

## Procedural Safeguards for the Accused of an International Crime at the Trial Stage

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### Abstract:

The Statute of the International Criminal Court, in Article 67 under the heading “Rights of the accused”, sets out a range of safeguards guaranteed to the accused.

Through this study, we analyse these safeguards and explain the particularity of each during this sensitive procedural stage, which is decisive for the interests of the accused: it may lead to conviction on the charges brought, and it may also end in acquittal.

Criminal justice requires viewing the accused as a human being endowed with dignity and rights, entitled to a fair trial regardless of the act attributed to him or her, or his or her social or political status. This can only be achieved through recognising a set of legal safeguards that secure those rights at every stage of proceedings.

**Keywords:** accused; trial stage; safeguards; International Criminal Court; guarantees; rights.

### Introduction:

The procedural safeguards afforded to the accused before international criminal justice are of great importance in international criminal law, which seeks fundamentally to protect human rights and preserve human dignity. This has been reflected in international efforts to conclude agreements that guarantee respect for these rights and strengthen them.

Providing such safeguards to a person accused of committing an international crime is a fundamental element in ensuring fairness of procedure and protection of rights. It is difficult to conceive of international criminal proceedings without a natural person to whom the criminal act is attributed—who is, in this equation, the weaker party.

Accordingly, recognising the accused’s rights is not sufficient unless supported by effective guarantees enabling their exercise during both the investigation and trial phases; otherwise, these rights become mere slogans with no practical effect.

Accordingly, the effectiveness and credibility of the international judicial system is demonstrated by the extent to which it provides safeguards protecting the accused’s rights and ensuring the integrity of justice, thereby enhancing the international community’s confidence in the system’s impartiality and its capacity to achieve justice and to preserve international peace and security.

This gives rise to the following question: **To what extent do these procedural safeguards contribute to ensuring a fair and expeditious trial for a person accused of committing international crimes?**

We answer this research question through the following structure:

Chapter One: General procedural safeguards

Chapter Two: Special procedural safeguards

## **1. General procedural safeguards**

The Rome Statute expressly provides for general procedural safeguards, including: informing the accused of the charges; allowing adequate time for preparation of the defence; ensuring trial without undue delay; enabling the assistance of counsel; and ensuring freedom to make statements (Rome Statute of the ICC, 1998, art. 67).

### **1.1 Informing the accused of the charges brought**

There is no doubt that knowledge of the charge that is the subject of trial is one of the fundamental requirements for the accused. The accused must be informed of all procedures taken against him or her, of the allegations directed against him or her, and of the supporting evidence, so that he or she may prepare a defence on that basis and is not taken by surprise by a charge he or she has not had full opportunity to rebut—since the accused has the right to know everything relating to him or her in the case (Isra, 2015, p.246).

The accused's right to be informed of the charges constitutes an important safeguard ensuring the right of defence at the trial stage. Without detailed, accurate knowledge of the nature of the charges and the evidence against him or her, the right of defence becomes merely an abstract right, and the accused cannot effectively exercise the right to defend him- or herself (Mounia, 2002). Therefore, the accused must be notified immediately, and in detail, of the nature and cause of the charges, so that he or she may identify and delimit the grounds of defence accordingly (Sedira, 2014, p.268).

This right has been entrenched in many international texts, including Article 14(3)(a) of the International Covenant on Civil and Political Rights, which provides:

“(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.” [Authority note: (International Covenant on Civil and Political Rights, 1966, art. 14(3)(a)).

The source text also refers to the Charter of the Nuremberg Tribunal (International Military Tribunal). The applicable fair-trial guarantees in the IMT Charter are set out in Article 16, not Article 14; Article 16(b) states that during any preliminary examination or trial the defendant has the right to give any explanation relevant to the charges.

Likewise, this is reflected in Article 21(4)(a) of the Statute of the International Criminal Tribunal for the former Yugoslavia:

“(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;” [Authority note: (Statute of the International Criminal Tribunal for the Former Yugoslavia, 1993, art. 21(4)(a)).

A similar provision appears in Article 20(4)(a) of the Statute of the International Criminal Tribunal for Rwanda (Sedira, p.269). (Statute of the ICTR, 1994, art. 20(4)(a)). As for the Rome Statute, it guarantees this right through Article 67(1)(a):

“(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;” (Rome Statute of the International Criminal Court, 1998, art. 67(1)(a)).

Reading this provision alongside Article 55(2)(a), one finds a proximity of rationale, but a difference in the content required at the respective procedural stages. Article 55(2)(a) provides:

“(a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;” (Rome Statute of the ICC, 1998, art. 55(2)(a)).

The latter provision is limited to informing the person of the existence of grounds to believe a crime within the Court’s jurisdiction has been committed, whereas trial-stage notification under Article 67(1)(a) is more detailed—an intentional difference reflecting the distinct function and sensitivity of the trial phase as compared to the investigative phase.

It should be noted that notification of the charges may occur either orally or in writing; in both cases, it must be in a language the accused understands and speaks well, even if the Court must rely on oral and written translation services (Bousmeha, 2008, pp.64-13).

From the foregoing, it may be said that informing the accused of the charge is not an end in itself; it is a means to enable the accused to prepare the defence in the manner deemed to best serve the accused’s interest in establishing innocence. By giving effect to this right, the system does not merely secure the right of defence; it also secures for the accused, through that right, the right to a fair trial (Sedira , p.270; Hidjazi, 2006).

## **1.2 The right to adequate time and facilities to prepare the defence**

Merely informing the accused of the nature of the charges upon which he or she will be tried before the International Criminal Court is not, in itself, sufficient. The accused must be granted a reasonable period enabling preparation of the defence. This requires that a sufficient time interval separate the confirmation of charges from the commencement of trial hearings, so that the accused can prepare a meaningful and effective defence (Mounira, p.480).

The right to adequate time and facilities for defence preparation is an important aspect of the principle of equality of arms; that is, treating the prosecution and the accused in a manner ensuring each has equal opportunity to prepare and present evidence at trial. This right applies across all stages of proceedings (Sedira, p.270).

UN Human Rights Committee (2007) treats “adequate time and facilities” as an application of “equality of arms”. (UN Human Rights Committee, 2007, para. 13).

Given its importance, the ICCPR expressly provides:

“(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;” (International Covenant on Civil and Political Rights, 1966, art. 14(3)(b)).

The same meaning is reiterated in the European Convention on Human Rights and the American Convention on Human Rights (Mounira, p.480). (European Convention on Human Rights, 1950, art. 6(3)(b)); (American Convention on Human Rights, 1969, art. 8(2)(c)).

It is also provided for in Article 21(4)(b) of the ICTY Statute and Article 20(4)(b) of the ICTR Statute (Sedira, p.270). (ICTY Statute, 1993, art. 21(4)(b)); (ICTR Statute, 1994, art. 20(4)(b)).

The Rome Statute confirms this right in Article 67(1)(b):

“(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused’s choosing in confidence;” (Rome Statute, 1998, art. 67(1)(b)).

In this context, Rule 101(1) of the ICC Rules of Procedure and Evidence provides:

“In making any order setting time limits regarding the conduct of any proceedings, the Court shall have regard to the need to facilitate fair and expeditious proceedings, bearing in mind in particular the rights of the defence and the victims.” (Assembly of States Parties to the Rome Statute, 2002, rule 101(1)).

It should be noted that what counts as “adequate time” depends on the nature of the proceedings and the circumstances of each case. Factors affecting the assessment include the complexity of the case, the accused’s ability to access evidence, and the ability to communicate with counsel (Sedira, p.271). This is consistent with UN interpretive guidance that adequacy cannot be assessed in the abstract and must be judged case-by-case. (UN Human Rights Committee, 2007, para.32-33).

The Rules also contemplate that the Trial Chamber may postpone the trial date. Rule 132(1) provides (in relevant part) that the Trial Chamber may postpone the date of trial on its own motion or at the request of the Prosecutor or the defence. (Assembly of States Parties to the Rome Statute, 2002, rule 132(1)).

### **1.3 The right to be tried without undue delay**

A core guarantee found in constitutions and human-rights instruments is the right to trial within a reasonable time. Its substance lies in an obligation on judicial authorities to provide trial within a reasonable period, beginning with the charging of the accused and ending in a final judgment.

The aim is to preserve the accused’s rights to security, stability, liberty, and defence, and also the community’s interest in the effectiveness of judicial institutions in achieving general deterrence (Hidjazi, p.252).

Accordingly, the Rome Statute recognises as a fundamental right of the accused at the trial stage the right “to be tried without undue delay”. (Rome Statute, 1998, art. 67(1)(c)).

Rule 101(2) further provides:

“Taking into account the rights of the accused, in particular under article 67, paragraph (1) (c), all those participating in the proceedings to whom any order is directed shall endeavour to act as expeditiously as possible, within the time limit ordered by the Court.” (Assembly of States Parties to the Rome Statute, 2002, rule 101(2)).

Proceeding without undue delay serves the accused’s interest for several reasons, including: limiting the suffering that may result from being under accusation; preventing undue weakening of the accused’s ability to gather rebuttal evidence; and preventing witness memory degradation, which may affect fact-finding (Hidjazi, p.254).

Because the right to trial within a reasonable time extends from charge to final judgment, the “final” limit is the judgment not subject to appeal. If appellate proceedings are prolonged in a manner attributable to judicial authorities and thereby harm the accused’s rights, the right to trial within a reasonable time extends to that period as well (Hidjazi, p.254). This is consistent with the UN Human Rights Committee’s position that “without undue delay” covers all stages, including appeal. (UN Human Rights Committee, 2007, para. 35).

In summary, the right to trial within a reasonable time is among the most important safeguards: it requires necessary measures from charge to judgment within a reasonable period, prevents interference with liberty, security, and defence rights, and enables society to achieve justice and deterrence (Hidjazi, p.245).

#### **1.4 The right to the assistance of counsel**

The trial stage is among the most dangerous stages of criminal proceedings, because the fate of the accused is decided at it. For this reason, it is surrounded by numerous guarantees, one of the most important of which is the right to be assisted by a lawyer (Sedira, p.280).

The lawyer’s role at trial is considerably more serious than at other stages. Counsel bears the burden of challenging evidence put forward against the accused after it has been gathered and strengthened by the prosecution. This frequently requires patience and vigilance to identify weaknesses or contradictions—something that may not be possible for the accused personally, even if the accused’s argument is strong and the accused has knowledge of legal rules (Hidjazi, p.250).

Given its importance, this safeguard has been entrenched in domestic criminal legislation and in international and regional instruments. The ICCPR provides, inter alia, that the accused has the right “to defend himself in person or through legal assistance of his own choosing” and to have counsel assigned where the interests of justice require. (International Covenant on Civil and Political Rights, 1966, art. 14(3)(d)).

The African Charter similarly includes “the right to defence, including the right to be defended by counsel of his choice”. (African Charter on Human and Peoples’ Rights, 1981, art. 7(1)(c)).

The American Convention also provides for the right “to communicate freely and privately with counsel”. (American Convention on Human Rights, 1969, art. 8(2)(d)).

The systems of the ad hoc international tribunals also confirm the guarantee. The IMT Charter includes the right to the assistance of counsel and regulates the function of defence counsel. (Charter of the International Military Tribunal, 1945, arts. 16(d), 23).

The Rome Statute provides in Article 67(1)(d):

“(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused’s choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;” (Rome Statute, 1998, art. 67(1)(d)).

From the foregoing, the importance of counsel is evident. This is not merely a matter of the accused’s preference; it relates to the international criminal judicial function itself, given that the Court addresses extremely serious crimes.

Accordingly, trial before the ICC should be accompanied by the presence of counsel; if the accused has no counsel, the Court assigns counsel. This assignment must not be a mere formality; it must achieve its purpose—effective defence (Sedira, pp.282-283).

It should also be noted that merely having a lawyer is not sufficient to say the accused has fully enjoyed this right. To avoid emptying the right of its content, safeguards must surround it (Hidjazi, p.251). These safeguards may be summarised as follows:

- The accused may choose the lawyer in whom he or she has confidence (Hidjazi, p.487).
- Where the accused has no counsel, the ICC must provide legal assistance without payment when the accused lacks sufficient means (Article 67(1)(d)). (Rome Statute, 1998, art.67(1)(d)).
  - Effective defence requires good preparation and access to evidence. This necessitates “adequate time and facilities” as reaffirmed in Article 67(1)(b). [Authority note: (Rome Statute of the International Criminal Court, 1998, art. 67(1)(b)).
- The right to counsel entails protecting confidential communications between the accused and counsel, particularly given the international character of the alleged crime and the need for complete confidentiality (Sedira, p.285). ICC RPE recognises legal-professional privilege. (Assembly of States Parties to the Rome Statute, 2002, rule 73).
- If interests conflict, each accused must have separate counsel (Mounira, p.499).
- The accused remains the principal party; counsel is a representative. The presence of counsel does not prevent the accused from personally presenting defences and requests. The Court must hear the accused and respond to substantive defences, even if counsel takes a different view (Sedira, p.285).

From this, it may be said that the right of defence is a fundamental guarantee under the Rome Statute, and it cannot be effectively enjoyed without these surrounding safeguards.

### **1.5 The right of the accused to make statements freely**

This means that the accused has the right to present his or her defence freely in the proceedings, including submitting such documents or memoranda as are considered appropriate in support of the accused’s position, without quantitative or qualitative restrictions. It also means that no influence of any type may be exerted upon the accused to induce particular statements (Mounira, p.452).

This is reflected in the Rome Statute’s recognition of the right:

“(h) To make an unsworn oral or written statement in his or her defence;” (Rome Statute of the International Criminal Court, 1998, art. 67(1)(h)).

Accordingly, for this safeguard to operate, the accused must be allowed to make an oral or written statement, freely, in defence of him- or herself.

## **2. Special procedural safeguards**

Special procedural safeguards, by their nature, are connected to special procedures—especially **admission of guilt** and **evidence**. The importance of these procedures is obvious, as the fate of the accused may be determined through them.

The Rome Statute provides several other safeguards and rights without which the above rights cannot be meaningfully realised; these may be summarised as follows.

### **2.1 Not requiring the accused to take an oath**

Requiring the accused to take an oath may restrict the accused's freedom to present statements and defence as he or she wishes (Mounira, p.459). It may also constitute a form of moral coercion affecting will (Hidjazi, p.265; Abdelghani, 2008).

Given its importance, domestic legal systems and the statutes of international criminal tribunals prior to the ICC have recognised this safeguard. For example, the ICTY and ICTR statutes provide that an accused shall not be compelled to testify against him- or herself or to confess guilt. (ICTR Statute, 1994, art. 20(4)(g)); (ICTY Statute, 1993, art. 21(4)(g)).

The Rome Statute provides:

“(h) To make an unsworn oral or written statement in his or her defence;” (Rome Statute of the International Criminal Court, 1998, art. 67(1)(h)).

This is an appropriate safeguard: requiring the accused to take an oath places the accused in an embarrassing position, between two options—sacrifice by confessing, or lying by denying the truth (Matar, 2008, p.278).

In this context, doctrine has differed on whether the accused has a “right to lie”. One trend holds that the accused has no such right, because the accused must take a position on the evidence and suspicions raised; either rebut by all lawful means, or concede and then rely on defences such as grounds for exemption or mitigation.

A second trend argues that the accused may lie when innocence depends on it, by analogy to the acceptance of unlawfully obtained evidence for acquittal, and considering lying an unlawful means that may be accepted in favour of acquittal. A third trend holds that while denial is permitted, lying is not recognised as a right (Mounira, p.460).

Whatever the doctrinal debate, this safeguard is not properly understood as granting a licence to lie: not requiring an oath does not mean authorising falsehood to secure acquittal. If the accused or counsel makes untrue statements or a false defence, the law does not penalise them for those statements (Mounira, p.460).

## **2.2 The right of the accused to remain silent**

The Rome Statute confirms the right to silence in Article 67(1)(g): “(g) 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;” (Rome Statute of the International Criminal Court, 1998, art. 67(1)(g)).

Under this provision, the accused enjoys a legal entitlement to take a position in response to the prosecution evidence without being obliged to defend against it; it is a manifestation of freedom of defence, though it is a “negative” manifestation of that freedom.

Doctrine has largely recognised this, though some views reject recognising silence as a right on the basis that society is entitled to know the truth and that silence is neither a right nor an entitlement (Hidjazi, p.263; Labidi, 2012).

The right is grounded in the presumption of innocence and in the right of defence. Since the default position is that every accused is innocent, the burden of proof rests with the prosecuting authority, not the accused.

Therefore, the accused may speak to defend him- or herself, or may remain silent while relying on the presumption of innocence. The Court may not compel speech or answers through unlawful means, intimidation, psychological pressure, or drugs designed to collapse will

(Mounira, p.464; Saadi, 2000). This aligns with UN interpretive guidance that the privilege against self-incrimination must be understood as the absence of direct/indirect physical or undue psychological pressure. (UN Human Rights Committee, 2007, para.41).

Recognition of the right to silence entails three principal consequences:

- **No compulsion to speak:** the accused cannot be compelled to speak or testify against him- or herself, since compulsion amounts to pressure nullifying voluntariness (Hidjazi, p.264; Khouin,1988).
- **No punishment for silence:** no penalty may be imposed for silence, as the accused is exercising a lawful entitlement (Mounira, p.465).
- **No adverse inference from silence:** silence must not be interpreted against the accused; the Court may not infer guilt from silence when forming its conviction (Hidjazi, p.265). This is explicit in Article 67(1)(g): "...without such silence being a consideration in the determination of guilt or innocence." (Rome Statute of the International Criminal Court, 1998, art. 67(1)(g)).

### 2.3 The right of the accused to speak last

To further secure the accused's freedom to present defence, the ICC Rules of Procedure and Evidence enable the defence to speak last. Rule 141(2) provides:

"The Presiding Judge shall invite the Prosecutor and the defence to make their closing statements. The defence shall always have the opportunity to speak last." (Assembly of States Parties to the Rome Statute, 2002, rule 141(2)).

This indicates a commitment to criminal justice by seeking to balance the legal positions of the Prosecutor and of the accused. Equality requires giving the accused, on equal footing with the Prosecutor, adequate time to present statements and granting the "last word" (Sedira, p.279).

By recognising this right, the system provides an additional safeguard, strengthening the foundations of the accused's right to a fair international criminal trial (Sedira, p.280; Nabil, 2006).

### 2.4 The right of the accused to an interpreter

In line with Article 55(1)(c), the Rome Statute recognises the accused's right to interpretation at trial through Article 67(1)(f):

"(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks;" (Rome Statute of the International Criminal Court, 1998, art. 67(1)(f)).

The interpreter ensures that the accused understands what is said by the prosecution and witnesses and helps the accused convey what he or she wishes to say to the judge, including responding to the charge and clarifying the defence. This includes translating essential documents and case papers necessary for a fair trial (Hidjazi, p.261).

The right also contributes to *effective* equality between an accused who does not understand the language of proceedings and an accused who does (Hidjazi, p.261). This understanding corresponds to UN interpretive guidance treating interpreter assistance as an aspect of fairness and equality of arms. (UN Human Rights Committee, 2007, para. 33)

Finally, among the most important safeguards confirmed by Article 67 is Article 67(1)(i):

“Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.” (Rome Statute of the International Criminal Court, 1998, art. 67(1)(i)).

Recognising this is an implicit consequence of the presumption of innocence in Article 66. (Rome Statute of the International Criminal Court, 1998, art. 66).

### **Conclusion:**

On this basis, the Rome Statute surrounds the trial stage with a set of procedural safeguards aimed at entrenching a fair trial and protecting the accused’s rights. These safeguards can be classified into two main types: general safeguards and special safeguards.

General safeguards are those associated with the ordinary conduct of trial proceedings before the International Criminal Court. They include fundamental principles governing international criminal litigation, as well as the safeguards of Article 67, most notably: the right to be tried without undue delay; the right to counsel; the right to challenge evidence submitted against the accused; and the right to present statements and defence with complete freedom. The core guarantees are enumerated in Article 67(1)(a)–(i).

Special safeguards relate to specific procedures within the conduct of the trial, such as procedures governing admission of guilt and the presentation and discussion of evidence. These procedures are of fundamental importance because they directly affect the Court’s conviction and the accused’s fate.

From the foregoing, it is clear that these safeguards—general and special—form the procedural framework that balances, on the one hand, the effectiveness of international criminal justice, and, on the other, the protection of the accused’s rights and the guarantee of a fair trial.

From this study, a number of *conclusions* reflecting the Rome Statute’s orientation towards entrenching fair-trial safeguards for the accused may be drawn, including:

- The Rome Statute has, to a significant extent, ensured effective safeguards protecting the accused’s rights during trial, consistent with the requirements of international criminal justice and enhancing the credibility of that justice.
- It has adopted general principles established in national and international criminal systems—especially the right of defence, the presumption of innocence, and equality before the judiciary. Presumption of innocence and onus of proof are expressly set out in Article 66, and minimum guarantees in Article 67.
- It devoted a special provision organising the rights of the accused at trial—Article 67—which represents the basic legal framework for these safeguards.
- It subjected certain procedures with decisive impact on the accused’s fate—such as admission of guilt and evidentiary presentation/discussion—to specific controls aimed at protecting rights and preventing abuse that could undermine fair-trial safeguards. Admission of guilt is regulated by Article 65; trial fairness and expeditiousness by Article 64; status conferences and closing statements by Rules 132 and 141.

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