecutions by international criminal tribunals. The United States Congress, for example, regularly approves significant funding, as well as contributions of personnel and resources, to the Rwanda and Yugoslavia International Tribunals. Numerous statutes passed over the course of the past decade also bespeak Congress's interest in criminal prosecutions by international tribunals.<sup>21</sup> The Cambodian Genocide Justice Act of 1994, for example, urges the President "to encourage the establishment of a national or international criminal tribunal" for the prosecution of the perpetrators

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<sup>18/</sup> Draft Statute, *supra* note 12, arts. 45(5), 49(b). The Appeals Chamber may order a new trial in the case of a successful appeal brought by the Prosecutor following an acquittal.

<sup>19/</sup> At a press conference following the G-7 summit in Denver in June 1997, President Clinton stated that "there probably should be an international war crimes tribunal that is permanently established and goes forward." In September 1997, the President stated in an address to the United Nations General Assembly that "[b]efore the century ends, we should establish a permanent international court to prosecute the most serious violations of humanitarian law."

<sup>20/</sup> Statement by Ambassador Bill Richardson, United States Representative to the United Nations, on Agenda Item #150, the Establishment of an International Criminal Court, in the Sixth Committee, October 23, 1997, U.S.U.N. Press Rel. #188-(97) (Oct. 23, 1997).

<sup>21/</sup> See, e.g., Section 1201(d) of the Omnibus Diplomatic Security and Terrorism Act of 1996, Pub. L. No. 99-399, 100 Stat. 896, which states that "[t]he President should also consider . . . the possibility of eventually establishing an international tribunal for prosecuting terrorists."

of genocide in Cambodia.<sup>22</sup> The House Report on the War Crimes Act of 1996 also states that "prosecutions can be handled by the nations involved or by an international tribunal."<sup>23</sup>

Finally, the United States Constitution does not prohibit ratification of the ICC treaty as presently configured.<sup>24</sup> Art. I, Sec. 8 of the Constitution provides that "Congress shall have Power . . . To define and punish . . . Offences against the Law of Nations," which the United States Supreme Court relied on to uphold Congressional authority to determine "an appropriate tribunal for the trial and punishment of offenses against the laws of war."<sup>25</sup> In addition, the ICC would not be an Article III court exercising "the judicial power of the United States," therefore, the absence of particular protections afforded by the Bill of Rights -- trial by jury, for example -- would not render U.S. ratification of the ICC treaty unconstitutional.<sup>26</sup> Finally, the United States delegation has not raised the constitutionality of the ICC as a principal concern in the Preparatory Committee.<sup>27</sup>

## V. CORE CRIMES

The recommendation calls for the inclusion of three categories of crimes within the ICC's initial subject matter jurisdiction: (1) genocide; (2) war crimes; and (3) crimes against humanity. These so-called "core crimes" are almost universally acknowledged to be crimes under customary international law<sup>28</sup> or treaty-based international law, and individual criminal responsibility is clearly

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22/ Foreign Relations Authorization Act, FY 1994-95, H.R. 2333-105, §§ 571-74 (emphasis added).

23/ House Report on War Crimes Act of 1996, 1996 U.S.C.C.A.N. 2166, 2179 (emphasis added).

24/ See Paul D. Marquardt, Law Without Borders: The Constitutionality of an International Criminal Court, 14 Colum. J. Transnat'l L. 73 (1995) (arguments that constitutional objections to the ICC are not well founded). See also Association of the Bar of the City of New York, supra note 4, at 118-19 (arguing in favor of constitutionality of ICC).

25/ In re Yamashita, 327 U.S. 1, 7 (1946). See also Louis Henkin, Foreign Affairs and the United States Constitution 269 (2d ed. 1996) (Constitution permits the United States to participate in an ICC sitting outside the United States).

26/ See Hirota v. MacArthur, 338 U.S. 197, 198 (1948) (denying habeas corpus petition because tribunal established in Tokyo by Allied Powers following World War II was "not a tribunal of the United States . . . [therefore,] the courts of the United States have no power or authority to review, to affirm, set aside or annul the judgments and sentenced imposed").

27/ The constitutionality issue has surfaced with regard to the procedures by which suspects would be surrendered from the United States to the ICC. In 1994, the State Department criticized a proposal providing for "immediate arrest and surrender of an offender" as raising "a matter of constitutional dimension" in terms of due process requirements for a judicial hearing. See Statement by the Hon. Conrad K. Harper, Legal Adviser, U.S. Dep't of State, U.S.U.N. Press Rel. No. 149-(94) (Oct. 25, 1994). Even in this context, however, the constitutionality issue is a red herring because the United States government would only surrender an accused to the ICC pursuant to implementing legislation that would apply bilateral extradition standards.

28/ Customary international law, considered to be as binding as treaty law, "results from a general and (continued...)



established for the core crimes. They should therefore appropriately fall within the ICC's initial subject matter jurisdiction.<sup>29</sup>

**Genocide.** The crime of genocide is authoritatively defined in the widely ratified Genocide Convention of 1948,<sup>30</sup> which defines genocide as the commission of certain prohibited acts with the specific intent to destroy "in whole or in part, a national, ethnical, racial or religious group[.]" The Convention also clearly implicates individual criminal responsibility by providing in Article IV that "[p]ersons committing genocide . . . shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." In addition, the International Court of Justice held in 1996 that "the rights and obligations enshrined by the [Genocide] Convention are rights and obligations *erga omnes*. . . . [T]he obligation each state thus has to prevent and to punish the crime of genocide is not territorially limited[.]"<sup>31</sup>

**War crimes.** The scope of war crimes, referred to in the Draft Statute as "serious violations of the laws and customs applicable in an armed conflict," develops from several sources. First, the diplomatic conferences held at the Hague in 1899 and 1907 resulted in widely ratified treaties regulating the conduct of war.<sup>32</sup> Second, the Nuremberg Tribunal's Charter and Judgment developed existing Hague law and also affirmed individual culpability for war crimes. Third, the

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consistent practice of states followed by them from a sense of legal obligation." Restatement (Third) of the Foreign Relations Law of the United States §102(2). The United States Supreme Court has held customary international law to be part of United States law. The Paquete Habana, 175 U.S. 677 (1900). See also Demjanjuk v. Petrovsky, 776 F.2d 571, 583 (6th Cir. 1985) ("The law of the United States includes international law").

29/ The Draft Statute neither defines the elements of particular crimes, nor enumerates defenses, mens rea and actus reus requirements. The elements of each crime, basic principles of liability and applicable defenses will be spelled out in the statute or in an annex, in accordance with the Draft Statute's fundamental principle of legality (*nullum crimen sine lege*). Draft Statute, supra note 12, art. 39. The United States argues that "the Court's rules and general legal principles must be formulated in conjunction with the statute of the Court and agreed to by states parties prior to the establishment of the Court." Statement by David Scheffer, Senior Adviser and Counsel to Ambassador Madeleine K. Albright, the United States Permanent Representative to the United Nations, on the International Criminal Court, in the Sixth Committee, October 31, 1996, U.S.U.N. Press Rel. #165(96) (Oct. 31, 1996), at 8.

30/ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 227. The Genocide Convention, ratified by 122 countries, was ratified by the United States in 1989.

31/ Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia), ¶ 31 (11 July) (Judgment) (Preliminary Objections) (unofficial text released by ICJ Registry).

32/ See Hague Convention (IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, 36 Stat. 2277, T.S. 539.

Geneva Conventions of 1949, and Protocol I, contain the landmark “grave breaches” provisions.<sup>33</sup> “Grave breaches” are particularly egregious offenses committed against certain “protected” persons such as civilians, the wounded and sick, the shipwrecked and POWs. States parties to the Geneva Conventions are obligated to enact “effective penal sanctions” for persons committing or ordering to be committed the acts defined as grave breaches. In addition, the grave breaches and much of Hague Law are considered to embody customary international law.<sup>34</sup>

The principal issue regarding war crimes has been whether the ICC’s jurisdiction should extend to war crimes committed in internal, as well as international, armed conflicts. The prevailing view within the Preparatory Committee appears to be that the category of war crimes includes violations committed in noninternational armed conflicts.<sup>35</sup>

**Crimes against humanity.** Crimes against humanity have also met with general agreement as appropriately falling within the ICC’s jurisdiction. In general, crimes against humanity encompass very serious inhumane acts, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population, as well as widespread or systematic persecution based on national, political, ethnic, racial or religious grounds.<sup>36</sup>

Unlike genocide and war crimes, however, there are no authoritative treaty definitions of crimes against humanity. Instead, the scope of crimes against humanity has evolved from such

33/ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (“Geneva Convention I”); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (“Geneva Convention II”); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (“Geneva Convention III”); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (“Geneva Convention IV”); Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3 (“Protocol I”). The United States has signed, but not ratified, Protocol I. See generally Theodor Meron, *The Time Has Come For The United States To Ratify Geneva Protocol I*, 88 Am. J. Int’l L. 678 (1994).

34/ Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), UN Doc. S/25704, ¶¶ 37-44 (1993).

35/ An Appeals Chamber for the Yugoslavia International Tribunal stated in 1995 that war crimes “entail individual criminal responsibility, regardless of whether they are committed in internal or international armed conflicts.” *Tadić*, *supra* note 10, at ¶ 137. See also Hall, *supra* note 9, at 179 (noting that “[m]ost delegations” to the Preparatory Committee agree that war crimes “should include violations of humanitarian law committed in noninternational armed conflict”).

36/ There have been proposals to add “gender grounds” to the definition. This conforms with the view that the ICC treaty should codify developments recognizing rape and other crimes of sexual and gender violence. For example, Article 2(b) of the Statute for the Yugoslavia International Tribunal makes rape and other forms of sexual assault punishable as grave breaches.

instruments as the Nuremberg Charter, Control Council Law No. 10,<sup>37</sup> the Tokyo Tribunal Charter, the Statutes of the Rwanda and Yugoslavia International Tribunals and the Draft Code of Crimes.<sup>38</sup>

Crimes against humanity have been defined in the Preparatory Committee to encompass "widespread or systematic" acts. A majority of delegations, including the United States, also appear to have rejected the nexus between crimes against humanity and an armed conflict, as was required in the definition in the Nuremberg Tribunal Charter.<sup>39</sup>

**United States position.** The United States favors the inclusion of genocide, war crimes and crimes against humanity.<sup>40</sup> It also stresses that war crimes and crimes against humanity must be defined to cover internal situations; otherwise, "the Court will be unable to address many or even most of the situations in which it is most required."<sup>41</sup>

**1992 and 1994 ABA recommendations.** Rather than proposing specific crimes, the 1992 recommendation stated that the jurisdiction of the ICC should "cover a range of well established international crimes[.]"<sup>42</sup>

The 1994 recommendation referred only to two broad categories of crimes: (1) "crime[s] specified in an international convention"; and (2) "crime[s] . . . recognized by the international community as a gross violation of a rule of customary international law widely accepted by states representing all of the world's major legal systems."<sup>43</sup>

## VI. AUTOMATIC JURISDICTION OVER THE CORE CRIMES

The ICC should exercise automatic (or "inherent") jurisdiction over the core crimes of war crimes, crimes against humanity and genocide. All three crimes are of sufficient gravity in terms of clearly implicating individual criminal responsibility. Moreover, the core crimes are crimes of universal jurisdiction; therefore, under customary international law states are obligated to extradite or try persons suspected of committing these crimes.

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37/ Following World War II, the Allied forces promulgated Control Council Law No. 10 to ensure uniform standards for prosecutions before tribunals established by the occupying powers.

38/ In 1996, the International Law Commission completed its work on the text of twenty draft articles comprising the Draft Code of Crimes Against the Peace and Security of Mankind. See Report of the International Law Commission on the work of its forty-eighth session, UN GAOR, 51st Sess., Supp. No. 10, UN Doc. A/51/10 (1996).

39/ See Preparatory Committee Report, *supra* note 6, ¶¶ 85-90; Hall, *supra* note 8, at 180.

40/ October 1996 Statement of David Scheffer, *supra* note 29, at 6.

41/ October 1996 Statement of David Scheffer, *supra* note 29.

42/ 1992 ABA recommendation, *supra* note 1, at 257.

43/ 1994 ABA recommendation, *supra* note 3, at 300-01.

The Draft Statute, however, complicates the core crimes' universal jurisdiction by establishing consent requirements for crimes other than genocide. Under the Draft Statute, a state party that is also a party to the Genocide Convention may lodge a complaint alleging that the crime of genocide has been committed without the necessity of additional expressions of consent. With respect to all other crimes, however, the jurisdiction of the ICC over the crime in question must be accepted by: (1) the complaining state; (2) the state with custody of the accused; and (3) the state in which the crime is alleged to have occurred.<sup>44</sup>

The triple consent requirement has been widely criticized. Of particular concern is the requirement that the consent of the state on whose territory the crime occurred be obtained. The purpose of this requirement -- maximizing state participation and assistance -- is unquestionably legitimate, but fostering state participation should not jeopardize the ICC's ability to effectively exercise its jurisdiction.

The distinction between genocide and the other core crimes for jurisdictional purposes may unnecessarily impede the ICC's ability to serve as a complement to the jurisdiction of national courts. Automatic jurisdiction, exercised concurrently with national tribunals, over genocide, war crimes and crimes against humanity, is therefore recommended. (The recommendation would allow for an "opt-in" regime for crimes other than the core crimes.<sup>45</sup>)

**United States position** -- In early discussions, the United States opposed automatic jurisdiction over any crime but genocide, and endorsed the distinction in the Draft Statute between genocide and all other crimes.<sup>46</sup>

**1992 and 1994 recommendations** -- The 1992 recommendation required that jurisdiction be conferred by "the state or states of which he [the accused] is a national and by the state or states in which the crime is alleged to have been committed."<sup>47</sup>

The 1994 recommendation departed from the 1992 recommendation by requiring that, in cases initiated by states parties, only "the consent of the state having custody over a person accused

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44/ Draft Statute, *supra* note 12, art. 21(1)(b). The consent of a state making an extradition request to a state with custody of an accused may also be required. Draft Statute, *supra* note 12 art. 21(2).

45/ See Preparatory Committee Report, *supra* note 7, ¶ 117 (noting that "if the Statute were to include crimes other than the core crimes, the 'opt in' regime could be maintained for them"); Association Internationale de Droit Pénal, *supra* note 6, at 165 ("...the Court's jurisdiction over treaty crimes will presumably be predicated on the consent of the State (or States) involved...") (statement of International Law Association -- American Branch). Thus, the Court's automatic jurisdiction would be limited to the core crimes even if the ICC's jurisdiction were to encompass additional crimes.

46/ Statement by Jamison S. Borek, Deputy Legal Adviser, United States Department of State, U.S.U.N. Press Rel. No. 182, at 3 (Nov. 1, 1995).

47/ 1992 recommendation, *supra* note 1, at 257.

of a crime" should be obtained.<sup>48</sup> The report to the 1994 recommendation acknowledged that "this position is inconsistent with the [1992] ABA Task Force . . . where the consent of the state or states of which the accused is a national would also have been required."<sup>49</sup>

The prior recommendations also endorsed an "opt-in" regime for all crimes.<sup>50</sup> This differs from the current recommendation, which favors an "opt-in" requirement only for crimes other than genocide, war crimes and crimes against humanity.

## VII. COMPLEMENTARITY

The recommendation favors the Draft Statute's characterization of the ICC as complementary to national criminal justice systems. The "complementarity" principle refers broadly to the jurisdictional balance between the international criminal court and national courts. It is both a foundational construct designed to express the notion that the ICC does not replace or supersede national systems of criminal justice, as well as a leitmotif animating the treaty relationships among the ICC and states. Complementarity is emphasized in the Draft Statute's preamble:

The States parties to this Statute, . . . Emphasizing further that such a court is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective[.]

National courts will remain the preferred forum for the prosecution and punishment of international criminals. As the ILC's Commentary states, the international criminal court "is not intended to exclude the existing jurisdiction of national courts[.]" A focus at the Preparatory Committee, therefore, has been how to determine in which circumstances national courts "may not be available or may be ineffective."<sup>51</sup>

A proposal that has attracted significant support during the August 1997 Preparatory Committee would allow the Court to determine admissibility *sua sponte* or upon the request of an accused or a state. Under proposed article 35, "the Court shall determine that a case is inadmissible where:

- (a) the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

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<sup>48/</sup> 1994 recommendation, supra note 3, at 300.

<sup>49/</sup> 1994 recommendation, supra note 3, at 303.

<sup>50/</sup> The 1992 recommendation stated that "member states shall be free to choose by filing a declaration of the crimes they shall recognize as within the court's jurisdiction." 1992 recommendation, supra note 1, at 257. The 1994 report stated that "an 'opting in' system . . . is preferred." 29 Int'l Law. at 303.

<sup>51/</sup> Draft Statute, supra, note 12, preamble.

⊙ the person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under paragraph 2 of article 42<sup>52</sup>;

(d) the case is not of sufficient gravity to justify further action by the Court."<sup>53</sup>

The ICC treaty in all probability will delineate the basic framework for cooperation between states and the ICC. In this regard, the Draft Statute provides that states parties shall furnish assistance in investigating crimes, arresting suspects, gathering evidence and enforcing judgments. The Draft Statute also imposes "a general obligation of cooperation on States parties to the Statute, independent of whether they are parties to relevant treaties or have accepted the Court's jurisdiction with respect to the crime in question."<sup>54</sup> The mechanics of transferring accused persons to the ICC likewise involve complementarity.<sup>55</sup>

The ICC is not intended to undermine existing extradition arrangements. Under article 53(3), transfer to the ICC by a state party complies with an obligation to extradite or prosecute found in a bilateral extradition treaty between two states parties. Article 53(4) provides that a state party that accepts the jurisdiction of the ICC with respect to a crime in question shall "as far as possible" give priority to the Court's request over a competing request from another state.

The Preparatory Committee debates reveal two basic approaches to the complementarity principle. The first emphasizes the primary "right" of states to prosecute international crimes and the exceptional circumstances which would invoke the ICC's jurisdiction. The other approach stresses the frequency and ease with which persons suspected of having committed international crimes had escaped justice, and suggests a wider role for the ICC. These competing visions of complementarity will continue to be the focus of debate through the diplomatic conference.<sup>56</sup>

## VIII. TRIGGER MECHANISM

52/ Article 42(2) of the Draft Statute prohibits a second trial by the ICC when an accused has already been tried by a national court unless: (1) the national court trial was for an "ordinary crime," as opposed to an international crime within the ICC's jurisdiction; or (2) the national court trial was "not impartial or independent," or was "designed to shield the accused from international criminal responsibility," or (3) if the case was not diligently prosecuted."

53/ Decisions Taken by the Preparatory Committee, supra note 13, at 10-11.

54/ Draft Statute, supra note 12, art. 51(1) & Commentary. States that are not parties to the Statute are encouraged to provide assistance and cooperation "on the basis of comity, a unilateral declaration, an ad hoc arrangement or other agreement with the Court." Draft Statute, supra note 12, art. 56.

55/ For example, "an interested state" -- such as a state that has lodged an extradition request against an accused -- may challenge the ICC's exercise of jurisdiction. Draft Statute, supra note 12, art. 34. In addition, a state party that has been served with an arrest warrant may transfer the accused to the ICC or "extradite the accused to the requesting State or refer the case to its competent authorities for the purpose of prosecution." Draft Statute, supra note 12, art. 53(2).

56/ These two approaches were identified in Hall, supra note 9, at 181.

The recommendation states that the United Nations Security Council, states parties to the ICC treaty, and, subject to appropriate safeguards, the ICC Prosecutor should be permitted to initiate proceedings. (Under the Draft Statute, cases are initiated either by the "referral of a matter" by the Security Council, or by states parties, which "lodge a complaint with the Prosecutor."<sup>57</sup>)

The UN Security Council should be authorized to initiate proceedings before the ICC. This is in accordance with the Security Council's primary role under the UN Charter in the maintenance of international peace and security.

States parties also should be permitted to initiate proceedings by referral of an overall situation. As the ILC Commentary argues, reliance on states to initiate proceedings may encourage states to more actively shoulder the burdens and obligations associated with maintaining a fair and effective Court.

The recommendation further calls for allowing the Prosecutor to initiate cases ex officio, as many nations have urged in the Preparatory Committee. An independent Prosecutor is essential if the ICC is to be effective in punishing and deterring the most serious international crimes. Indeed, the Prosecutor of the Yugoslavia International Tribunal is permitted to initiate investigations ex officio on the basis of information obtained from any source. The recommendation similarly favors some degree of independence for the ICC Prosecutor, assuming of course that the Prosecutor would be a person of the highest integrity, competence and judgment.

Recognizing that the ICC Prosecutor's discretion should not be unfettered, and that the treaty should establish a means for accountability, the recommendation suggests that "appropriate safeguards" be embodied in the ICC treaty. Constraints on the Prosecutor already are provided for in the Draft Statute: once an indictment is filed by the Prosecutor, the Presidency, consisting of five judges, must "examine the indictment and any supporting material" and make two determinations: (a) "whether a prima facie case exists with respect to a crime within the jurisdiction of the Court;" and (b) whether the case should be heard in view of principles of complementarity, e.g., whether a national court is unavailable or ineffective. If the case is to proceed beyond the indictment once these determinations have been made, the Presidency "shall confirm the indictment and establish a trial chamber[.]"<sup>58</sup>

Additional constraints at an earlier stage of review, during the initial investigation and prior to the filing of an indictment, could also be included in the ICC statute.<sup>59</sup> The mechanism for

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<sup>57/</sup> Draft Statute, supra note 12, arts. 23, 25. Article 26(1) of the Draft Statute affords the Prosecutor discretion to forego an investigation even if a situation or matter has been referred to the Prosecutor by a state party or by the Security Council. If the Prosecutor concludes that "there is no possible basis for a prosecution under this Statute," the Presidency must be informed, although the Presidency "may request the Prosecutor to reconsider the decision."

<sup>58/</sup> Draft Statute, supra note 12, art. 27(2).

<sup>59/</sup> Accountability and oversight could also be strengthened through the procedures for the election of the Prosecutor and through the procedures for removal and replacement of an unsuitable Prosecutor. See, e.g., Lawyers Committee for Human Rights -- Legal Experts Project, The Accountability Of An *Ex Officio* (continued...)

ensuring that there is accountability for the Prosecutor's decision to investigate *ex officio* could involve an oversight role by states and/or by an internal body.<sup>60</sup> Thus, the recommendation attempts to preserve the Prosecutor's independence to initiate investigations within a system that ensures appropriate accountability and oversight.

**United States position.** The United States position is that "no case should be initiated by the Prosecutor unless the overall situation pertaining to that case has been referred to the court. Once there has been a referral, however, the Prosecutor should have full discretion to determine what and whom to investigate and prosecute, and indeed not prosecute."<sup>61</sup> Referrals by states parties to the court would be subject to Security Council approval if the Security Council was "already actively seized" of the situation. The United States has emphasized that states parties would only have the right to refer overall situations to the Court, and not individual cases.<sup>62</sup>

**1992 and 1994 recommendations.** The 1992 recommendation did not address the trigger mechanism issue.

The 1994 recommendation stated that the "mandatory jurisdiction" of the ICC could be invoked by "a decision of the Security Council issued pursuant to its powers under Chapter VII of the United Nations Charter."<sup>63</sup>

## IX. PROTECTIONS FOR DEFENDANTS AND ACCUSED PERSONS

Proceedings before the ICC must meet or exceed the highest standards of fairness and due process, and the rights of accused persons and defendants must be set forth in the ICC's constituent instruments and rules of procedure and evidence. The protections incorporated in the Draft Statute are expressly modeled on Article 14 of the International Covenant on Civil and Political Rights. These protections include a presumption of innocence; the right to be informed promptly and in detail of the nature of the accusations; the right to defense counsel of choice, and the right to a defense attorney assigned by the Court if a defendant is without sufficient means; the right to be

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59/(...continued)

Prosecutor (publication forthcoming).

60/ See generally Lawyers Committee for Human Rights -- Legal Experts Project, *supra* note 59. The Lawyers Committee's Legal Experts considered a wide range of possible means of ensuring oversight and accountability of the Prosecutor's *ex officio* investigations. These possibilities included review by external bodies such as interested states, states parties, the UN Human Rights Commission, the General Assembly or the Security Council. The Legal Experts concluded that internal review by a Pre-Trial Chamber during the period of the Prosecutor's investigation, in consultation with interested states with regard to the requirements of complementarity under article 35 (i.e., whether national courts were unavailable or ineffective), would be the option most consistent with an independent prosecutor. Any indictment that results from an investigation would still be subject to judicial review.

61/ October 1997 Statement of Amb. Richardson, *supra* note 20.

62/ October 1996 Statement of David Scheffer, *supra* note 29, at 4, 5.

63/ 1994 recommendation, *supra* note 3, at 300.



tried without undue delay; the right to examine prosecution witnesses; the right to an interpreter free of cost; the right not to be compelled to testify or confess guilt; and the right to receive exculpatory evidence that becomes available to the Procuracy.<sup>64</sup>

"As a general rule, the accused should be present during the trial."<sup>65</sup> Trials *in absentia* are permitted under the Draft Statute, however, in certain circumstances: (1) "for reasons of security or the ill-health of the accused"; (2) "[i]f the accused is continuing to disrupt the trial"; or (3) "if the accused has escaped . . . or has broken bail."<sup>66</sup>

If a trial cannot be held "because of the deliberate absence of an accused," the Draft Statute provides for the establishment of an "Indictment Chamber." The Indictment Chamber records the evidence against the accused, considers whether this evidence establishes a *prima facie* case, and whether to issue an arrest warrant.<sup>67</sup>

## **X. ACTS OF TORTURE AND TERRORISM; AGGRESSION**

The present consensus suggests that the initial subject matter jurisdiction of the ICC will be limited to the core crimes of genocide, war crimes and crimes against humanity,<sup>68</sup> and the recommendation takes no position on the expansion of jurisdiction beyond the core crimes.

**Acts of terrorism and torture.** General agreement is emerging to include a review mechanism that would permit the states parties to revise the ICC's initial subject matter jurisdiction. The crimes included in the Draft Statute that eventually may be considered are acts of torture and terrorism as defined in five treaties listed in an Annex to the Draft Statute:

- (1) the unlawful seizure of aircraft, as defined in Article 1 of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970;
- (2) aircraft sabotage, as defined in Article 1 of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971;
- (3) hostage-taking and related crimes, as defined in Article 1 of the International Convention against the Taking of Hostages of 17 December 1979;

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<sup>64/</sup> Draft Statute, supra note 12, arts. 40, 41. There is disagreement with respect to special protections that need to be given in certain circumstances to victims and witnesses, and this area will be subject to further negotiations. See August 1997 Decisions Taken by the Preparatory Committee, supra note 13, at 36-37 (proposals relating to protections for the accused, victims and witnesses).

<sup>65/</sup> Draft Statute, supra note 12, art. 37(1).

<sup>66/</sup> Draft Statute, supra note 12, art. 37(2).

<sup>67/</sup> Draft Statute, supra note 12, arts. 37(4), (5). The Rules of Procedure and Evidence of the Yugoslavia International Tribunal similarly allow for an Indictment Chamber, and at least six such proceedings have been held. In June and July 1996, proceedings were held regarding the indictments of Radovan Karadžić and General Mladić, following which arrest warrants were issued.

<sup>68/</sup> E.g., Hall, supra note 9, at 178.

(4) torture, made punishable pursuant to Article 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984; and

(5) crimes defined in Article 2 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 14 December 1973.

Among the arguments against the inclusion of terrorism are that these prosecutions would require enormous resources beyond the capacity of the ICC and perhaps undermine national investigations. The United States has opposed the inclusion of crimes other than the three core crimes within the jurisdiction of the ICC.<sup>69</sup>

The arguments in favor of inclusion are that international terrorism and torture clearly qualify as "the most serious crimes of concern to the international community as a whole," as the Preamble to the Draft Statute requires.<sup>70</sup> In addition, terrorism is a crime occurring with some frequency; therefore, the gap caused by the absence of a permanent court is particularly egregious.<sup>71</sup> The five treaties referred to above, it is argued, provide a suitable definitional basis. It is also argued that all crimes within the ICC's subject matter jurisdiction will involve significant resources, and that acts of terrorism cannot justifiably be singled out as a unique drain on resources. Finally, it is argued that inclusion of terrorism should not undermine national investigations in view of the ICC's obligation to proceed only when national courts are unavailable or ineffective, and in a manner that supports rather than undermines national efforts.

**Aggression.** The debate over the inclusion of aggression has been sharp. The sentiment in favor of including aggression stems largely from the Nuremberg judgment, which described aggression as "the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."<sup>72</sup> At the February 1997 Preparatory Committee meeting, the German delegation presented a new definition of aggression that has garnered significant support.

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69/ Preparatory Committee Report, supra note 7, ¶ 107; October 1997 Statement of Amb. Richardson, supra note 20 ("The better course now will be to focus on the core crimes of genocide, crimes against humanity, and war crimes.").

70/ In addition, Article 20(e) of the Draft Statute limits the treaty crimes to those constituting "exceptionally serious crimes of international concern," which would exclude acts which, although serious, are more appropriately within the competence of national courts. Draft Statute, supra note 12, art. 20(e) Commentary.

71/ For example, the bombing of Pan Am flight 103 and the resulting stalemate over prosecution of the persons accused of the crime "presents precisely the kind of case that befits prosecution by an international criminal court. The Court may thus provide a neutral forum that would not otherwise be available to address a politically charged incident." Association International de Droit Pénal, supra note 6, at 165 (Report of International Law Association -- American Branch)

72/ Judgment of Oct. 1, 1946 (Int'l Mil. Trib., Nuremberg), 41 Am. J. Int'l L. 172, 186 (1947).

The United States, and other countries, favor excluding aggression. The arguments against aggression are that: (1) aggression, including the definition in G.A. Res. 3314 (1974), for the purposes of individual criminal responsibility, has not been adequately defined; (2) the Draft Statute requires the Security Council, in fulfillment of its role under the UN Charter, to determine that an act of aggression has occurred by the state of nationality of the accused, which would limit the ICC's independence, and (3) the definitional problem, as well as the fact that no court has ever prosecuted an individual for the crime of aggression other than at Nuremberg and Tokyo, raises concerns with respect to the principle of legality (nullum crimen sine lege).<sup>73</sup>

Respectfully submitted,

Timothy L. Dickinson  
Chair, Section of International Law and Practice  
February 1998

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<sup>73/</sup> See Preparatory Committee Report, supra note 6, ¶¶ 65-69; October 1996 Statement of David Scheffer, supra note 29, at 6.

**GENERAL INFORMATION FORM**

Submitting entities: Section of International Law and Practice

Submitted by: Timothy L. Dickinson, Chair of the Section of International Law and Practice

**1. Summary of Recommendation**

Through this recommendation, the American Bar Association would express support for the establishment of an international criminal court established by multilateral treaty, and further recommend that the United States government continue to take an active part in the negotiations leading up to and during the diplomatic conference scheduled for June 1998.

The recommendation further resolves that: (1) the ICC's initial jurisdiction should include genocide, war crimes, and crimes against humanity; (2) the Court should exercise automatic ("inherent") jurisdiction over the three core crimes -- genocide, war crimes and crimes against humanity; (3) the ICC's jurisdiction should complement, not supersede or replace, the criminal jurisdiction of states; (4) the Security Council, states parties, and the Prosecutor (subject to appropriate safeguards) should be permitted to initiate proceedings; and (5) internationally recognized standards of fairness and due process shall be recognized and enforced by the ICC.

Although the ABA adopted recommendations endorsing an international criminal court in 1992 and 1994, it is important to issue a new recommendation in view of the rapidly accelerating ICC proposal (see Part III of the report). The new recommendation corresponds more closely with the issues that have emerged since 1994, and the ABA should be at the forefront of the debate leading up to the diplomatic conference in 1998.

**2. Approval by submitting entities**

The recommendation was approved by the Council of the Section of International Law and Practice at its meeting on November 15, 1997 in Miami. Another version of the recommendation was approved by this Council at the 1997 Annual Meeting in San Francisco.

The recommendation was approved by the Council of the Section of Criminal Justice at its meeting on November 8, 1997 in Washington, DC.

The recommendation was approved by the Section of Individual Rights and Responsibilities on November 10, 1997 from Muriel Morisey, Chair of the Section of Individual Rights and Responsibilities, to Timothy L. Dickinson, Chair of the Section of International Law and Practice.

The recommendation was approved by the Standing Committee on World Under Law on November 7, 1997 from Jay M. Vogelsson, Chair of the Standing Committee on World Order Under Law, to David Stoelting, Co-Chair of the Coordinating Committee on the International Criminal Court.

The recommendation was approved by the Association of the Bar of the City of New York on October 21, 1997 from Michael A. Cardozo, President of the Association of the Bar of the City of New York, to Timothy L. Dickinson, Chair of the Section of International Law and Practice.

**3. Has this or a similar Recommendation been submitted to the House or the Board before?**

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

Previous recommendations relating to in an International Criminal Court are:

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

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

This recommendation is in conformity with existing policies.

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

As described in Part III of the report, the momentum in favor of the proposed ICC has increased significantly since the issuance of the ABA's recommendations in 1992 and 1994. Most important, there will be a diplomatic conference in June and July 1998 in Rome to finalize and adopt the treaty that will create the ICC. As a result, a recommendation is needed at this critical stage to clarify the position of the ABA with respect to the most critical issues to emerge from the ongoing negotiations on the International Criminal Court.

**6. Status of legislation. (if applicable)**

No applicable.

**7. Cost to the Association.**

None.

**8. Disclosure of interest. (if applicable)**

None.

**9. Referrals.**

As of November 17, 1997, this report and recommendation has been referred for co-sponsorship to the Section of Litigation and to the Los Angeles County Bar Association.

The Section of International Law and Practice is planning to inform of this report and recommendation to all ABA Section Chairs through the Chair listserves.

**10. Contact person. (prior to the meeting)**

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**11. Indicate the name(s) and contact information of the person(s) who will present the report to the House and who should be contacted at the meeting when questions arise concerning its presentation and debate.**

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**12. Indicate if there are any known proposed amendments at this time and the name, address, telephone and fax numbers and e-mail address of the person to contact.**

No.