

**American Bar Association
Milwaukee Bar Association
and
Section of International Law
and Practice
Report to the House of Delegates
Blue Ribbon Committee on the Establishment of an
International Criminal Court***

RECOMMENDATION

BE IT RESOLVED, That the American Bar Association, in light of the passage by the Congress of the United States of Amendment 3068 to the Foreign Operations Appropriations Bill for fiscal year 1991 calling for the President and the Judicial Conference of the United States to explore the possibility of an international criminal court and report to the Congress by October 1, 1991, decides to establish a Blue Ribbon Committee on the Establishment of an International Criminal Court;

BE IT FURTHER RESOLVED, That the President of the American Bar Association, in consultation with the Chairman of the Section of International Law and Practice, the Section of Criminal Justice, and the Judicial Administration Division, shall determine the structure, composition and mandate of the Blue Ribbon Committee, which shall present its report to the Board of Governors and the House of Delegates in time for their August 1991 meetings.

REPORT

I. Explanation of Recommendation

The purpose of this recommendation is to assist in the preparation by the government of the United States of proposals for the establishment of an international criminal court, as mandated by a recent act of Congress.

*This Recommendation and Report was adopted by the House of Delegates in February 1991. The Recommendation and Report was prepared primarily by the International Criminal Law Committee, chaired by William M. Hannay. Stuart Deming was the principal drafter.

II. Background

The American Bar Association has been concerned with this issue of establishing an international criminal court since 1978.¹ In that year the House of Delegates adopted a resolution urging the Department of State to

... open negotiations for a Convention for the establishment of an International Criminal Court with jurisdiction expressly limited to (a) international aircraft hijacking as defined in the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft; (b) violence aboard international aircraft as defined in the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation; (c) crimes against diplomats and internationally protected persons as defined in the 1972 Convention on the Prevention and Punishment of Crime Against Diplomatic Agents and Other Internationally Protected Persons; and (d) the crimes of murder and kidnapping, defined in clause (c), when committed or directed against any group of five or more nationals of a state other than the state of the alleged perpetrator of the crime; . . .²

The issue was revived in 1989, when Congressmen Jim Leach and Robert Kastenmeier proposed House Concurrent Resolution 66, which stated the sense of the Congress to be that the United States "should pursue the establishment of an International Criminal Court to assist the international community in dealing more effectively with those acts of terrorism, drug trafficking, genocide, and torture that are condemned as criminal acts in the international conventions cited in the preamble. . . ."³ Integral to its establishment were to be "internationally established standards of due process and the rights of the accused to a fair trial" and "guarantees as to the impartiality of its judges."⁴

As part of the process, the President was urged to convene an international conference for purposes of negotiating a multilateral convention establishing an international criminal court.⁵ In this regard, the Congress sought a report as to the status of the President's efforts by the conclusion of its second session.⁶ Similarly, a report was sought from the Judicial Conference of the United States "on the feasibility of, and relationship to the Federal judiciary of, an International Criminal Court."⁷

1. It should be noted that in 1976 the then Section of International Law sought passage of a resolution endorsing in principle the concept of an international criminal court. ABA Section of International Law, Report to House of Delegates Regarding an International Criminal Court at 3 (Feb. 1978). The resolution was not approved as the House of Delegates feared that the jurisdiction of such a court would be "open ended."

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

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

4. H. Con. Res. 66 at par. 2 & 3.

5. *Id.* at par. 4.

6. *Id.* at par. 5.

7. *Id.* at par. 6.

In support of that resolution, the Section of International Law and Practice prepared in July 1990 a report with recommendations which suggested conferring on an international criminal court jurisdiction restricted to crimes specified in the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.⁸ The House of Delegates had before it a report of the Milwaukee Bar Association with a broader recommendation supporting House Concurrent Resolution 66. At the request of the Section of International Law and Practice, the House of Delegates deferred action on the Milwaukee Bar Association recommendation in order to allow the Section of International Law and Practice and the Milwaukee Bar Association to prepare a joint report and recommendation.

The issue received renewed impetus in the waning hours of the 101st Congress as a result of amendments proposed by Senator Arlen Specter to the Foreign Operations Appropriations Bill for the 1991 fiscal year.⁹ By those amendments, House Concurrent Resolution 66 was revised and adopted by the Congress. The legislation provides in pertinent part as follows:

(b) It is the sense of Congress that—

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

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

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

(d) The Judicial Conference of the United States shall report to the Congress by October 1, 1991, on the feasibility of, and the relationship to, the Federal judiciary of an International Criminal Court.¹⁰

8. ABA Section of International Law and Practice, Recommendation and Report to the House of Delegates Regarding the Establishment of an International Criminal Court with Jurisdiction Restricted to Crimes Specified in the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Aug. 1990).

9. See Supplemental Statement of Senator Arlen Specter for the *Congressional Record* Regarding the Need for an International Criminal Court (Oct. 27, 1990). A copy of the Supplemental Statement is included among the accompanying materials at Appendix A.

10. 142 Cong. Rec. S16216 (daily ed. Oct. 19, 1990) (statement of Sen. Specter). A complete version of the resolution is set forth in the portion of the *Congressional Record* included among the accompanying materials at Appendix B. A printed version of the legislation has yet to be issued in its final form. However, Senator Specter's staff has confirmed that no modifications were made to Amendment 3068 prior to its passage.

III. Recommended Action

It is recommended that the American Bar Association assist in the exploration of the need for the establishment of an international criminal court and in the evaluation of proposals for such a court by appointing a committee of experts, a Blue Ribbon Committee. It is suggested that the President of the American Bar Association should make the arrangements for that committee, after consulting the Section of International Law and Practice and the Section of Criminal Justice. In addition, these consultations would enable the President to determine the modalities of the Committee's work and its scope.

In particular, it would seem desirable that the report should address, *inter alia*, the following issues:

1. Identification and explanation of factors to be considered, both for and against, the establishment of an international criminal court.
2. Preparation of a model for an international criminal court with details as to its jurisdiction and procedure.
3. Recommendations as to whether and, if so, in what manner and to what degree the United States should avail itself of the jurisdiction of an international criminal court.

The Committee should also take into account the work of the International Law Commission of the United Nations on this topic.¹¹ In the most recent session of the International Law Commission, the concept of an international criminal court was examined at the request of the General Assembly of the United Nations. In July 1990, the International Law Commission reported its agreement in principle on the "desirability of establishing a permanent international criminal court to be brought into relationship with the United Nations system."¹²

Respectfully submitted,

Homer E. Moyer, Jr.,
Chair
Section of International Law
and Practice

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11. *See, e.g.*, U.N. GAOR Supp. (No. 10) at 58-62 U.N. Doc. A/45/10 (1990).

12. 45 U.N. GARO Supp. (No. 10) at 36-54.

