



## ***QUESTIONS & ANSWERS ON THE INTERNATIONAL CRIMINAL COURT: A TRUE CRIMINAL COURT***

### ***Is the International Criminal Court (ICC) like courts in the United States?***

Yes. The ICC has all of the same components as US criminal courts; a prosecutor's office, a body of judges which preside over pre-trial, trial and appeals proceedings, defense counsel and an administrative office.

The ICC Office of the Prosecutor (OTP) collects and examines evidence in the same way as the police in the US, and prosecutes cases as US prosecutors do. The 18 judges of the ICC are also similar to their US counterparts. The ICC judges are organized into Pre-Trial, Trial and Appeals Divisions. US courts do not have a Pre-Trial Chamber (PTC), but many of its tasks are similar to pre-trial phases in US courts. The ICC Trial Chamber conducts criminal trials much as US judges. Similar to US appellate courts, the Appeals Chamber deals with appeals against decisions of the Pre-Trial and Trial Chambers. In addition, both the ICC and US courts have administrative branches which are responsible for the non-judicial aspects of the Court.

As to the defense: a defendant standing trial in the ICC has the same representation rights as an accused in US courts; to conduct the defense in person or to choose legal representation. If the defendant is destitute, counsel will be appointed on his or her behalf. (See pages 1-6 of the AMICC paper *The International Criminal Court: A True Criminal Court*, by Harriette Hill, available at [www.amicc.org](http://www.amicc.org).)

### ***How do the powers of the ICC Prosecutor compare to those of prosecutors in the US?***

The prosecutor is central to providing justice in both the ICC and US courts, as he or she conducts the investigations and prosecutions. The ICC Prosecutor has the same discretion over the course of criminal proceedings as US prosecutors. The ICC Prosecutor is responsible for starting an investigation and has discretion over what charges to file in the same way as US prosecutors. To file a charge, the ICC Prosecutor and US prosecutors must convince judges (and in the US, sometimes grand juries) that the available evidence is so strong that the defendant is likely to be convicted. (See pages 6-10.)

### ***How does enforcement of the accountability of the ICC Prosecutor compare to US prosecutors?***

The ICC Prosecutor is subject to accountability requirements similar to those of US prosecutors. The Office of the Prosecutor is foremost accountable to the Assembly of States Parties (ASP). The ASP elects the Prosecutor and Deputy Prosecutors by an absolute majority, and may remove them from office if they act prejudicially. The investigative work of the Prosecutor and his office are also overseen by the Court's judges, especially the PTC.

US prosecutors have *absolute* discretion to proceed with an investigation and indictment although judges can throw out unmeritorious claims in various pre-trial phases in a similar way to PTC authorization. The safeguards in US courts against oppressive prosecution are grand jury proceedings and preliminary hearings, which resemble the ICC confirmation of charges hearing. However, in the pre-trial phase of ICC proceedings, the Prosecutor must provide both incriminating and exonerating facts, and defense counsel and victims' legal representatives can present evidence and views. In contrast, US federal courts leave it to the good faith of the prosecutor to present conflicting evidence. Also, US prosecutors may have greater influence over the pre-trial phase. While grand juries are made up of laypersons, the ICC Prosecutor is instead subject to the stringent review of the PTC, comprised of three expert judges. (See pages 10-11.)





## ***How does the independence of ICC judges and American judges compare?***

An independent judiciary is an integral feature of both the ICC and US courts. The Rome Statute contains a number of mechanisms to directly ensure the independence of ICC judges. ICC judges hold office for a non-renewable term of 9 years, which makes it impossible for outside political influences to exert pressure on them based on the hope of re-election. ICC judges also have control over the Court's jurisdiction in the same way as US judges. In addition, no two judges may be nationals of the same state. Furthermore, ICC judges acting improperly are subject to removal from office, imposition of disciplinary measures or to disqualification from a particular case. These stringent provisions allow for the discipline of misbehaving judges while blocking frivolous attacks.

ICC judge independence is also derived from some of the accountability provisions of the Rome Statute. The election process provides that successful candidates must secure a two-thirds majority by the Assembly of States Parties. The Rome Statute also requires a panel of judges to carry out most judicial functions, including the trial verdict and all appeals. In addition, judges must give reasons for their decisions, and are instructed to attempt unanimity in their opinion, which may only be replaced by a majority verdict if consensus proves impossible.

A similar system of checks and balances exist in US federal courts to ensure the independence and accountability of US judges. The presidential nomination for a judicial candidate can only be confirmed "by and with the advice and consent of the Senate," and disciplinary action may also be taken against federal judges for "Treason, Bribery or other high Crimes and Misdemeanors", which involves impeachment by the House of Representatives and conviction by the Senate. (See pages 2-4, 21-22)

## ***Do the judicial proceedings of the ICC resemble those of courts in the US?***

Yes. Only the Pre-Trial Chamber authorization phase is unique to ICC trial proceedings. The Investigation Division of the OTP starts the criminal process by investigating the alleged crimes, which in the US system is the task of the police. If the ICC Prosecutor initiates an inquiry independently, he or she must submit the situation to the PTC for authorization to proceed to a formal investigation.

After the investigations, where appropriate the ICC or US prosecutor will request the issuance of a warrant of arrest or summons to appear. An initial hearing follows taking the form of a preliminary hearing or grand jury in US courts and a confirmation of charges hearing in the ICC; at this stage in both US and ICC proceedings the charges are either confirmed or dismissed. On confirmation of the charges, the PTC will then be responsible for the resolution of any pre-trial issues in the same way that US courts rule on pre-trial motions. A Trial Chamber is then established, which has the same responsibility as a trial court in the US. In both the ICC and US courts, the accused is then either found guilty or innocent, and if convicted is sentenced. A US or ICC defendant also has an opportunity to appeal on a factual, procedural or legal error. (See pages 12-20.)

## ***What does the ICC Prosecutor need to prove in comparison to a prosecutor of a criminal trial in the US?***

At the pre-trial phase, to confirm the charges the ICC Prosecutor must produce sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. This corresponds to the probable cause standard for US prosecutors, which requires a reasonable belief that the accused committed the crime. At the trial stage, the standard of proof on the ICC Prosecutor and US prosecutors is the same; to convict the accused they must prove guilt beyond reasonable doubt. (See pages 15-16.)





***Does the ICC determine its own jurisdiction over a case just as criminal courts do in the US?***

Yes. The ICC has the power to determine its jurisdictional mandate and limits in the same way as both US criminal courts, and all true criminal courts globally. Despite criticism by US commentators of the Court’s “jurisdiction to determine jurisdiction”, this feature actually confirms its status as a true criminal court. (See page 14.)

***Do ICC defendants have the same due process rights as criminal defendants in the US?***

Defendants at the ICC enjoy all of the due process rights of defendants in US courts except trial by jury; instead, ICC trial verdicts and decisions are made by three-judge panels. The US has long accepted that its citizens, including US servicemembers, would not receive jury trials in countries where juries are not used and has even signed extradition treaties with countries that explicitly permit Americans to be tried without a jury. Moreover, the US is a strong supporter of the ICTY and ICTR, neither of which provides for trial by jury. (See pages 17-19.)

***How are suspects and defendants detained before trial and imprisoned after the trial, conviction and sentencing?***

When a State Party receives a request for provisional arrest or for arrest and surrender of a subject from the PTC, it must apprehend the person, who is kept in custody in a national detention facility until he or she is transferred to the ICC. The defendant is then transferred to the ICC and detained in the ICC’s detention facility at the seat of the Court unless he or she is granted interim release pending trial. If the person is convicted, the offender will serve out a term of imprisonment in a national prison facility of a willing ICC State Party, in the same way as a sentenced person in the US justice system. (See pages 7-8, 19.)

***Does the ICC have a system of checks and balances equivalent to the US courts?***

Yes. The distinct purposes and priorities of the four organs of the ICC are designed to check and balance each other. The Assembly of State Parties has the ultimate oversight authority of the Court. For example, the ASP elects the Prosecutor, Deputy Prosecutor and judges to the Court, and can also remove any one of these officials from office if they act improperly. The Registrar and Deputy Registrar are elected and can be removed by the judges of the Court. They are also subject to the authority of the Presidency in their daily work. Additionally, both the judges and the Prosecutor of the ICC have different mechanisms to control each other’s impartiality; the PTC provides substantial oversight to the Prosecutor, while the Prosecutor can request the disqualification of a judge. A majority of the judges decides whether or not to disqualify a judge, and the Appeals chamber decides whether or not to disqualify the Prosecutor. (See pages 20-23.)

***How does the ICC’s relationship with and independence from the United Nations Security Council contribute to the ICC’s character as a true criminal court?***

A true criminal court must have freedom from external pressures and influences, a feature promoted by judicial and prosecutorial independence. In addition, all true criminal courts have the right to determine their own jurisdiction, and must apply the law universally to all the parties before them. During negotiations for the ICC, the US insisted that the Security Council be given a monopoly on determining the cases the ICC would try. These efforts failed however, and as a result the ICC’s status as a true criminal court was strengthened. Had the Security Council been given sole power to determine the cases given to the Court, it would have effectively created exemptions from the ICC’s jurisdiction for its five permanent members. Additionally, the Council is an



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overtly political body and therefore its choice of cases could have been influenced by external pressures. Moreover, had the Security Council alone been able to refer cases, the Court would not have had the power to determine its own jurisdiction.

Nevertheless, the Security Council does have some power in the ICC. It can refer situations to the ICC, although these referrals are not binding on the Court. In addition, the Security Council can defer an investigation or prosecution. This power is intended to combat the “peace versus justice” dilemma. The question of deferring to peace efforts is inherently political; it is important therefore to separate this from the work of the Court. (See pages 20-21.)

*Researched and drafted by Harriette Hill  
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