

QUESTIONS & ANSWERS ON THE RIGHTS AND DUTIES OF DEFENSE COUNSEL AND THE PROTECTIONS PROVIDED FOR THE ACCUSED AT THE INTERNATIONAL CRIMINAL COURT

What internationally protected rights are provided for in the Rome Statute?

The rights codified in the Universal Declaration of Human Rights and the Covenant on Civil and Political Rights are included within the language of the Rome Statute. The Universal Declaration specifically refers to rights that should be afforded to all persons, including the right to be “entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” The Covenant on Civil and Political Rights goes into further detail and includes rights such as the right “to be tried without undue delay, to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; and to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing.” These documents are among those that provide for globally recognized rights, and the framers of the Rome Statute were sure to include them in the Statute.

What are the some of the specific rights in the Statute for individuals being investigated?

Article 55 [rights of persons during an investigation] affords the person under investigation by the Court extensive rights, including the right to remain silent, the right to a speedy trial, the right not to be subject to arbitrary arrest or detention, and the right to have legal counsel provided if he or she cannot afford it. Under this article, the individuals has the right to be informed before being questioned that there are grounds to believe that he/she has committed a crime within the Court’s jurisdiction. In addition, the accused has the right to be questioned with counsel present.

How do these rights differ if these individuals are accused of a crime?

After charges have been confirmed and the defendant has been advised that he/she will be brought before the Court, article 67 [rights of the accused] expands upon the rights in article 55. It affords the accused the same rights as listed above, but also provides that he/she is to be tried without undue delay, will have adequate time and facilities for the preparation of defense, and will have, free of cost, an interpreter and translations as necessary for his/her defense.

How does the ICC ensure an expeditious trial?

The establishment of the Pre-trial Chamber (PTC) may have been one of the most positive steps that the ICC has taken to support the defense, guaranteeing the accused an expeditious trial. The PTC is responsible for the confirmation of charges, issuance of arrest warrants and summons to appear. It is this chamber that decides whether the Prosecutor may begin a formal investigation. The PTC has already begun to function in the situations currently before the Court.

What steps have been taken by the ICC to ensure that only qualified defense counsel represent defendants before Court?

Rule 22(1) of the Rules of Procedure and Evidence (RPE) [appointment and qualifications of counsel for the defense] states that counsel must be competent in criminal law and procedure, possess the necessary relevant experience in criminal proceedings, and be fluent in either of the working languages of the court - English or French. Furthermore, the Registrar created the draft “Code of Professional Conduct for counsel before the ICC.” This document outlines the

requirements for counsel and also highlights the standards that the counsel must abide by. This document sets a standard for all lawyers to meet, and will also serve as an internal enforcement mechanism for these entities by placing checks on one another.

What is “equality of arms” and why is it important?

Defined simply, equality of arms means that the defense and the prosecution should enter into court “armed” equally, that is, with equal status before the court, equal access to its resources, and equal support facilities. It is vital for “equality of arms” to exist between the prosecution and the defense so that a fair judgment can be reached. The interests of justice can only be furthered if all participants in the legal proceedings are provided with an equal and fair opportunity to prove guilt or innocence.

What are some of the shortcomings of the Rome Statute in relation to the defense?

Although the ICC has begun to take up its responsibilities to defense counsel, there are some areas where there is room for improvement. Article 43 describes the duties of the Registrar, but his/her duty to defense counsel is not mentioned at all. Article 48 [Privileges and Immunities] does not afford the defense counsel the same immunities and privileges as the Prosecutor and his office. In addition, Article 51 [Rules of Procedure and Evidence] states that amendments to the RPE may be proposed by a state party, the judges acting in an absolute majority, or the Prosecutor; the defense does not have the authority to propose an amendment. Furthermore, Article 52 [Regulations of the Court] states that the Prosecutor and the Registrar will be consulted as to any amendments or elaboration of the regulations, but there is no requirement to consult defense counsel.

What steps have been taken to address the gap in the Rome Statute?

The Rules of Procedure and Evidence, the establishment of the Defense Support Section under the Office of the Registry, the creation of an Office of Public Defense Counsel under Regulation 77 of the Regulations of the Court, provisions for the Registrar in relation to defense in the draft Regulations of the Registry, and protections for the defense in the Agreement of Privileges and Immunities, were all established with the interests of the defense in mind. In addition, lawyers and legal associations created the International Criminal Bar to provide a venue through which defense counsel may be represented before the ICC. These institutions, along with other proactive entities, constitute attempts by the Court to provide adequate facilities for defense counsel, and are an effort to make the defense feel like an integral part of the Court.

What specific provisions have been included in the Rules of Procedure and Evidence to address the shortcomings in the Rome Statute?

The RPE not only elaborated on the duties of the Registrar that are provided in the Statute, but also expanded upon the provisions concerning defense counsel. Some of the rules specifically state that the defense counsel and representative bodies of defense counsel should be consulted in the drafting of various regulations and the Code of Professional Conduct. The relevant articles of the Rome Statute do not contain such provisions. Rule 20 provides the most extensive provisions in relation to the defense. For instance, it provides for the Registrar to organize the staff of the Registry in a manner that promotes the rights of the defense, to provide support, assistance, and information to all defense counsel appearing before the ICC, and to provide the defense with adequate facilities so that counsel may carry out its functions. Furthermore, Rule 20(3) states that

the Registrar may consult with independent representative bodies of counsel or legal associations (whose creation may be facilitated by the ASP).

What is the difference between the Defense Support Section and the Office of Public Defense Counsel?

The Division of Victims and Counsel was created within the Registry of the ICC. This section is divided into two units: the Defense Support Section and the Victims' Participation and Reparations Section. The Defense Support Section is responsible for the administrative and logistical aspects of legal assistance for the defense. The Regulations of the Court established the Office of Public Defense Counsel per Regulation 77. This office will handle all the legal aspects that the Defense Section does not. At this point, it is unclear how broadly mandated the rights and functions that the Regulation gives this office will be, and especially how much support and assistance it will be expected to give defense counsel generally. It has not been determined if this office will be small with a limited mandate, or large, with a great many functions and rights. It appears that Regulation 77 will be approved by the Assembly of States Parties very soon, perhaps at its 4th meeting in November.

Is the International Criminal Bar recognized by the ICC?

The International Criminal Bar (ICB) was created to ensure the quality of defense counsel and also serve as an organization through which they may collectively organize and speak with one voice. This bar association was not created by the Court, but rather through the efforts of legal associations and individual lawyers who saw this as an essential entity of the ICC. Although the Registrar does not recognize the ICB, it is the most developed and organized association of defense counsel before the Court. There is no provision for the ASP to formally recognize an association of lawyers, but Rule 20(3) of the RPE makes it strongly advisable for the Registrar to consult with an organization that has been facilitated by the Assembly. If the ASP states that it is its desire to facilitate the establishment of the ICB, the association will enjoy an improved status with the Registrar. That improved status will assist the ICB in completing its mission to speak with one voice and provide a venue through which its members may mobilize. It will also give it the power to discipline itself and uphold the integrity and credibility of its members. Once the ASP so designates the ICB, a component of that designation should include facilities provided for the ICB at the Court.

What provisions are included in the Rome Statute or other legal documents of the ICC to ensure that States cooperate with the Court and its officials, including the defense teams?

Part 9 of the Rome Statute, "International Cooperation and Judicial Assistance," creates an obligation on those States that ratify the Statute to not interfere or inhibit the work of the Court. It is their duty to assist the ICC in carrying out its functions. The Court may request States Parties to arrest and surrender persons to the ICC, identify and provide information as to the whereabouts of items and individuals, question persons being investigated and assist in the service of documents. Furthermore, the Agreement on Privileges and Immunities was created in addition to the obligations set forth in the Rome Statute. The agreement gives court officials and staff certain immunities and privileges so that they may conduct their work independently and adequately. By ratifying this agreement, countries agree to respect the mandate of the Court's staff and officials so that their work is not compromised or affected.