

**LETTER FROM THE PRESIDENT OF THE ASSOCIATION OF THE BAR  
OF THE CITY OF NEW YORK**

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To The Readers Of The Metropolitan Corporate Counsel:

On July 1, 2002, the Rome Statute of the International Criminal Court ("ICC") will enter into force. The precondition of ratification by sixty nations was satisfied on April 11. The Rome Statute has been ratified by all Western democracies except the United States.

In January 1997, our Committee on International Law and our Committee on International Human Rights issued a thorough report calling for an international criminal court. We urged that the Court's jurisdiction be limited to the core crimes that all nations agree are proscribed by international criminal law: war crimes, crimes against humanity and genocide. That recommendation is now part of the Rome Statute.

We take pride in the creation of the ICC. We were also proud when the United States signed the Rome Statute. We are distressed, however, that the President has not submitted the Rome Statute to the United States Senate for ratification and is taking the unusual if not unique step of "unsigned" it. Even more appalling, anti-ICC legislation has been proposed in Congress that is designed to punish countries that ratify the ICC.

On April 11, at the urging of our Committees on International Law, International Human Rights and United Nations Affairs, I wrote the President urging the United States to join with its closest friends and allies to support this landmark advance in international criminal law.

Our country's hostility to the International Criminal Court comes at a high price. It places us in the company of problem, non-democratic states. It creates conflict with our allies that impedes the cooperation necessary to fight terrorism. Particularly important, it reduces materially the likelihood that the leadership of Al Qaeda and other terrorist organizations will be brought to justice. This last consequence should be of particular concern to New Yorkers.

As we said in our 1997 report, an international criminal court is needed to enforce international criminal laws that protect civilians who are increasingly the primary target of combatants.

During this century, warfare has evolved from conflicts where the principal victims are members of national armed forces, to conflicts where the majority of victims are innocent civilians. In many instances civilians have been the prime targets of armed combatants, in clear violation of the accepted norms of international criminal law.

A minimal but essential response to the indiscriminate barbarity of modern warfare, therefore, should be a permanent mechanism to enforce established international criminal law.

Crimes against humanity are inhumane acts of a very serious nature "committed as part of a widespread and systematic attack against a civilian population on national, political, ethnic, racial or religious grounds." (quoting the 1994 Draft Statute of the ICC prepared by the International Law Commission, U.N. Doc. A/49/10(1994)).

Our 1997 Report recommended that the jurisdiction of the International Criminal Court include crimes against humanity not committed in connection with armed conflict. We said that this nexus is no longer required under existing law. The Rome Statute was drafted in conformity with our recommendation.

The September 11 attacks by suicide hijackers are part of Al Qaeda's widespread and systematic attacks against civilians. Although the ICC will not have jurisdiction over crimes committed before July 1, 2002, the attacks of September 11 are within the Rome Statute's definition of crimes against humanity.

Prosecution before the ICC offers advantages when compared to military tribunals. Under U.S. law and President Bush's military order, military tribunals are limited to violations of the law of war and do not have jurisdiction over crimes against humanity. The application of the law of war to terrorist organizations poses many legal uncertainties that may be avoided in a prosecution for crimes against humanity.

In addition, other countries will be more likely to surrender terrorists to the ICC than to a U.S. military tribunal. A trial by the ICC, with the stipulated protections for defendants and victims, would have worldwide legitimacy. Our country would also avoid creating a dangerous precedent that could result in other countries creating or expanding their use of military tribunals. Why does the United States oppose the ICC even though it could play a useful role in punishing the leadership of terrorist organizations that systematically target civilian populations? The President agrees, it is said, with leaders of our armed services who do not want any possibility that they could be prosecuted before the ICC.

The terms of the Rome Statute, however, reduce this possibility to near zero because the United States could block the assumption of jurisdiction by the ICC by exercising its own prosecutorial discretion in good faith. In the end the opposition likely rests more on ideology about U.S. sovereignty than it does on practical thinking.

Even though our government won't support the ICC, the Association will. We are meeting with other bar associations from around the world in Montreal this June to discuss the establishment of an organization of defense lawyers who will practice before the ICC. We will continue to urge the ratification of the Rome Statute and seek the possibility of a compromise that would allow for ratification by the United States. There is no better way for the law to be a constructive force for the peace and security of the world. The times, therefore, call for that effort.

Sincerely,

Evan A. Davis