



QUESTIONS & ANSWERS ON DEFENSE COUNSEL AT THE INTERNATIONAL CRIMINAL COURT

What due process rights are guaranteed to defendants at the ICC relevant to defense counsel?

Defendants at the ICC have the right to counsel, the right to be tried without undue delay and all other rights guaranteed in the US with the exception of a jury trial. Defense teams are entitled to disclosure of evidence by the Office of the Prosecutor (OTP), to conduct investigations without governmental or other interference, and to have adequate and unrestricted access to the accused.

If a case proceeds to trial, the defendant is guaranteed:

- adequate time and facilities for the preparation of his defense;
- the choice of his own counsel, even if indigent;
- free communication with counsel in confidence;
- the right to be present at trial and to conduct the defense in person or through legal assistance of his choosing; and
- the right to be informed that he has the right to such legal assistance, and the right to have legal assistance assigned by the Court in any case where the interests of justice so require and without payment if he lacks sufficient means to pay for it.

How do those rights vary from US courts and other international criminal tribunals?

Defendants at the ICC enjoy defense counsel rights substantially similar to or greater than in US and other international courts. Defendants at the Nuremberg Trials after World War II had the right to counsel of their choice, and if they had none, a German advocate was appointed for each by the tribunal. Defendants tried at the ICTY and ICTR have received far greater due process rights, including the right to defend themselves in person or through legal assistance of their choosing; the right to be informed, if they do not have legal assistance, of this right; and the right to have legal assistance assigned to them where the interests of justice so require and without payment for this assistance in cases of indigence. State and federal courts in the US also provide for the choice of counsel and provide legal assistance to those who cannot afford it.

When may a suspect or accused person have a lawyer?

A person who has been arrested or who will appear before the Court pursuant to a summons is entitled to assistance in the preparation of his defense. Such persons are entitled to counsel at all stages of proceedings, including pre-trial, trial, appeal and sentencing.

How does an ICC defendant obtain counsel?

Defendants are entitled to select counsel from a list of qualified persons maintained by the Registry. A list of counsel must be made available to a detainee upon arrival at the ICC detention center. If a suspect or defendant is found to be indigent, he or she is entitled to assistance under the Court's legal aid program.





The Court may appoint counsel when a person entitled to legal assistance is to be questioned, or in any case where a person entitled to legal assistance is in need of it and that person has not already secured representation. This may include instances “where the interests of justice so require”, when a defendant will be without counsel for a brief period but is in urgent need of legal assistance, and when there is a unique and brief opportunity for the Prosecutor to obtain and evaluate important evidence.

How is the size of an indigent defendant’s defense team determined?

This issue has not yet been fully resolved. The Legal Aid Proposal presented by the Court envisages a core team that works throughout the proceedings, consisting of one attorney, one assistant, and one case manager and determines how the teams will be paid. The core team will be supported by additional resources during the trial phase, including the automatic assignment of a second attorney. In addition, the formula would allow for additional resources taking into account the characteristics of the case, including the number of charges against the defendant, the number of victims who seek to participate, and the number of pages of evidence disclosed by the OTP. Critics have noted that this proposal is too limited to adequately provide for defense teams. The International Criminal Bar (ICB) has suggested additional factors that a formula for counsel will need to take into account the complexity of ICC cases.

Can a defendant represent him or herself?

Yes. A defendant wishing to represent him or herself must inform the Registry of this choice at the first opportunity.

How is the ICC’s Office of Public Counsel for the Defense (OPCD) different from counsel assigned to or appointed by a defendant?

The OPCD is an office based in, but independent from, the Registry. This office ensures that the capacity and resources of the defense are reasonably balanced with those of the prosecution (“equality of arms”), and that the rights of the defense and the right to a fair trial are safeguarded. It serves as a resource at the Court for defense counsel and, at the investigations stage, may represent and protect the rights of the defense generally.

What are the qualifications for appearing as defense counsel before the ICC?

In order to qualify to appear or represent a defendant before the Court, counsel must demonstrate established competence in international law or criminal law and procedure, relevant experience in criminal proceedings, and ten years of relevant experience. In addition, defense counsel must be able to work in French or English, the two working languages of the Court.

What resources and training does the Court provide to defense counsel?

The Registrar is required to provide support, assistance, and information to all defense counsel appearing before the Court and, as appropriate and necessary, support for professional investigators. In addition, the Registrar must assist counsel in traveling to the Court and the location of any proceedings, to wherever his client is in





custody, or for on-site investigations. The Registry must also provide assistance to persons representing themselves. The Registrar is also charged with providing training for defense counsel in cooperation with national defense and bar associations to promote specialization and training of lawyers on the ICC as well as training on and access to the Court's case law database.

Are defense counsel entitled to disclosure of evidence prior to trial?

Yes. The prosecution must provide the defense with the names and statements of any witnesses it intends to call and "exculpatory" evidence which may show the innocence of the defendant. The Prosecutor must also permit the defense to inspect any books, documents, photographs, or other tangible objects in possession or control of the prosecutor which are material to the preparation of the defense or are intended for use by the Prosecutor as evidence. The defense must provide similar disclosures to the Prosecutor.

Do defense counsel have any privileges or immunities to protect them in their work?

Defense counsel are provided protections by the Court and States Parties, as set out in the Agreement on the Privileges and Immunities of the Court (APIC), to ensure the proper functioning of the Court. More specifically, States Parties which have ratified the APIC must accord to defense counsel: immunity from arrest or detention and from seizure of personal baggage; immunity from legal process of every kind in respect of words spoken or written and all acts performed in an official capacity, which immunity shall continue to be accorded even after he or she has ceased to exercise his or her functions; inviolability of papers and documents in whatever form and materials relating to the exercise of his or her functions; and the right to receive and send papers and documents in whatever form for the purposes of communications in the course of his or her functions as counsel. However, lead defense counsel do not enjoy the same total and unqualified privileges and immunities as the other main participants in the Court's proceedings – namely the Prosecutor, Deputy Prosecutors, the Registrar and judges – as provided in the Vienna Convention on Diplomatic Immunities. It is therefore possible that an ICC defense counsel could be targeted and arrested for reasons unrelated to an investigation in order to halt any proceedings.

Are any independent professional associations for defense counsel represented at the ICC?

Yes. The International Criminal Defense Attorneys Association (ICDAA), based in Montreal, was created in 1997 to lay the foundations for a full, fair and well-organized defense in proceedings before the ICC and other international tribunals. In addition, the ICDAA helped launch the International Criminal Bar (ICB) which was established to ensure that counsel are able to practice in total independence before the ICC, to assist counsel to speak in a strong and unified voice regarding issues which affect their practice, and to guarantee an equitable trial to victims and accused. The ICB seeks to have the Assembly of States Parties facilitate its establishment as a legitimate and representative interlocutor of the Registrar and the Court on all issues related to the legal profession.

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Updated June 30, 2008*

