

AMERICAN BAR ASSOCIATION
CRIMINAL JUSTICE SECTION

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

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- RESOLVED,** That the Congress should enact legislation to require the President to:

 1. Report to the Congress within thirty days after receiving notice from the International Criminal Court Prosecutor that a United States National committed an act within the jurisdiction of the International Criminal Court;
 2. Take all reasonable steps to assure that the United States retains jurisdiction to investigate and, if necessary, prosecute the alleged act; and
 3. Report promptly to Congress on subsequent actions by the International Criminal Court with respect to the alleged act.

REPORT

Introduction

The American Bar Association has a long history of developing policy statements pertaining to the establishment of a permanent, international tribunal to prosecute the most heinous crimes against humanity. The Association's policies have consistently supported establishment of an international criminal court, while acknowledging that there are certain issues that pose barriers to United States participation. The court's jurisdiction and the role of court's prosecutor have historically been problematic issues. While the Association's policies have recognized these barriers, they offer at most, only general principles on how such issues should be resolved.

Likewise, the Association has not previously urged that the United States participate in an international criminal court. Its resolutions have been limited in urging the United States to participate in activities to bring about the establishment of an international criminal court. However, in its November 18, 2000 Fall Council Meeting the ABA Criminal Justice Section joined in sponsoring a recommendation, proposed by the International Law Section, urging full American participation in the International Criminal Court (ICC or Court) as set out in the Rome Statute. This recommendation is House of Delegates Report No. 105C of the February 2001 Midyear Meeting. If adopted by the ABA House of Delegates, the recommendation will be a major step in the evolution of the Association's policy statements related to the international criminal court.

The recommendation that accompanies this report urges implementation of a three point legislative regimen designed to provide the greatest possible assurance that the United States exercise principal jurisdiction over its nationals, and thereby minimize the risk of an American national being prosecuted in the ICC. This recommendation was adopted by the Criminal Justice Section in full consideration of two significant assumptions. First, the Court is very likely to come into being. Second, whether or not the United States elects to ratify the Rome Statute, a policy must be put in place to ensure that the United States exercise primary jurisdiction over its nationals with regard to the ICC.

Background

In February 1978 the Association urged the United States Department of State to open negotiations for a convention on the establishment of an international criminal court with expressly limited jurisdiction (Report No. 102C). In February 1991, the American Bar Association House of Delegates established an "ABA Blue Ribbon Committee on an International Criminal Court (Report No. 8A). The Committee was subsequently appointed and designated as an ABA Task Force.

In the wake of the Task Force's work an August 1992 policy (Report No. 111) was approved urging the United States government to address the issues identified in the reports of, both, the ABA Task Force on an International Criminal Court, and the New York State Bar Association. The ABA Resolution contained in Report 111 urged that the issues raised in the ABA Task Force

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and New York Bar reports be addressed in the context of establishing an international criminal court, but no endorsement was given to a concrete plan that would resolve any of the paramount legal or practical issues.

In August 1994, the ABA House of Delegates adopted a resolution (Report No. 114 C) urging the United States government to take an active role in establishing an international criminal court. This resolution envisioned a court with two bases for jurisdiction: consensual jurisdiction, received via deference by the state in custody of the suspect, and mandatory jurisdiction, authorized by all nations' assent to the United Nations Charter.

In February 1998, a resolution (Report No. 118B) was adopted urging establishment of a permanent international criminal court, and recommended that the United States government continue to play a role in negotiating and drafting a treaty establishing a court. It further, outlined four specific principles, concerning jurisdiction, the initiation of prosecution and due process standards, which should guide the creation of an international criminal court.

In August 1999 the ABA Criminal Justice Section and International Law Section each approved and submitted to the ABA House of Delegates recommendations (Report Nos. 113B and 300, respectively) urging the United States, in varied language, to participate in the shaping of a Rome Statute that the United States could ratify. Both recommendations were withdrawn from the House of Delegates in hopes that the two sections could reach a mutually acceptable recommendation.

Finally, at its November 18, 2000 Fall Council Meeting the ABA Criminal Justice Section adopted two recommendations concerning the Rome Statute on the International Criminal Court (ICC or Court). The first recommendation, proposed by the International Law Section, urges the United States to ratify the Rome Statute. The second recommendation adopted by the Criminal Justice Section is the subject of this report.

United States Participation in the International Criminal Court

On July 17, 1998, a United Nations Diplomatic Conference concluded negotiation of the Rome Statute of the International Criminal Court (Rome Statute or Statute). The United States actively participated in the Conference, and its preparatory meetings, but was unable to support the final text agreed upon by the majority of states participating. The reservations held by the United States with respect to the final text of the Statute concern: the breadth of prosecutorial discretion to initiate investigations and prosecutions *proprio motu*; the Court's ability to exercise jurisdiction over a national of a non-party state; and the planned inclusion of the crime of aggression in the subject matter jurisdiction of the Court.

Since the end of the Rome Conference, the United States government has continued to engage in diplomatic consultations with other governments in an effort to bring about an accommodation that would resolve or alleviate its concerns and allow the United States to sign the Statute. While U.S. negotiators have realized some success in shaping the Rome Statute, most other state parties, including NATO countries and other United States allies, have repeatedly rejected the notion of exempting persons from the Court's jurisdiction. This refusal to exempt has been

asserted in the case of proposals involving nationals of non-party states and for government agents acting in furtherance of national foreign policy objectives. One hundred and seventeen nations signed the Rome Statute, indicating their intent to proceed with the ratification process. The Statute requires ratification by sixty of the signatory nations in order to come into force. As of November 29, 2000 twenty-three nations have ratified the Rome Statute. Among the ratifying nations are Canada, France, Italy and Spain.

ICC Jurisdiction

The Court envisioned by the Rome Statute is intended only to complement national jurisdiction. As such, the Statute sets out a complex series of procedures and jurisdictional foundations that limit the Court's authority and require deferral by the ICC to the good faith investigative efforts and prosecutorial discretion of national governments. A brief examination of the Rome Statute's jurisdictional process demonstrates the need for the United States to set a mechanism in place to ensure the investigation and / or prosecution of allegations under the Rome Statute. Whether or not the United States ratifies the Statute, the best hope to avoid prosecution of an United States national by the ICC is to ensure that a timely, legitimate process is in place to which both the ICC and the international community can, in good faith, defer.

Subject Matter Jurisdiction

The subject matter jurisdiction of the Court is expressly limited to a list of enumerated crimes with defined elements. The ICC would be limited to cases involving genocide, crimes against humanity, war crimes, and aggression, committed only after the entry into force of the Statute (Rome Statute ("RS"), Arts. 5, 11(1)).

Triggering the Court's Jurisdiction

There are three means by which the Court's jurisdiction may be triggered. First, a signatory to the Rome Statute (State Party) may refer to the Court's Prosecutor for investigation a circumstance where one or more of the enumerated crimes appears to have been committed (RS Art. 14). Second, the United Nations Security Council, acting under Chapter VII of the U.N. Charter may refer potential crimes to the Court (RS Art. 13(b)). Third, the Prosecutor may initiate a preliminary investigation *proprio motu* regarding the alleged commission of one of the enumerated offenses. In any of the three instances the underlying facts must be presented to the Pre-Trial Chamber by the ICC Prosecutor before it can proceed beyond the preliminary stages of investigation.

Consent to Jurisdiction

With the limited exception of a referral by the U.N. Security Council, the Court is limited in its ability to exercise jurisdiction without the consent of a sovereign government that could otherwise exercise jurisdiction on its own. Absent a referral by the U.N. Security Council, where consent is presumed as to certain crimes, the Court may exercise its jurisdiction only if one or more of the following States have accepted the Court's jurisdiction:

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(a) The State where either the alleged conduct occurred, or in the instance of alleged conduct occurring on board a vessel or aircraft, the State of registration for the craft; or

(b) The State of which the person accused of the crime is a national. (RS Art.12(2)).

A State may accept the jurisdiction of the Court by either becoming a party to the Statute (RS Art. 12(1)), or, if not a party to the Statute, by a Declaration lodged with the Court's Registrar with respect to the alleged crime in question. (RS Art.12(3)).

The Pre-Trial Chamber

The Pre-trial Chamber acts as a check upon the discretion of the ICC Prosecutor. In matters involving *proprio motu* investigations, challenges to the Court's jurisdiction and case admissibility, determinations must be reached by a majority of the Pre-Trial Chamber judges, which must number at least six.

The preliminary investigation of an alleged offense by the ICC Prosecutor, whether triggered by referral from a State Party or through the Prosecutor's own motion, is followed by an evaluation by the Pre-Trial Chamber. Article 15(4) of the Statute details the role of the Pre-Trial Chamber at this stage:

If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of the case.

Admissibility

The preliminary determination of admissibility (i.e. whether a case is within the jurisdiction of the International Criminal Court) is covered by Article 18 of the Statute. Upon a determination by the Prosecutor that there exists a reasonable basis to conduct an investigation concerning conduct which may fall under the purview of the Court, the Prosecutor shall notify all State Parties and those States which would exercise jurisdiction over the alleged acts (RS Art.18(1)). Within one (1) month of such notification, a State may inform the Court that it is conducting, or has conducted, its own investigation into the alleged conduct. (RS Art. 18(2)). Upon a request by the State, the Prosecutor shall defer to the State's investigation of the matter, absent authorization by the Pre-Trial Chamber, upon application by the Prosecutor, to investigate. (Id.). Either the State or the Prosecutor may appeal an adverse Pre-Trial Chamber ruling to the Appeals Chamber on an expedited basis. (RS Art. 18(4)).

The Court shall determine a case is inadmissible, and thus outside of its jurisdiction, where, *inter alia*, a case is being, or has been, investigated and/or prosecuted by a State which has jurisdiction. The Court will defer to the State's investigation and/or prosecution unless the Court

determines as outlined in Article 17(2)(a-c), that the State is unwilling or unable to genuinely carry out such investigation and/or prosecution.

Challenges to Jurisdiction or Admissibility

Challenges to admissibility or jurisdiction may be made by either an accused for whom a warrant or summons has been issued (RS Art. 19(2)(a)); a State which has jurisdiction over a case, on the grounds that it is, or has completed, investigating and/or prosecuting the matter (RS Art. 19(2)(b)); or a State from which consent is required under Article 12 (RS Art. 19(2)(c)). In addition, the Prosecutor may seek a ruling on admissibility or jurisdiction from the Court.

Reporting and Investigating

The Recommendation accompanying this Report seeks to provide the maximum possible assurance that the United States government will take all reasonable steps to exercise its jurisdiction over United States nationals, thereby ensuring that no United States national will be charged and tried by the International Criminal Court. The reporting requirements advocated within this Recommendation would assure that both the executive and legislative branches are aware of any notice given by the an International Criminal Court Prosecutor that there may be crimes within the jurisdiction of the ICC that may have been committed by a United States national. The requirement that the president take all necessary steps to ensure that the United States retains primary jurisdiction to investigate and prosecute any potential offense by a United States national will allow the United States to assert that the ICC should defer to an ongoing U.S. investigation.

As a signatory to the Rome Statute, the implementation of the legal regimen contemplated by this Recommendation goes far in ensuring that the tools are in place to assert jurisdiction over any United States nationals that become subject to the Court's reach. In the event that the United States is a non-State Party, the proposed resolution would serve as a legal obligation upon the executive branch to investigate all allegations involving its nationals who could come before the Court. This obligation would inherently enhance the credibility of the exercise of jurisdiction by the United States to conduct a complete investigation, and in the event that it is warranted, a fair prosecution consistent with American notions of justice and due process.

Conclusion

Many who oppose the ICC do so out of concern for the risks involved in exposing U.S. nationals to international jurisdiction to be tried for acts committed in furtherance of United States foreign policy. It is in response to this risk that United States negotiators have sought, on several occasions, exemption language within the Rome Statute that would exclude members of the United States military and other government agents from the jurisdiction of the ICC. These attempts have, thus far, been rejected by the other signatory nations.

Those who support the ICC have addressed the concern over the Court's jurisdiction by noting its complementary nature. In essence the supporters point out that the Rome Statute, through a

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complex series of checks and balances, authorizes the Court's jurisdiction only where a country asserting jurisdiction refuses or is unable to conduct a bona fide investigation of the underlying facts and, where merited, a prosecution. Supporters would argue that the Court would operate as an incentive for nations to exercise their sovereignty within their own system of jurisprudence in investigating and prosecuting the most heinous crimes against humanity.

Whether the proponents or opponents of the Court ultimately carry the day in the United States, it is likely that the Court will be a reality. The United States has historically stood against the crimes sought to be prosecuted by the Court. Its efforts against such crimes, often at great cost, have established its credibility and commitment to justice within the world community. That history and the many sacrifices it has involved cannot be taken lightly. It is a legacy making it imperative that the United States takes the lead in defining its relationship with the ICC.

The process urged in this Recommendation is not an ironclad guarantee that a U.S. national will not face prosecution under the Rome Statute. The Recommendation does, however, provide the greatest possible assurance that the United States will act with sufficient speed and diligence to minimize the risk of a United States national being brought before the ICC because such action would place the United States in a strong position to assert the exercise of its primary jurisdiction.

Respectfully submitted,

Ralph C. Martin, II
Criminal Justice Section Chairperson

February, 2001

GENERAL INFORMATION FORM

To Be Appended to Reports with Recommendations

Submitting Entity: Criminal Justice Section Council

Submitted By: Ralph C. Martin II, Criminal Justice Section Chairperson

1. Summary of Recommendation(s).

The recommendation urges the United States Congress to enact legislation requiring the president to take specific actions intended to avoid the exercise of jurisdiction over a United States National by the International Criminal Court (ICC) proposed in the Rome Statute. Specifically, the recommendation urges legislation requiring the president to: report within thirty days of receiving notice from the ICC prosecutor that a United States national may be a target of prosecution; take all reasonable steps to ensure that the U.S. retain complete jurisdiction and; report to Congress on subsequent actions by the ICC with respect to the alleged criminal act.

2. Approval by Submitting Entity.

The Criminal Justice Council approved this resolution, as amended, at its Fall Meeting, November 18, 2000, in Washington, DC.

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

This resolution has not been submitted to the House of Delegates or the Board of Governors. The ABA currently has no policy calling for the implementation of any such legislation. ABA policy related to the International Criminal Court is listed under question 4.

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

The following are relevant ABA policies on the International Criminal Court. Report No. 102C (MY78); Report No. 8A (MY91); Report No. 111 (AM92); Report No. 114C (AM94); Report No. 118B (MY98). The existing ABA policies would be enhanced by the adoption of this recommendation.

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

It is likely, regardless of whether the United States elects to ratify the Rome Statute, that the International Criminal Court will come into being. Absent other agreements, the jurisdiction of the ICC, under the Rome Statute, has the potential to include United States nationals. The recommendation calls for the establishment of a legislative regimen that will ensure that the U.S. takes all reasonable steps to ensure the exercise principal jurisdiction over American Nationals and thereby avoid the exercise of jurisdiction over them by the ICC.

6. Status of Legislation. (If applicable.)

No pending legislation applicable.

7. Cost to the Association. (Both direct and indirect costs.)

Adoption of this resolution would not result in direct costs to the Association. The only anticipated costs would be indirect costs that might be attributable to lobbying to have the recommendation implemented or adopted by congress. These indirect costs cannot be estimated, but should be negligible since lobbying efforts would be conducted by existing staff members who are already budgeted to lobby for Association policies.

8. Disclosure of Interest. (If applicable.)

No known conflict of interest exists.

9. Referrals.

Concurrently with submission of this report to the ABA Policy Administration Office for calendaring on the February, 2001 House of Delegates agenda, it is being circulated to the following:

Standing Committees:

Armed Forces Law
Law and National Security
Legal Assistance for Military Personnel
Federal Judiciary

Sections, Committees, Commissions and Forums:

Government and Public Sector Lawyers Division
Individual Rights and Responsibilities
International Law and Practice
Judicial Division
Young Lawyers Division

Affiliated Organizations:

Judge Advocates Association
National Association of Criminal Defense Lawyers, Inc.

Other Legal Organizations

International Bar Association
International Criminal Defense Attorneys Association

10. Contact Person. (Prior to the meeting.)

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