



A COMPARISON OF CRIMINAL PROCEDURE IN US FEDERAL COURTS AND AT THE ICC

This paper compares the various stages of US and ICC criminal procedures and finds that they are generally similar although they sometimes use different terms. In addition, it explains some of the rights afforded to defendants in US federal criminal proceedings and at the ICC.

In the US, there are state, federal and military legal systems. There are also state and federal specialty courts, like those dealing with bankruptcy. Since most of the fifty states have adopted their criminal procedure based on the federal system, for clarity this paper compares the US federal system and the ICC. Specifically, this paper explains the similarities between the investigation process, application for an arrest warrant, formal charges, the arrest, detention and first formal appearance in a US federal court and at the ICC.

In the US, protections afforded to defendants in criminal proceedings are found in the US Constitution. The Constitution sets the minimum standard of protections afforded to an accused, and the fifty states may increase these protections. This paper focuses on federal protections because not all constitutional protections required in federal courts extend to the states. Specifically, the grand jury indictment imposed by the Fifth Amendment is required in federal proceedings but is not mandatory at the state level where judges now often have the authority to issue indictments. Therefore, to maintain clarity, this paper will focus only on the rights afforded individuals in federal criminal proceedings.

Comparison of Criminal Proceedings

Investigation

In the US, law enforcement agencies, like the FBI, handle criminal investigations leading to prosecution. At the ICC, there is no police force; therefore, the investigation is handled completely by the Office of the Prosecutor (OTP).

Application for an arrest warrant

Both the US and the ICC use arrest warrants to secure the appearance of a suspect in court. An arrest warrant is not an official charge against a suspect in either system; instead, it is only a document that permits seizure of the suspect. Further, both systems require the application for an arrest warrant to be made to a judicial body. The judicial body determines whether sufficient evidence has been presented to justify issuing a warrant.

In the US, the police may request an arrest warrant from a judge or a magistrate. In order to obtain it, they must show that it is reasonable to believe that the person named committed a crime, is committing a crime or is about to commit a crime. The arrest warrant may be obtained at any time during the investigation of a crime.

At the ICC, the Prosecutor presents to a three judge panel an application for an arrest warrant or summons to appear. The application must present evidence establishing reasonable grounds to believe that the person named committed a crime within the jurisdiction of the Court. The Prosecutor must follow the procedures set forth in the Rome Statute which require the application for the arrest warrant or summons only after sufficient evidence has been collected.





Arrest

In the US, the judge issues the arrest warrant to a law enforcement agency which is responsible for the arrest of a suspect. The ICC depends on the cooperation of its State Parties to carry out arrest warrants since it does not have its own police force. At the ICC, an arrest warrant is transmitted to relevant States Parties and other governments to be executed. The Rome Statute requires State Parties to arrest a suspect wanted by the Court.

Detention hearing

Both the US and the ICC require an initial detention hearing which is different from an arraignment. In the US, a suspect in federal custody is brought before a magistrate for an initial hearing, also known as a detention hearing, which to satisfy US constitutional standards “must be held without undue delay.”

During the hearing, the magistrate informs the defendant of his or her rights including: the right to remain silent, the right to have counsel appointed if he or she is unable to pay for one, and the right to a preliminary hearing. (A preliminary hearing is not held in federal criminal cases if the defendant has already been indicted or was charged with a misdemeanor.) Following this hearing, the suspect will return to court for the arraignment.

Similarly, if a suspect is arrested by an ICC State Party or another government, the arresting state may conduct a detention hearing if required by its legal system. In this hearing, the arresting state can satisfy itself that the person named in the arrest warrant is the person arrested. After determining the identity of the suspect, the arresting state will transport the suspect to the ICC.

Once the suspect is in custody, the ICC Pre-Trial Chamber may conduct its own detention hearing. At this initial hearing, the Court makes sure the suspect is aware of the charges against him or her and is advised of his or her rights under the Rome Statute. One right afforded to a suspect is the right to have counsel appointed if he or she is unable to hire one. At this stage, the Pre-Trial Chamber takes very seriously its obligation to communicate to the suspect the importance of having counsel represent him or her and strongly encourages the suspect to accept a court appointed attorney if necessary. The Court may appoint a Duty Counsel to the purpose of this hearing and until a suspect has selected counsel.

Another right at the ICC allows the suspect to ask to be released pending trial, similar to provisional release on bail in the US. The suspect may petition for release and the Court will determine if release is appropriate based on the likelihood that the suspect would voluntarily appear before the Court. After this hearing, the suspect will return to court for the confirmation of charges hearing.

Formal charges

In both the US and at the ICC, a court or grand jury must formally examine the charges before a suspect can be put on trial. In US federal cases, a grand jury reviews evidence presented by the prosecutor to determine if there is sufficient evidence to justify formally charging the suspect. If the grand jury finds sufficient evidence, it will issue an indictment. This document, which is sometimes called a bill of information at state level, lists the charges against the defendant.

The indictment is what charges the suspect in US federal criminal cases. The arraignment is the court appearance where these charges are formally presented to the defendant. During the hearing, the judge makes





sure the defendant has time to read and understand the charges, the defendant makes a plea of guilty or not guilty and the judge sets the schedule for trial. If the suspect was not indicted by a grand jury prior to his or her arraignment, the court will hold a preliminary hearing to ensure the rights of the suspect until a grand jury can consider the charges against him or her.

At the ICC, the defendant is formally charged during the confirmation of charges hearing after he or she has been arrested and is in the Court's custody. During the hearing, the Prosecutor presents evidence and the defendant may be represented by counsel. The defendant is provided with a copy of the charges against him or her and is informed of the evidence the Prosecutor will rely on at trial. The defendant may challenge the Prosecutor's evidence, object to the charges and present his or her own evidence.

The confirmation of charges hearing may be held without the presence of the defendant. The hearing is held if the defendant has waived his or her right to be present or has fled and all reasonable steps to locate them have failed. Similarly, the ad hoc tribunals for the former Yugoslavia and Rwanda established by the UN Security Council also allowed charges to be confirmed without the defendant being present. Supporters and founders of the Court wanted to prevent claims that the Court is ineffective because it is unable to produce the defendant or evidence and testimony might be lost because of delays. An ICC trial requires the defendant to be present.

Rights of Suspects and Accused Persons in Criminal Proceedings

Both the US and the ICC provide protections for an accused during criminal proceedings. In the US, these protections are found in the Bill of Rights in the US Constitution; the Rome Statute imposes these on the ICC. The Rome Statute incorporates elements of both common and civil law traditions. Accordingly, its terminology may seem different but the basic protections afforded are the same as those required in US federal courts.

In both systems an accused is afforded the right to remain silent, the right from self incrimination, the right to have counsel present at all stages of criminal proceedings, the right to confront witnesses and the right to be presumed innocent until proven guilty. Further, both systems provide counsel if the accused is unable to afford representation.

In addition, both systems observe rules of evidence and procedure. In the US, the Federal Rules of Evidence and the Federal Rules of Procedure govern the evidentiary and procedural issues at trial. Similarly, these issues are governed by the Rules of Procedure and Evidence at the ICC. These rules provide for the disclosure of exculpatory evidence which is evidence of the defendant's innocence, the disclosure of lists of the witnesses and expert lists that will testify at trial and for disclosure of other documents, reports or evaluations conducted by experts. Failure to comply with these rules may result in the case being dismissed at the ICC or a judge declaring a mistrial in the US.

A difference between the US federal criminal process and the ICC is the use of jury trials. In the US, the right to a jury trial is applicable to both federal and state courts. However, this right may be reserved for serious crimes such as felonies and may not be guaranteed for petty offenses. In addition, a defendant may waive his or her right to a jury trial in favor of a bench trial, a trial by judge. Further, the right to a jury trial does not extend to military courts; instead, military trials are bench trials. The right to a jury trial does not exist at the ICC





because of the impracticality of creating an international jury and because of the complexity of the crimes within the Court’s jurisdiction. Instead, the Court uses a panel of judges with specialized expertise to analyze the evidence and arguments presented by the prosecution and defense as part of their conduct of trial.

Comparison Chart of Criminal Proceedings in US Federal Courts and at the ICC

<u>ICC</u>	<u>Stage in Process</u>	<u>US Federal Courts</u>
· Office of the Prosecutor	<i>Investigation</i>	· Law enforcement agency
· Three-judge panel issues arrest warrant or summons to appear · After sufficient evidence is obtained	<i>Arrest Warrant</i>	· Judge · Magistrate · Anytime during investigation
· ICC State Party or other government	<i>Arrest</i>	· Law enforcement agency
· Arresting state · ICC Pre-Trial Chamber	<i>Detention Hearing</i>	· Magistrate
· Confirmation of charges	<i>Formal Charges</i>	· Indictment by grand jury

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