

Annex A

THE INTERNATIONAL CRIMINAL COURT

A COMMENTARY
ON THE ROME STATUTE

SECOND EDITION

WILLIAM A. SCHABAS

ICC Library - Bibliothèque CPI



3 2004 00041642 4

OXFORD

The International Criminal Court: A Commentary on the Rome Statute

SECOND EDITION

WILLIAM A. SCHABAS

OXFORD
UNIVERSITY PRESS

Article 31. Grounds for excluding criminal responsibility/ Motifs d'exonération de la responsabilité pénale

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:
 - a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;
 - b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;
 - c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;
1. Outre les autres motifs d'exonération de la responsabilité pénale prévus par le présent Statut, une personne n'est pas responsable pénalement si, au moment du comportement en cause:
 - a) Elle souffrait d'une maladie ou d'une déficience mentale qui la privait de la faculté de comprendre le caractère délictueux ou la nature de son comportement, ou de maîtriser celui-ci pour le conformer aux exigences de la loi;
 - b) Elle était dans un état d'intoxication qui la privait de la faculté de comprendre le caractère délictueux ou la nature de son comportement, ou de maîtriser celui-ci pour le conformer aux exigences de la loi, à moins qu'elle ne se soit volontairement intoxiquée dans des circonstances telles qu'elle savait que, du fait de son intoxication, elle risquait d'adopter un comportement constituant un crime relevant de la compétence de la Cour, ou qu'elle n'ait tenu aucun compte de ce risque;
 - c) Elle a agi raisonnablement pour se défendre, pour défendre autrui ou, dans le cas des crimes de guerre, pour défendre des biens essentiels à sa survie ou à celle d'autrui ou essentiels à l'accomplissement d'une mission militaire, contre un recours imminent et illicite à la force, d'une manière proportionnée à l'ampleur du danger qu'elle courait ou que couraient l'autre personne ou les biens protégés. Le fait qu'une personne ait participé à une opération défensive menée par des forces armées ne constitue pas en soi un motif d'exonération de la responsabilité pénale au titre du présent alinéa;

- d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
- i) Made by other persons; or
 - ii) Constituted by other circumstances beyond that person's control.
2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.
3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.
- d) Le comportement dont il est allégué qu'il constitue un crime relevant de la compétence de la Cour a été adopté sous la contrainte résultant d'une menace de mort imminente ou d'une atteinte grave, continue ou imminente à sa propre intégrité physique ou à celle d'autrui, et si elle a agi par nécessité et de façon raisonnable pour écarter cette menace, à condition qu'elle n'ait pas eu l'intention de causer un dommage plus grand que celui qu'elle cherchait à éviter. Cette menace peut être:
- i) Soit exercée par d'autres personnes;
 - ii) Soit constituée par d'autres circonstances indépendantes de sa volonté.
2. La Cour se prononce sur la question de savoir si les motifs d'exonération de la responsabilité pénale prévus dans le présent Statut sont applicables au cas dont elle est saisie.
3. Lors du procès, la Cour peut prendre en considération un motif d'exonération autre que ceux qui sont prévus au paragraphe 1, si ce motif découle du droit applicable indiqué à l'article 21. La procédure d'examen de ce motif d'exonération est fixée dans le Règlement de procédure et de preuve.

Introductory Comments

The *Rome Statute* uses the label 'grounds for excluding criminal responsibility' out of a sense of cultural neutrality. Otherwise, it might have been compelled to employ terminology from one or another of the national legal traditions, such as 'defences' or 'justifications and excuses'. The general subject takes up three provisions in the *Rome Statute*, articles 31, 32, and 33. Defences was a matter of considerable significance in the early days of international criminal justice. For example, when legal issues were examined by the London International Assembly and the UN War Crimes Commission, in the early 1940s, as a preparation for post-war trials, great attention was devoted to the issue of superior orders as a defence. When prosecutions resumed half a century later, at the International Criminal Tribunal for the former Yugoslavia, one of the earliest cases provoked a fascinating judgment of the Appeals Chamber on the defence of duress or compulsion.¹

It is quite surprising, therefore, that in the first decade of prosecutions at the International Criminal Court the grounds excluding criminal responsibility that are codified in articles 31, 32, and 33 appear to have been quite irrelevant. There is no case

¹ *Erdemović* (IT-96-22-A), Judgment, 7 October 1997.

'excuses', and 'justifications'. According to Albin Eser, the term 'defence' is used to denote 'all grounds which, for one reason or another, hinder the sanctioning of an offence—despite the fact that the offence has fulfilled all definitional elements of a crime'.²⁴ Singapore seems to have proposed the term 'Grounds for the Exclusion of Criminal Liability' so as 'to avoid the problem of having to distinguish between the negation of liability and excuses from liability which would otherwise arise (ie., defences), since the effect of either is that there will be no criminal responsibility attaching to the individual'.²⁵

If the defence intends to raise a defence provided for in article 31(1), it is required to notify the Prosecutor of this, specifying the names of witnesses and other evidence on which it intends to rely.²⁶ For example, if a defence of insanity is being invoked, the Prosecutor must be informed prior to trial, providing an opportunity for expert opinions to be prepared. The notification must be given 'sufficiently in advance to enable the Prosecutor to prepare adequately and to respond',²⁷ although failure to provide notice does not limit the right of the defence to raise matters related to such defences and to present evidence.²⁸

Insanity (Art. 31(1)(a))

The first of the codified defences in article 31 is insanity, although in practice it is rarely encountered in the case law of major war crimes prosecutions.²⁹ It is distinct, of course, from the issue of fitness to stand trial. The defence concerns the mental state of the accused at the time of commission of trial, and not at the time of trial itself. 'Diminished mental capacity' as a defence first appeared as a suggestion in the list of possible defences prepared by the 1995 Ad Hoc Committee.³⁰ In the 1996 report of the Preparatory Committee, it was renamed 'Insanity/Diminished mental capacity'.³¹ Two competing versions³² were condensed into a single text where it was noted that the provision was 'meant to cover insanity resulting either from sickness ("disease") or from other causes ("defect")'.³³ Consideration was given to including a sentence dealing with diminished mental capacity, which would be grounds for reduction of sentence but not acquittal; this suggestion was not taken up, however.³⁴ The consolidated draft led to an unbracketed text adopted by the Preparatory Committee at its December 1997 session that survived essentially unchanged into the final version of the *Rome Statute*: 'The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform

²⁴ Albin Eser, "Defences" in War Crime Trials', in Yoram Dinstein and Mala Tabory (eds), *War Crimes in International Law*, The Hague, Boston, and London: Kluwer Law International, 1996, pp. 251–73, at p. 251.

²⁵ Article ____—Grounds for the Exclusion of Criminal Liability or the Mitigation of Punishment, UN Doc. A/AC.249/1997/WG.2/DP.2, fn. 2.

²⁶ Rules of Procedure and Evidence, Rule 79(1)(b).

²⁷ *Ibid.*, Rule 79(2).

²⁸ *Ibid.*, Rule 79(3).

²⁹ *United States of America v. Back*, (1947) 3 LRTWC 60 (US Military Commission); *Delalić et al.* (IT-96-21-T), Order on Esad Landžo's Submission Regarding Diminished or Lack of Mental Capacity, 18 June 1998.

³⁰ Ad Hoc Committee Report, Annex II, p. 59.

³¹ Preparatory Committee 1996 Report, Vol. I, para. 204; Preparatory Committee 1996 Report, Vol. II, p. 97.

³² *Ibid.*; Preparatory Committee 1996 Report, Vol. II, p. 97.

³³ Working paper Submitted by Argentina, Canada, France, Germany, Mexico, Portugal and the United States of America, UN Doc. A/AC.249/1997/WG.2/DP.3.

³⁴ *Ibid.*, fn. 3.

to the requirements of law.³⁵ The text echoes the *M'Naghten rules* of the common law,³⁶ but would also seem to be consistent with the approach taken in other legal traditions. The issue of diminished responsibility also arose in the context of sentencing. The following proposal emerged: 'If a mental disease or defect merely influences his judgement or his control over his actions without destroying it, the person shall remain criminally responsible but his punishment may be reduced.'³⁷ At the Rome Conference, Syria challenged the text, saying a mental defect should not be sufficient to exclude criminal responsibility and that the defence should apply only in cases of obvious and total insanity. Syria asked for deletion of the last part of the subparagraph, a change that the Coordinator of the Working Group said would be difficult for other delegations to accept. In order to satisfy the Syrian delegation, a footnote was included in the report, stating: 'The word "law" is meant to refer to article [21].'³⁸

The *Statute* provides for no consequence of the plea other than acquittal, nor should it. An individual who is insane at the time of the crime may well pose no threat either to him- or herself or to others by the time of trial and in such circumstances ought simply to be released. In the alternative, the public health authorities in the Netherlands can be expected to take the appropriate measures.

The *Statute* does not speak directly to the burden of proof in cases of the defence of insanity. Is a defendant required only to raise a doubt about mental capacity, or must he or she actually prove such an exception based on a preponderance of evidence? Domestic justice systems take different views of this matter. The International Criminal Tribunal for the former Yugoslavia has opted for the preponderance of evidence standard, making proof of insanity more difficult for the accused.³⁹ Article 67 of the *Rome Statute*, which shields the accused from 'any reversal of the burden of proof or any onus of rebuttal', may compel the less onerous requirement that the accused only raise a reasonable doubt. In any case, even if insanity requires a burden of proof to a level of preponderance, it constitutes an exception to the general rule that the defence need only establish a reasonable doubt for a ground excluding criminal responsibility to succeed.⁴⁰

Voluntary Intoxication (Art. 31(1)(b))

If the codification of an uncontroversial definition of the insanity defence seems somewhat unnecessary, the provision that follows, concerning intoxication, borders on the absurd. Drafting of the text was troublesome, and the final result 'had the benefit of not satisfying anyone'.⁴¹ While many individual war crimes may be committed by soldiers and thugs

³⁵ UN Doc. A/AC.249/1997/L.9/Rev.1, p. 19; UN Doc. A/AC.249/1997/WG.2/CRP.7; UN Doc. A/AC.249/1998/L.13, p. 61; UN Doc. A/CONF.183/2/Add.1, p. 57; UN Doc. A/CONF.183/C.1/WGGP/L.4/Add.1, p. 4; UN Doc. A/CONF.183/C.1/WGGP/L.4/Add.1/Rev.1, p. 3; UN Doc. A/CONF.183/C.1/L.65/Rev.1, p. 6; UN Doc. A/CONF.183/C.1/L.76/Add.3, p. 5.

³⁶ *M'Naghten's Case*, (1843) 10 Cl & Fin 200, 8 ER 718.

³⁷ UN Doc. A/AC.249/1997/WG.2/DP3, fn. 3; UN Doc. A/AC.249/1997/WG.6/CRP.1, fn. 5.

³⁸ UN Doc. A/CONF.183/C.1/WGGP/L.4/Add.1/Rev.1, p. 3, fn. 7.

³⁹ *Delalić et al.* (IT-96-21-T), Order on Esad Landžo's Submission Regarding Diminished or Lack of Mental Capacity, 18 June 1998; *Delalić et al.* (IT-96-21-T), Order on Landžo's Request for Definition of Diminished or Lack of Mental Capacity, 15 July 1998; *Delalić et al.* (IT-96-21-T), Judgment, 16 November 1998, (1999) 38 ILM 57, para. 1160; *Delalić* (IT-96-21-A), Judgment, 20 February 2001, para. 582.

⁴⁰ *Bagilishema* (ICTR-95-1A-T), Separate Opinion of Judge Asoka de Z. Gunawardana, 7 June 2001, para. 7; *Hadžihasanović et al.* (IT-01-47-T), Judgment, 15 March 2006, para. 230.

⁴¹ Per Saland, 'International Criminal Law Principles', in Lee, *The Making of the Rome Statute*, pp. 189–216, at p. 207.

Article 67. Rights of the accused/Droits de l'accusé

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:
 - 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;
 - 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;
 - c) To be tried without undue delay;
 - 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;
 - e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;
 - 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;
 - 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;
1. Lors de l'examen des charges portées contre lui, l'accusé a droit à ce que sa cause soit entendue publiquement, compte tenu des dispositions du présent Statut, équitablement et de façon impartiale. Il a droit, en pleine égalité, au moins aux garanties suivantes:
 - a) Être informé dans le plus court délai et de façon détaillée de la nature, de la cause et de la teneur des charges dans une langue qu'il comprend et parle parfaitement;
 - b) Disposer du temps et des facilités nécessaires à la préparation de sa défense et communiquer librement et confidentiellement avec le conseil de son choix;
 - c) Être jugé sans retard excessif;
 - d) Sous réserve des dispositions du paragraphe 2 de l'article 63, être présent à son procès, se défendre lui-même ou se faire assister par le défenseur de son choix; s'il n'a pas de défenseur, être informé de son droit d'en avoir un et, chaque fois que l'intérêt de la justice l'exige, se voir attribuer d'office un défenseur par la Cour, sans frais s'il n'a pas les moyens de le rémunérer;
 - e) Interroger ou faire interroger les témoins à charge et obtenir la comparution et l'interrogatoire des témoins à décharge dans les mêmes conditions que les témoins à charge. L'accusé a également le droit de faire valoir des moyens de défense et de présenter d'autres éléments de preuve admissibles en vertu du présent Statut;
 - f) Se faire assister gratuitement d'un interprète compétent et bénéficier des traductions nécessaires pour satisfaire aux exigences de l'équité, si la langue employée dans toute procédure suivie devant la Cour ou dans tout document présenté à la Cour n'est pas une langue qu'il comprend et parle parfaitement;
 - g) Ne pas être forcé de témoigner contre lui-même ou de s'avouer coupable, et garder le silence sans que ce silence soit pris en considération pour déterminer sa culpabilité ou son innocence;

- h) To make an unsworn oral or written statement in his or her defence; and
 - i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.
2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.
- h) Faire, sans prêter serment, une déclaration écrite ou orale pour sa défense; et
 - i) Ne pas se voir imposer le renversement du fardeau de la preuve ni la charge de la réfutation.
2. Outre toute autre communication prévue par le présent Statut, le Procureur communique à la défense, dès que cela est possible, les éléments de preuve en sa possession ou à sa disposition dont il estime qu'ils disculpent l'accusé ou tendent à le disculper ou à atténuer sa culpabilité, ou sont de nature à entamer la crédibilité des éléments de preuve à charge. En cas de doute quant à l'application du présent paragraphe, la Cour tranche.

Introductory Comments

During the Second World War, Churchill and other Allied leaders flirted with the idea of some form of summary justice for major war criminals.¹ Only weeks before the London Conference where the Charter of the International Military Tribunal was adopted, the British remained unconvinced about international criminal justice. They wrote to the US Government to express their own reservations about the proposal to set up an international court: 'It being conceded that these leaders must suffer death, the question arises whether they should be tried by some form of tribunal claiming to exercise judicial functions, or whether the decision taken by the Allies should be reached and enforced without the machinery of a trial.'² Yet, only a few years later, one of the Nuremberg Tribunals held that prosecutors and judges involved in a trial lacking the fundamental guarantees of fairness could be held responsible for crimes against humanity. Such guarantees include the right of the accused to introduce evidence, to confront witnesses, to present evidence, to be tried in public, to have counsel of choice, and to be informed of the nature of the charges.³

The credibility of international justice is dependent on rigorous respect for the rights of the accused to a fair trial. This idea was frequently expressed during the development of the *Rome Statute*. Nor can the exemplary role of international courts be gainsaid; their treatment of the accused provides a model to domestic justice systems throughout the world in respect of fundamental human rights. As Robert Jackson said, in his opening address at Nuremberg: 'We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well.'⁴

¹ A. J. Kochavi, *Prelude to Nuremberg, Allied War Crimes Policy and the Question of Punishment*, Chapel Hill, NC: University of North Carolina Press, 1998, pp. 63–91.

² 'Aide-Mémoire from the United Kingdom, April 23, 1945', in *Report of Robert H. Jackson United States Representative to the International Conference on Military Trials*, Washington, DC: US Government Printing Office, 1949, p. 18.

³ *United States of America v. Alstötter et al.* ('The Justice case'), (1948) 3 TWC 954, at pp. 1046–7.

⁴ (1947) 2 IMT 101.

elected not to testify but rather to make an unsworn statement may conflict with the accused's right not to be compelled to testify or confess guilt and to remain silent pursuant to Article 67(l)(g) of the Statute'.²³²

Burden of Proof and Onus of Rebuttal (Art. 67(1)(i))

The prohibition of any reverse onus or duty or rebuttal is really a corollary of the presumption of innocence, protected by article 66 of the *Rome Statute*. The provision was not included in the International Law Commission draft statute, nor did it form part of the first series of amendments, during the 1996 sessions of the Preparatory Committee. Article 67(1)(i) was proposed during the August 1997 meeting, when it was left in square brackets.²³³ It posed no problem during the debates at Rome and was adopted promptly.²³⁴ As Judge Pikis explained:

[T]he Statute assures to the accused the right 'not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal'. The right to silence is interwoven with the presumption of innocence of the accused. The accused is presumed to be innocent. He does not have to prove his innocence. What he must do in order to free himself from the accusation is to cast doubt on its validity; it is his right to be acquitted unless the accusations against him are proven beyond reasonable doubt.²³⁵

In *Bemba*, the Appeals Chamber found that the Trial Chamber had erroneously reversed the burden of proof when it admitted the totality of prosecution witness statements, leaving a burden on the accused to disprove the admissibility of items of evidence that had already been admitted.²³⁶

The reverse onus prohibition in article 67(1)(i) is quite original. Because there are no typical reverse onus provisions in the *Statute*, its application to judge-made reverse onus provisions would seem to be the real purpose of the provision. Depending on the scope given to this by the Court, these norms may create troublesome hurdles for the prosecution and provide the defence with a wealth of arguments.

During the *Čelebići* trial before the International Criminal Tribunal for the former Yugoslavia, one of the accused raised a plea of lack of mental capacity, or insanity. The Trial Chamber considered that the accused was presumed to be sane, despite an absence of prosecution evidence, and that it was for the accused to establish the contrary. Not only was the accused required to lead evidence of insanity, the Trial Chamber also held that the accused had a burden to prove this according to the preponderance of evidence

²³² *Bemba* (ICC-01/05-01/08), Decision on unsworn statement by the accused pursuant to Article 67(l)(h) of the Rome Statute, 1 November 2013, para. 8.

²³³ Decisions Taken by the Preparatory Committee at its Session Held from 4 to 15 August 1997, UN Doc. A/AC.249/1997/L.8/Rev.1, p. 35. Also: Zutphen Report, p. 155; Preparatory Committee Draft Statute, p. 128. Note the error in the *nota bene* at the end of art. 60 in the Zutphen Report. The reference is to para. (l) in general, and not to subpara. 1(j). The error is corrected in the Preparatory Committee Draft Statute.

²³⁴ Draft proposal for article 67 submitted by the chairman, UN Doc. A/CONF.183/C.1/WGPM/L.42, p. 5; Compendium of draft articles referred to the Drafting Committee by the Committee of the Whole as of 9 July 1998, UN Doc. A/CONF.183/C.1/L.58, p. 42; Draft Statute for the International Criminal Court, UN Doc. A/CONF.183/C.1/L.76/Add.6, p. 5.

²³⁵ *Lubanga* (ICC-01/04-01/06 OA 11), Partly dissenting opinion of Judge Georgios M. Pikis, 11 July 2008, para. 14.

²³⁶ *Bemba* (ICC-01/05-01/08), Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence', 3 May 2011, para. 73.

standard.²³⁷ As the Trial Chamber explained, '[t]his is in accord and consistent with the general principle that the burden of proof of facts relating to a particular peculiar knowledge is on the person with such knowledge or one who raises the defence'.²³⁸ Given the combined effect of articles 66(2) and 67(1)(i) of the *Statute*, would the International Criminal Court not conclude otherwise? At the very least, it seems appropriate for the Court to rule that the accused is only required to raise a reasonable doubt as to mental condition, an approach with which many legal systems have been able to live.²³⁹ But under a more extreme hypothesis, the Court might apply these rules so as to impose a burden on the prosecution to establish sanity, a result that was surely unintended by the drafters of the *Statute* and one that could wreak havoc with the work of the Prosecutor.

Disclosure (Art. 67(2))

The Prosecutor is required, 'as soon as practicable', to disclose evidence to the defence in the Prosecutor's possession or control that she 'believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence'. This obligation is in addition to any other disclosure required by the *Rome Statute*.²⁴⁰ The requirement that exculpatory evidence be disclosed is a fundamental component of the right to a fair trial.²⁴¹ A remedy is required, by which the Court is to decide 'in case of doubt as to the application of this paragraph'. The obligation is not unrelated to that imposed by article 54(1)(a) requiring that the Prosecutor, in order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under the *Statute*, and, in doing so, investigate incriminating and exonerating circumstances equally.²⁴²

The ancestry of article 67(2) goes back to the draft adopted by the International Law Commission, intended to comprise a second paragraph in the article on rights of the accused: 'Exculpatory evidence that becomes available to the Procuracy prior to the conclusion of the trial shall be made available to the defence. In case of doubt as to the application of this paragraph or as to the admissibility of the evidence, the Trial Chamber shall decide.'²⁴³ At Rome, a new version submitted by Australia formed the basis of debate.²⁴⁴

²³⁷ *Delalić et al.* (IT-96-21-T), Judgment, 16 November 1998, paras 1157–60. Also paras 602–3. The Trial Chamber cited two English cases in support of its conclusion: *R. v. Dunbar*, [1958] 1 QB 1; *R. v. Grant*, [1960] Crim LR 424.

²³⁸ *Ibid.*, para. 1172.

²³⁹ *Davis v. United States*, 160 US 469 (1895); *Re Winship*, 397 US 358 (1970); *Mullaney v. Wilbur*, 421 US 684 (1975); *Jackson v. Virginia*, 443 US 307 (1979). But see: *R. v. Chaulk*, [1990] 3 SCR 1303, 62 CCC (3d) 193.

²⁴⁰ See *Rome Statute*, arts 61(3), 64(3)(c). Also: Rules of Procedure and Evidence, Rule 77.

²⁴¹ *Lubanga* (ICC-01/04-01/06), Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, para. 79; *Katanga et al.* (ICC-01/04-01/07), Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing 20 June 20, para. 3.

²⁴² *Bemba* (ICC-01/05-01/08), Decision Regarding the Disclosure of Materials Pursuant to Article 67(2) of the Rome Statute and Rule 77 of the Rules of Procedure and Evidence 12 November 2008, para. 14.

²⁴³ ILC 1994 Final Report, p. 115.

²⁴⁴ Proposal submitted by Australia, UN Doc. A/CONF.183/C.1/WGPM/L.35, p. 1: 'The Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the [Pre-Trial Chamber/Trial Chamber] shall decide.' There were other proposals relating to article