



Cour
Pénale
Internationale

International
Criminal
Court

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The Defence



The Defence Counsel for
Thomas Lubanga Dyilo
Photo: ICC-CPI/Michael Kooren

The International Criminal Court (ICC) has a mandate to try in a fair and impartial manner and, where guilt is established, punish persons responsible for the most serious crimes of concern to the international community. The Court aims to be a model of judicial administration and is steadfast in its commitment to ensure the proceedings before it are in conformity with the highest legal standards and due process rights of suspects and accused persons. As a fundamental pillar of the scales of justice at the ICC, the defence is a key component of a fair trial.

The importance of safeguarding the rights of the defence is reflected in the Court's founding instrument, the Rome Statute, as well as associated legal texts of the Court and they are effectively guaranteed by the overseeing judicial powers of the judges. Fundamental principles enshrined in the statute include, amongst others, the presumption of innocence and the grounds for excluding criminal responsibility. As provided in article 67 of the Rome Statute, the accused is also entitled to a public, impartial and fair hearing amongst other minimum guarantees that include:

- To be informed in detail of the charges in a language which they fully understand and speak;
- To be tried without undue delay;
- To be defended by themselves or a counsel (lawyer) of their choice, present evidence and call their own witnesses;
- To have adequate time and facilities for the preparation of their defence and to communicate freely and in confidence with counsel;
- To have legal assistance paid by the Court if the person lacks sufficient means;
- To be informed of the identity of prosecution witnesses and to challenge the credibility of these witnesses;

- Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;
- To have free of any cost, the assistance of a competent interpreter and translations of documents as necessary if they are presented to the Court in a language that the accused does not fully understand and speak;
- To have the Prosecutor disclose to the defence exculpatory evidence in his possession which he believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused.

Appointment of counsel: freedom of choice as a principle

Suspects and accused persons have the right to legal representation in proceedings before the Court.

The right to freely choose counsel for suspects and accused persons is a principle that is well safeguarded and entrenched in the legal regime of the Court. Where a suspect or accused person in need of legal representation wishes to appoint his or her own lawyer, the Registry of the Court facilitates this process and provides a pool of qualified counsel. Experienced lawyers who wish to represent defendants must be admitted to the List of Counsel that is currently composed of more than 300 lawyers from around the globe.

Counsel are not however staff members of the Court; they exercise their duties with complete independence in accordance with the Code of Professional Conduct for counsel practicing before the Court.

Appointed counsel is responsible for constructing his or her team, including the selection of the associate counsel, legal assistants, case-managers, resource-persons and professional investigators. The latter along with legal assistants must also be admitted to respective rosters. All members of the defence team have to meet certain qualifications to ensure that they can

assist the defendant effectively and efficiently at the highest international standards.

In situations where a person requires urgent legal assistance and has not yet secured a lawyer, or where his or her counsel is unavailable, the Registrar can appoint duty counsel.

The Chambers can also appoint a lawyer in certain circumstances. For example a Chamber can appoint *ad hoc* counsel to represent the general interests of the defence where there is a unique opportunity to take testimony, a statement from a witness or to examine, collect or test evidence which may not be available subsequently for the purposes of a trial.

Finally, a Chamber can appoint counsel where the interests of justice so require. This power includes the possibility of appointing counsel where there is a person against whom charges have been brought by the Prosecutor, where they have not appeared before, or transferred to, the Court and there are procedural issues which require the intervention of counsel.

The legal aid system

A key component in guaranteeing the rights of suspects and accused persons is the legal aid system, which ensures that the costs of legal representation is paid by the Court for those who lack sufficient resources. The ICC Registrar's decision to recognise a defendant as partially or totally indigent, and whether or not to grant legal aid, is based on objective criteria and a full investigation into the means of the legal aid applicant. Due to the complexity and amount of tasks and materials involved in cases heard before the Court, it is impossible

for a single person to manage and secure an effective legal representation. In view of this reality, under the Court's legal aid system an ideal legal team structure has been envisaged whose remuneration is assumed by the Court. The composition of a team depends on the different stages of the proceedings.

Above and beyond the resources available to a legal team under the Court's legal aid system, counsel can request additional resources on the basis of actual needs of the case, including the number of charges, the number of pages in the case file, etc.

Administrative and logistical support for the defence

To guarantee the rights of defendants at all times during the proceedings, the Registry takes all appropriate measures to ensure that the chosen counsel and his or her team, where applicable, are capable of fully exercising their mandates. For example, the Registry provides all appointed counsel and other members of the legal team a series of services including but not limited to, interpretation and translation services, training for the e-court technology system, office space at the seat of the Court equipped with the necessary office supplies.

The Court provides counsel and their teams with assistance and support in the execution of their investigative requirements. These services include office use, security support, liaison with national authorities and the organisation of local transport.

The Counsel Support Section is the focal point of the above mentioned services, and is established to provide institutional backing to external counsel and their team members.

The Office of Public Counsel for the Defence

The establishment of the Office of Public Counsel for the Defence (OPCD), which is dedicated to promoting, representing and researching the rights of the defence, raising the profile of defence issues, and endeavouring to realise an 'equality of arms' for the defence throughout all stages of an investigation and trial, constitutes a major innovation in the judicial architecture of international criminal courts.

Its staff consists of specialised lawyers, who are permanently updated on the work and jurisprudence of the Court and can provide immediate substantive legal assistance to all defendants and defence teams.

The Office is wholly independent in terms of its substantive functions, but falls within the remit of the Registry solely for administrative purposes. Counsel and assistants within the OPCD act independently.

The tasks of the OPCD include:

- Representing and protecting the rights of the defence during the initial stages of an investigation;
- Providing support and assistance to defence counsel and to persons entitled to legal assistance, either by providing legal advice, or by appearing before a Chamber in respect of specific issues;
- Acting as *ad hoc* counsel if appointed by a Chamber, or as duty counsel if selected by a suspect who has not yet secured permanent legal representation;
- In the event of a dispute between the defendant and his

or her defence counsel, the Registrar may offer mediation and the OPCD may be requested to act as a mediator.

The OPCD is not *per se* a public defenders office, since suspects or accused persons are guaranteed a free choice of counsel under the Rome Statute. The OPCD does not determine or interfere with the strategy of individual defence teams.

The Office assists defence teams to provide quality representation to their clients in an expeditious manner. For example, the OPCD provides new defence teams with practice manuals, and research memoranda. Defence teams may also subsequently request the OPCD to conduct research in relation to legal and procedural issues arising in their case.

As part of the Court, the OPCD seeks to constitute an institutional memory for the defence and to establish a resource centre for defence teams. Through its access to all public decisions and transcripts, the OPCD has compiled various legal digests on specific subject matter, such as oral decisions on trial procedure, victim participation, criteria for interlocutory appeal, etc. These digests, regularly updated, are disseminated to all defence teams.

One of the main objectives of the OPCD is to advocate for the general interests of the defence. The OPCD also liaises with external partners to promote awareness of the role of the defence and the importance of equality of arms to the notion of international justice.