ENTRY INTO FORCE AND AMENDMENT OF THE STATUTE*

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I. Introduction

Adopted on 17 July 1998 by 120 of the 160 States that had taken part in the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, the Statute of the latter had been signed by 27 of them by the following day. By 31 December 2000, the closing date for signatures, the number of signatories had risen to 139. As of 1 March 2002, 52 States had ratified the Statute. In accordance with the provisions of Article 126, it will enter into force once 60 States have ratified, accepted, or approved it, or have acceded to it.

Given the acceleration in the ratification movement, there is scarcely any doubt that the Court will actually see the light of day in the near future, on the

* Translated by Iain L. Fraser.

Seven States voted against, among which China, the United States, India, and Israel according to their own declarations, and 21 abstained, including Mexico, Singapore, Turkey, and many Arab States. The vote was not recorded; the names of States voting against or abstaining can only be deduced from the declarations made before or after the vote.
understanding that 'widespread signature and ratification is important not only to bring the Statute into force, but also to provide the Court with a jurisdictional reach which is as universal as possible'. It is however likely for many years to remain a treaty-based institution created by an international agreement of classical type, combining the features of a normative treaty and of an act founding an international organization, and binding only the States party to it.

This position, which was not unavoidable, is unsatisfactory. In accordance with Article 1 of its Statute, the Court was called on to 'to exercise its jurisdiction over persons for the most serious crimes of international concern'. Deterring those crimes which 'threaten the peace, security and well-being of the world' is a matter for 'the international community as a whole' and there is no reason to abandon it to a circle of virtuous States that agree to submit to a common international organ for the prosecution and trial of criminals they will likely try themselves (depriving the Court of competence, under the principle of complementarity) or will in all likelihood come under neither their personal nor their territorial competence, thus escaping the Court's jurisdiction pursuant to Article 12 of the Statute.

Certainly, the United Nations Security Council 'acting under Chapter VII of the Charter' has the possibility of referring to the Prosecutor a situation in which one or more crimes referred to in Article 5 appear to have been committed. But there was no need to take the road of a treaty in order to enable the Council to invoke a judicial body in such circumstances. Still more: the Council may (and perhaps should) hesitate to have recourse to an institution outside the UN, a creation of a haphazard group of States and not of the international community as a whole.

The latter is very acceptably represented by the General Assembly, the composition of which is today almost universal. It has powers in all areas covered by the Charter, including, therefore, for assuring 'universal respect for, and observance of, human rights and fundamental freedoms for all', with which the struggle against impunity is clearly connected. Additionally, as the ICJ affirmed in its consultative opinion of 13 July 1954, the Assembly undoubtedly has the power to create a judicial body where that is necessary for the exercise of its functions.

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3 Emphasis added.
4 See the 3rd and 4th paragraphs in the Preamble; emphasis added; see also Art. 5(1).
5 Cf. the 10th paragraph in the Preamble, and Arts. 1 and 17.
7 Emphasis added.
8 Art. 55 of the Charter.
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One may certainly maintain that the Assembly could not have compelled the States to accept the competence of the Court, since, with a few exceptions, it has no power of decision vis-à-vis UN Member States. One might however wonder whether precisely, on that assumption, this is not a case for one of those necessary and implicit exceptions. As the ICJ also indicated, 'it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative designs'.

In the specific case, it is not unreasonable to consider that the Assembly, as an organ of the international community as a whole, has the implicit power (and duty) to act for the defence of all mankind. The creation of an international criminal court as the only mechanism capable of putting an end to the impunity of the culprits of the 'most serious crimes of concern to the international community as a whole' meets that need.

In any case, even were one to refuse to acknowledge such a power for the General Assembly, that would not have constituted a decisive objection to the creation of the Court by it. All that would have resulted would have been that it could not confer obligatory competence on it, nor impose cooperation with it by States if they did not want that. But, on the one hand, the Security Council, which it would certainly have been right to associate with creating this truly world Court, might still take decisions in this direction, binding on all Member States, if it found that international peace and security were threatened—and they often are when one of the crimes listed in Article 5 is committed—just as it did in connection with the ICTY and the ICTR. On the other hand, if the General Assembly cannot impose, it can propose. In other words, it could have established a statute to which States could have voluntarily acceded (at least as much as to the Rome Statute), and created a court they could have committed themselves to invoking in advance or case by case where they felt the need. In this sense, the creation of the ICC by the Assembly would have presented no more and no less technical

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11 Rome Statute, Art. 5(1).

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drawbacks than the method that has been chosen; but it would have had the great advantage of having been decided not by a self-proclaimed group of States with no mandate to represent the international community as a whole, but by an organ, the only one in contemporary international society, that is its institution.

This would have brought us much closer to the ideal that, in words, inspired the promoters of the International Criminal Court, conceived of as having to be at the service of mankind as a whole, rather than creating it by a treaty without inspiration, designed to reassure the States most prone to contempt for the protection of human rights.

Though briefly contemplated by the ILC, these other methods of creating the ICC were nonetheless discarded by it with a stroke of the pen, and with Assembly General Resolution 49/53 of 9 December 1994, the fate of the ICC was definitively sealed: it would be created by a convention adopted by a conference of plenipotentiaries, without anyone ever seriously pondering the drawbacks of this way of creating it.

One of the slightest of these concerns the details of the entry into force of the Statute—and hence of the actual creation of the Court—which presupposes accomplishment of the inevitably slow formalities of ratification inherent in a treaty in solemn form. These are laid down in the final clauses (Part 13, Articles 119–128), which very classically determine the conditions for entry into force of the Statute and withdrawal from it and the arrangements for reservations (Articles 120 and 124–127), as well as the details regarding amendments and revision (Articles 121–123).14

Moreover, Article 128 makes the Secretary-General the depositary of the Treaty, 'of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic'. This formula could in any case be deceiving: one of these six languages is undoubtedly 'more equal' than the others; the initial text and the bulk of the working documents were written in English, and that is the language in which the great majority of the informal discussions, so important in this type of negotiation, were conducted.15

13 However, the ILC had annexed to its draft an Annex I entitled 'Outline of Possible Ways whereby a Permanent International Criminal Court may enter into Relationship with the United Nations'; see Report of the International Law Commission on the work of its forty-sixth session, YILC (1994), Vol. II, Part 2, pp. 73–74; the ILC also mentioned as a possibility an amendment to the UN Charter. See also J. Crawford, 'The ILC’s Draft Statute for an International Criminal Tribunal', 88 AJIL (1994) 140, at 142 ('The tribunal is to be established by a treaty') and 'The ILC Adopts a Statute for an International Criminal Court', 89 AJIL (1995) 404, at 416.

14 The final clauses also include a short Art. 119 on the 'Settlement of Disputes'; see Ch. 46 below.

15 See A. Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', 10 EJIL (1999) 144, at 145. The consultations on the final clauses took place entirely in English, for lack of available interpreting (see T. N. Slade and R. S. Clark, 'Preamble and Final
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What is more, the Rome text was adopted in haste at the end of a marathon that was exhausting both for the Secretariat and for the delegates.16 The outcome was not just approximate translations of the English text into the other languages, but also errors in the original text itself. This is why the Secretary-General '[i]n accordance with the established depositary practice'17 had—twice, on 10 November 1998 and then 12 July 1999—to publish long lists of 'corrections',18 relating respectively to 50 and 22 formulations for the English text alone.19 And while most of these corrections are fairly minor, this is not so for some of them, in particular the one made to Article 121(5).20

Article 128 is the only provision in the Statute not discussed at all during the preparatory work, and adopted without change from the text proposed by the Secretariat.21 All the other articles in Part 13 aroused discussion, sometimes bitter.22

In accordance with its practice the ILC did not put any final clauses into its Draft Statute for an International Criminal Court in 1994,23 and they appeared only late, before the Preparatory Committee, which briefly considered the six draft articles prepared by the Secretariat24 at its last session.25 It was thus essentially the Conference itself that discussed them.

Mandated to ensure coordination of the preamble and the final clauses, Ambassador Tuiloma Neroni Slade, of Samoa, on 29 June 1998 presented Part 13 to the Working Group of the Whole, which discussed it the same and the


16 See Ch. 2.3 above.
18 These corrections can be consulted on the United Nations Website: <http://www.un.org/law/icc/statute/9830rr/ and /99_con/>.
19 The figures are 29 and 243, respectively, for the French text.
20 See infra III.C.
22 For a detailed, and esp. authorized, description of the preparatory work on the final clauses, see Slade and Clark, supra note 15, at 421–450, esp. 422–424; the following account draws largely on this presentation.
23 See VILC(1994), supra note 13, at 146.
following days. On this basis the Coordinator drew up three successive drafts, without reaching a consensus text, particularly because of continuing uncertainties relating to other parts of the text from which the final clauses were inseparable; this included, in particular, the prohibition of reservations (article 121), the transitional opt-out provision for war crimes (article 124), and the number of parties (60) required to bring the Statute into force (article 126). It was thus the Bureau of the Committee of the Whole that settled the last difficulties and adopted the final text on the eve of closure of the Conference.

However technical and politically trivial they may seem, some of the final clauses thus appeared as 'some of the most contentious issues of the Diplomatic Conference', objects of constant 'skirmishes' leading to laborious compromises, some of which leave one perplexed, whether they have to do with the entry into force as such of the Statute (II, below) or the amendment or revision procedure (III, below).

II. Entry into Force of the Statute

A. Modes of Entry into Force

1. A Treaty in Classical Solemn Form

It follows from Article 125 that the Rome Statute constitutes a treaty in solemn form, without any particular oddities in the technical modes of its entry into force.

Open for signature by all States at the Ministry of Foreign Affairs of Italy until 17 October 1998, then at New York, at the United Nations Headquarters, until 31 December 2000, the Statute 'is subject to ratification, acceptance or approval by signatory States' then to 'accession by all States'. While there is no need to dwell on the terminology employed as regards the expression of consent by States to be bound, which meets the concern to accommodate the constitutional requirements of States, by contrast the expression 'all States' deserves notice: it contrasts with the formula usual until recently that reserved accession to agreements concluded under United Nations auspices to 'States Members of the United Nations or of any of the specialized agencies or of the International Atomic Energy Agency

27 R. S. Clark, 'Final Clauses—Preliminary Remarks', in Triffterer (ed.), supra note 21, at 1239.
29 Art. 125(1).
30 Art. 125(2) and (3), emphasis added. See also the last phrase of Art. 128: the depositary 'shall send certified copies of the authentic texts of the Statute to all States'.
31 It will however be noted that both in English and in French the word 'accession' has been preferred to the more traditional term 'adherence'.

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or parties to the Statute of the International Court of Justice, [to] any other State invited by the General Assembly to become a party. It also marks the negotiators' desire to open the Court's doors as widely as possible, and consecrates the advent of the 'all States' clause, which was the object of stormy debates at the Vienna Conference on the Law of Treaties in 1968-9. This broad opening (which does not rule out possible problems in determining whether a given entity constitutes a State or not) rendered superfluous Macedonia's request for the specification: 'all States without any kind of discrimination,' which would in any case not have met its concerns: the fact of subordinating its accession to the designation 'Former Yugoslav Republic of Macedonia' is more a condition (debatable but perhaps founded on general international law) than a discrimination.

As 'a first step to participation in the Convention,' signature requires States who agree to it 'to refrain from acts which would defeat the object and purpose' of the Statute. This general principle thus made partly pointless the Draft Article 113 proposed by Norway during the work of the Preparatory Committee, transmitted to the latter in square brackets. This proposal might however be interpreted as going much further. Entitled 'Early activation of principles and rules of the Statute', it reads:

Pending the entry into force of the Statute, States that have signed the Statute shall, in accordance with applicable principles of international law refrain from acts that would defeat the object and purpose of the Statute. To this end, in ensuring the international prosecution and suppression of crimes of international concern, States should pay due regard to the relevant principles and provisions contained in the Statute including in the performance of their responsibilities in competent organs of the United Nations, with a view to accelerating the achievement of the shared goal of establishing the Court.

While the first sentence in the Draft Article 113 confined itself to taking over the principle laid down in Article 18 of the 1969 Vienna Convention, the second gave

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32 Cf. Art. 81 of the Vienna Convention on the Law of Treaties (23 May 1969); see also e.g. Art. XLVII, para. 1, of the Draft Statute of an International Tribunal presented by M. C. Bassiouini in Nouvelles Études pénales (1993) at 111: 'This Convention is open for signature by all Member States of the United Nations.'
33 See P. Daillier and A. Pellet, Droit international public (6th edn., 1999) 174-175; for some years the 'all States' clause has nonetheless appeared in the main treaties relating to human rights; it is, however, quite unusual in treaties setting up international organizations.
34 The problem might arise in connection with the Palestinian Authority, the Sahrawi Democratic Arab Republic, or East Timor.
35 See the expression in square brackets appearing in the Report of the Preparatory Committee, supra note 25, Art. 112, p. 166.
38 See the Report of the Preparatory Committee, supra note 25, Art. 113, p. 166.
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it very broad scope, attenuated, to be sure, by use of the conditional (should), always disputable in a treaty text. Additionally, 't]he initial idea was that should the Security Council decide that there was a need to deal with a situation while the Statute is still not in force, the Statute would come into force upon referral to the Court of a situation by the Security Council'. But while no rule of international law excludes provisional entry into force of a treaty (or part of a treaty), such a provision could have raised constitutional difficulties for certain States and politically embarrassed the members of the Security Council. Still further aggravating the strictly voluntarist nature of creation of the Court, the Bureau of the Committee of the Whole took the decision not to include it in the final text.

It clearly does not follow from this decision that signatory States are free of any obligation towards the Statute once they have signed it.

Apart from the duty not to void it of its object and purpose within the meaning of Article 18 of the Vienna Convention, they have the duty to examine its text in good faith with an eye to determining their definitive position towards it (without their having the formal obligation to become parties). And if they decide to ratify, they must take the necessary steps to be able to meet their obligations on the date the Statute comes into force in relation to them. They must in particular adapt their domestic law to be capable of implementing the cooperation obligations incumbent on them by virtue in particular of Part 9, which would in many cases require amendment of domestic laws, or, as in France, of the Constitution.
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By contrast neither the signatory States nor even the States Parties have any clear obligation to bring their domestic legislation into harmony with the basic provisions of the Rome Statute. 45 Certainly, paragraph 6 in the Preamble recalls 'that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'. But the principle of complementarity as conceived in Article 17 of the Rome Statute does not make it a treaty obligation; still more, it offers States a loophole not to accomplish this duty by enabling them to base themselves on the Court to exercise the deterrence provided for by the Statute. And it is perhaps rather optimistic to think 'that States will consider themselves embarrassed and even humiliated when the Court attempts to exercise jurisdiction under the principle of complementarity'. 46 Undoubtedly, 'should States take this as the message of the International Criminal Court, then they will also want to turn their attention to the legislative reflection of the substantive provisions of the Rome Statute'; 47 but it is far from certain that they will interpret this message in this way or that there is a treaty obligation here. 48

In any case, if a State does not incriminate one of the acts defined in Articles 6 to 8 of the Rome Statute, or what is more likely, if the definition of these crimes in its domestic law does not correspond with the Statute's, it runs the risk of leading the Court to find its own jurisdiction, on the basis of Article 17.

Once the signature has been given, the State is free to ratify the Statute (or not) in accordance with the constitutionally provided domestic procedure, and States non-signatory at 31 December 2000 are free to accede at any time without any objection being able to be raised (except a challenge about whether they are a State 49). This is, then, a particularly perfect example of a totally open treaty, something justified by its object: its object and purpose imply that it is the intention of the Rome Conference 'that as many States as possible should participate. The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis'. 50

45 In this sense, see Broonhall, supra note 42, at 157, according to whom there is no explicit obligation under the Statute of Rome obliging States Parties to prohibit in their national law the crimes falling within the Court's competence.


47 Ibid.


49 See supra note 34.

It also follows that in cases of succession of States the new State or States succeeding to a State Party to the ICC Statute can succeed to it by mere notification, or even in virtue of the principle of 'automatic succession', if, like the Presidents of the human-rights review bodies, one considers that:

the successor States [here ex-Yugoslavia; are] automatically bound by the obligations resulting from the international instruments relating to human rights as from their respective date of independence, and respect for these obligations ought not to depend on a declaration of confirmation from the government of the successor State.

Though very far from obvious, the answer to this question is not without practical importance. In the Genocide case, the World Court felt that it had no effect on exercise of its competence since, 'even if Bosnia-Herzegovina were to be treated as having acceded to the Genocide Convention, with the result that the Application might be said to be premature when filed, “this circumstance would now be covered” by the fact that the 90-day period elapsed between the filing of the Application and the oral proceedings on the request (cf. Mavrommatis Palestine Concessions, Judgment No.2, 1924, P.C.I.J., Series A, No.2, p. 34). But in this case the Court declared itself competent ratione temporis only because 'the Genocide Convention—and in particular Article IX—does not contain any clause the object or effect of which is to limit the scope of its jurisdiction ratione temporis ...'. It is not the same when it comes to the ICC, the competence of which is expressly limited by Article 11 of its Statute—another manifestation of the questionable, anxious 'sovereignism' that presided over its drafting—to 'crimes committed after the entry into force of this Statute' for the State becoming a Party. The continuity of competence ensured by the principle of 'automatic succession' is not by the method of voluntary succession by notification.

51 Ibid., para. 23.
53 For a nuanced, well-documented analysis of this delicate question, left pending by the ICJ in the 1996 ruling cited, supra note 50, at 612, para. 23. To which no categorical response can at present be given, see B. Stern, 'La Succession d'Etats', 262 Rec. des cours (1996) 295-310.
54 i.e. at the date of the Court's decision.
55 This period between the deposit of the instrument of ratification or accession and the date when the Convention becomes effective in relation to the ratifying or acceding State is laid down in Art. XIII of the 1948 Convention.
57 ICJ, Judgment, 11 July 1996, supra note 50, at 617, para. 34.
58 For a much more categorical interpretation (succession exclusively at the date the new State is born), see the commentary on Article 124 by A. Zimmermann, in Trüfetter (ed.), supra note 21, at 1284.
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As customary, the instruments of ratification, acceptance, approval, and accession, and notifications of withdrawal, are deposited with the depositary, the Secretary-General of the United Nations, whose role is given various clarifications:

- Articles 121(1) and 122(1) make him the addressee of proposals for amendments.
- He has to circulate these and amendments adopted under Article 121 or Article 123 to all States Parties.
- By Article 123(1) and (2) he convenes the Review Conferences.
- Article 128 mandates him to send certified copies of the six original texts of the Statute to all States (and not just to Parties or signatories).

In other respects one should refer to Articles 76–80 of the Vienna Convention on the Law of Treaties of 1969 relating to the functions of depositaries, which, cautiously and rather restrictively, reflect habitual practice in this respect.

2. The Bar in Principle on Reservations

Though not equipping its Draft Statute with final clauses, the ILC felt that reservations to the Statute and its accompanying Treaty should either not be permitted, or should be limited in scope in order to preserve the balance among the various elements in these instruments.

The Preparatory Committee did not seriously consider the question, which is not tackled in the Report of the Ad Hoc Committee on the Establishment of an

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79 Art. 125(2) and (3).
80 Art. 127(1).
81 It should further be noted that he is not the exclusive addressee of proposals for amendments under Article 122 (Amendments to provisions of an institutional nature), which may also be submitted to 'such other person designated by the Assembly of States Parties', probably out of a concern for simplification and speed; logic would have had the Registrar, 'the principal administrative officer of the Court' (Art. 43(2)), charged with this task.
82 Cf. Arts. 121(1) and 122(1).
83 Cf. Art. 121(3) and Art. 123(3) referring to the previous article.
84 The limitation of this circulation only to States Parties is hardly logical, since all States may become Parties: it follows implicitly from Art. 121(5) that States that join after entry into force of the amendment should be bound by the new 'version' of the Statute. The result is so strange that one might wonder whether it is not an error pure and simple (though not corrected in either 1998 or 1999, see above, note 18) and whether, despite the text, the depositary ought not to send this notification to all States (Art. 77(1) of the 1969 Vienna Convention indicates that 'the functions of a depositary, unless otherwise provided in the treaty ... comprise in particular: ... (e) informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty'; emphasis added).
85 See supra note 30.
86 See supra note 23.
87 The Commission felt the Statute ought to be annexed to a treaty among the Parties; see YILC (1994), supra note 13, at 69.
88 Ibid.
International Criminal Court,\textsuperscript{69} except tardily on the basis of the Secretariat’s proposed final clauses, which excluded all possibility of reservations.\textsuperscript{70} This solution, highly approved by several NGOs, was however criticized by a number of States, so that in its final report the Preparatory Committee envisaged four options:

1. no reservations;
2. only permitted reservations (but not specified in draft option B) with or without a special mechanism on the settlement of disputes or legal questions arising in connection with the admissibility of reservations;
3. possibility of reservations except when forbidden; or
4. no article on reservations,\textsuperscript{71} which would have referred back to the general conditions laid down in the 1969 Vienna Convention.\textsuperscript{72}

There being no consensus in the consultations led by the Coordinator on the final clauses,\textsuperscript{73} it was the Bureau of the Committee of the Whole that took the option that seemed to have the preference of the greatest number of States: ‘No reservations may be made to this Statute’\textsuperscript{74}

Though essential in the eyes of the ‘like-minded’ and of many NGOs, this provision was heavily criticized by certain States,\textsuperscript{75} which, not without some reason, saw it as a factor of excessive rigidity. It is not certain that the possibility of limited, well-circumscribed reservations would have harmed the fundamental objectives aimed at, and it would have certainly facilitated ratification of the Rome Statute by States that in good faith strive to overcome constitutional obstacles they meet on technical points that all in all are of only secondary importance. By contrast, given that the ICC, with hardly any possible doubt, constitutes an international organization, it would have been essential, in accordance with the rule recalled in Article 20(3) of the 1969 Vienna Convention, for the ‘competent organ’ of the organization to accept reservations made and satisfy itself that they were in conformity with the Statute. Had they related to material provisions it would have been natural for this assessment to be made by the Court itself;\textsuperscript{76} had they concerned only the functioning of the institution, it could have been made by the Assembly of States Parties.

\textsuperscript{70} A/AC.249/1998/L.11, supra note 24, draft Article B.
\textsuperscript{71} A/CONF.183/2/Add.1, supra note 25, at 162-163.
\textsuperscript{72} Arts. 19 to 23.
\textsuperscript{73} Cf. Slade and Clark, supra note 15, at 431.
\textsuperscript{74} Art. 120.
\textsuperscript{75} Esp. the United States (see R. Wedgwood, ‘The International Criminal Court: An American View’, 10 EJIL (1999), 106). France, Russia, and several Arab States.
\textsuperscript{76} Cf. para. 5 of the Preliminary Conclusions of the International Law Commission on reservations to normative multilateral treaties, including human rights treaties adopted by the ILC in 1997; see YILC (1997) Vol. II, Part 2, para. 157.
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In any case, the categorical wording of Article 120 should not deceive the reader: Article 124, which allows the Court's competence for war crimes to be provisionally set aside,77 in fact authorizes States to make a declaration (highly disputable) that can be analysed as a downright reservation, that is, 'a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State'.78 As Draft Guideline 1.1.5 adopted on first reading by the ILC in August 2000 and included in the first part of the Guide to Practice regarding reservations specifies in relation to the definition of these instruments, declarations made in virtue of an opting-out clause constitute reservations, without there being any need to distinguish between those with temporary scope and those formulated without time limits.79

According to Professor Gerhard Hafner, the mere presence in the Statute of the reservation clause that Article 124 constitutes would suffice to render any reservation inadmissible other than those it authorizes 'by virtue of article 19(b) VCLT [of the Vienna Convention on the Law of Treaties] even in the absence of a clause excluding reservations; in the light of these considerations article 120 has to be considered redundant'.80 This is not obvious: Article 19(b) does not rule out reservations not mentioned in a clause explicitly providing for the possibility of specified reservations unless only those are authorized; Article 124 of the Statute does not contain such a clarification.

Be that as it may, Article 120 is quite unambiguous: reservations to the Rome Statute are prohibited, except only for the temporary declarations authorized by Article 124. This prohibition, however, leaves intact the question whether, failing reservations, contracting States may make interpretative declarations purporting 'to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions'.81

By contrast with certain multilateral treaties,82 the Rome Statute does not explicitly provide so. But the admissibility in principle of such declarations cannot be

77 See infra II. B.2.
79 'A unilateral statement formulated by a State or an international organization when that State or that organization expresses its consent to be bound by a treaty by which its author purports to limit the obligations imposed on it by the treaty constitutes a reservation.' See Report of the International Law Commission on the work of its fifty-first session, UN GAOR, 54th Sess., Supp. No. 10, A/54/10, p. 217.
80 Clark, in Triffterer (ed.), supra note 21, at 1261.
81 Definition of interpretative declarations given in Draft Guideline 1.2 in the Guide to Practice on Reservations adopted in 1999 by the ILC, supra note 79, at 223.
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doubted, as long as they are not in reality disguised reservations, where these are prohibited. 

In practice, twenty-two of the fifty-two first States to ratify accompanied their instrument depositing ratification with 'declarations'. Some of these were made under Article 87(1) and (2), which invites States Parties, on the one hand, to designate the channel through which requests made by the Court for cooperation are to be transmitted and, on the other, to choose the language in which these requests are to be made. These are neither reservations nor interpretative declarations, but purely informative declarations made in virtue of an explicit provision of the Statute, coming into the category of what the ILC has called 'statements concerning modalities of implementation of a treaty at the internal level'.

By contrast Belgium, France, and New Zealand have made interpretative declarations in the ordinary sense of the term:

- Belgium considers 'that article 31, paragraph 1(c), of the Statute can be applied and interpreted only in conformity' with the rules of international humanitarian law.
- France has made seven 'interpretative declarations' whereby it explicitly reserves 'its inherent right of self-defence in conformity with Article 51 of the Charter' (i), and affirms that the 'provisions of article 8 of the Statute, in particular paragraph 2(b) thereof, relate solely to conventional weapons and can neither regulate nor prohibit the possible use of nuclear weapons nor impair the other rules of international law applicable to other weapons necessary to the exercise by France of its inherent right of self-defence . . . ' (ii); and it (restrictively) interprets several provisions of Article 8 (iii) to (vii).
- New Zealand, for its part, bases itself on the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons of 1996 to express the view 'that it would be inconsistent with principles of international humanitarian law to purport to limit the scope of

85 See the declarations of Belgium (Art. 87(1) and (2)), of Belize (Art. 87(1)), of France (Art. 87(2)), and of Norway (Art. 87(1) and (2)).
86 Guide to Practice, Draft Guideline 1.4.5, supra note 79, at 284.
87 France also made a declaration pursuant to Art. 124 of the Statute, see infra II.B.2.
88 New Zealand further temporarily excluded application of the Statute to Tokelau until such time as a declaration 'consistent with the constitutional status of Tokelau and taking into account its commitment to the development of self-government through an act of self-determination under the Charter of the United Nations . . . is lodged by the Government of New Zealand with the Depositary on the basis of appropriate consultation with that territory'. This exclusion constitutes a reservation within the meaning of Draft Guideline 1.1.3 of the Guide to Practice on Reservations to Treaties provisionally adopted by the ILC in 1998, see ILC Report on the work of its fiftieth Session, UN GAOR, 53rd Sess., Supp. No. 1, A/53/10, p. 206.
article 8, in particular article 8(2)(b), to events that involve conventional weapons only and to consider 'that international humanitarian law applies equally to aggressor and defender states and its application in a particular context is not dependent on a determination of whether or not a state is acting in self-defence'.

This article is not an appropriate framework for commenting on the substance of these declarations, except to note that some of them (in particular Belgium's) highlight some definitely worrying problems raised by the wording of certain provisions in the Statute, while others are a matter of course, even if undoubtedly not without ulterior motives. The fact remains that they have, and can only have because of the prohibition of reservations in Article 120 of the Statute, only indicative scope: if it appeared they unduly restricted the meaning or scope of the provisions in the Statute they relate to, they would have to be thrown out by the Court, which could only see them, in the best of cases—that is to say, if not challenged by other Parties—as an element of the context to be taken into consideration for the purpose of interpreting the Statute.

It should be noted in this connection that the New Zealand declaration clearly contradicts the second French interpretative declaration, to which it is plainly intended to reply. At the moment neither of these interpretations can accordingly be regarded as 'accepted by the other parties', and one may take it that this amounts to a dispute relating to the interpretation of the Statute within the meaning of Article 119. If this dispute is not settled by applying this provision (and there is no reason for it to be if neither of the parties concerned invokes the Court, as they are entitled but not obliged to), it will be for the ICC to give its own interpretation in full independence, should the question present itself to it when trying an accused, and the interpretations put forward by the Parties will constitute only elements among others to be taken into consideration.

In that case neither of the two protagonists (or other States in the same position in future) would be entitled to regard themselves as freed of their Treaty obligations under the Statute, even if the interpretation it put forward were rejected:

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90 Cf. the first French interpretative declaration regarding the inherent right of self-defence.
91 In the worst they would be illicit reservations.
92 Cf. Art. 31(2) of the 1969 Vienna Convention on the Law of Treaties: 'The context for the purpose of the interpretation of a treaty shall comprise . . . (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty', emphasis added.
93 France deposited its instrument of ratification on 9 June 2000, and New Zealand on 7 September the same year.
94 See Ch. 46 below. See also R. S. Clark, 'Article 119', in Triffterer (ed.), supra note 21, at 1242-1244.
95 It should be noted that the Finalized Draft Text of the Elements of Crimes adopted by the Preparatory Commission in July 2000 (PCNICC/2000/INF/3/Add.2) furnished no factors able definitively to decide between France and New Zealand on the points opposing them.
(1) The declarations in question do not appear to be 'conditional interpretative declarations', a notion the ILC recently embodied in the 'Guide to Practice' it is drawing up in relation to reservations, which it defines as 'a unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or certain provisions thereof'; though some of the French declarations are worded more categorically than the New Zealand declaration, neither of the two States indicated it makes ratification depend on the interpretation put forward;

(2) would they have, given that there could be serious doubts as to the validity of such a procedure: conditional interpretative declarations are so close to reservations that it is highly doubtful that a State could make expression of its agreement to be bound by a treaty that prohibits reservations depend on acceptance by the other Parties or by the body set up by the treaty of its interpretation of its provisions.

Nothing by contrast prevents a State whose interpretation has been rejected from withdrawing from the Statute. But it would have to do so following the procedure laid down in Article 127, without being able to claim that it had ab initio or at the date of notification of withdrawal not been bound.

3. Conditions for Entry into Force

Article 126(1) of the Statute makes its entry into force depend on two conditions: the depositing of 60 instruments of ratification, acceptance, approval, or accession with the Secretary-General of the United Nations and expiry of a period of 60 days following the date of the deposit of the 60th instrument. Once the Statute has entered into force, this same period of 60 days is laid down in paragraph 2 for entry into force for States that subsequently ratify or accede.

As has rightly been written, this is a 'routine provision' that raised only one real problem when the Statute was being drafted: the minimum number of ratifications required. On the model of most of the NGOs present in Rome, some States wished to limit the figure to 30 or even less, so as to accelerate and facilitate entry into force. Others, on the contrary, advocated a higher figure on the ground of the importance of the innovation constituted by creating the ICC and the need to cre-

96 Draft Guideline 1.2.1, supra note 79, at 240.
97 New Zealand 'notes', 'recalls', is of 'the view' and 'finds support for its view'. France for its part is more affirmative; it 'declares' or 'considers', or quite simply states its position using the present indicative.
98 R. S. Clark, 'Art. 126', in Triffterer (ed.), supra note 21, at 1289.
ate a jurisdiction truly representative of the international community as a whole, if only in order to permit the election of the judges in conformity with Article 36 of the Statute—and it is not without interest to note in this connection that many of those that put forward these arguments were also the States most reticent towards the Court, so that one may wonder as to the sincerity of their position.

Article 114 in the Preparatory Committee’s draft (corresponding to the present Article 126) left this point entirely in suspense, but further laid down, in square brackets, two additional conditions for the Statute’s entry into force; that this would come about only:

1. on the one hand, ‘following the completion of the Rules of Procedure and Evidence’; and
2. on the other, provided that instruments of ratification (or equivalents) ‘have been deposited by no fewer than [one] [two] [four] members from each geographical group as established by the General Assembly of the United Nations’.99

These two additional conditions were dropped in Rome. Though the Coordinator for the final clauses had proposed retaining the second,100 the Bureau of the Committee of the Whole chose another solution, reflected in paragraphs 5(a) and (b) of Resolution F included in the Final Act of the Conference,101 whereby the Preparatory Commission established by that Resolution is to have finalized the Rules of Procedure and Evidence before 30 June 2000.102 In so doing the Conference was, on the one hand, betting on a fairly slow ratification process—it won!—and on the other, it was putting pressure on the Preparatory Commission by setting a specific date for completing its work on these two essential aspects of its functions.103

At the same time the Bureau settled the delicate problem of the number of ratifications required, by setting it at 60.104

Despite the lively opposition over this point at the Conference (to which ‘tactical’ considerations were not entirely foreign), there is agreement in thinking that it was a ‘reasonable compromise’.105 More would have compromised the chances of the Statute’s entering into force within an acceptable time, while fewer would have

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99 A/CONF.183/2/Add.1, supra note 25, at 166.
100 Recommendations of the Coordinator—Preamble and Final Clauses, A/CONF.183/C.1/L.61.
102 See infra II.B.1.
103 Though one may query the real importance of the Elements of Crimes, see Ch. II.5 below.
104 Failing consensus, the Coordinator for the final clauses had made no proposal in this connection, see A/CONF.183/C.1/L.61, supra note 100.
105 W. Bourdon (with E. Duverger), _La Cour pénale internationale: Le Statut de Rome_ (2000) at 302.
further enhanced the Court's lack of universality and the dissatisfaction that might be felt at that.

The fact remains that 'a race against the clock began against the future executioners'.\textsuperscript{106} This is all the more dramatic since the principle of non-retroactivity laid down in Article 11 of the Statute constitutes an undue, regrettable premium on impunity; the events in East Timor or Sierra Leone, and many others less prominent in the media, show, if it were needed, how the slowness in the ratification movement confirms these regrets.

It is however speeding up, since while there were six ratifications in 1999,\textsuperscript{107} eight States ratified in the first nine months of the following year, and a growing number of countries have subsequently ratified.\textsuperscript{108} And it is hardly exaggerated optimism to think that both the initial slowness and this acceleration testify to the seriousness with which States take their commitments under the Statute and equip themselves with concrete, and above all legislative and regulatory, measures to meet them.

\section*{B. The Effects of Entry into Force}

\subsection*{1. The 'Positive' Consequences of Entry into Force}

In virtue of the principle \textit{pacta sunt servanda}, entry into force of the Statute will entail the first sixty States Parties (and subsequently for new Contracting Parties) the obligation to apply its provisions and the right to appeal to them\textsuperscript{109} without retroactivity\textsuperscript{110} and without their being able to invoke either the provisions of their internal laws,\textsuperscript{111} nor, subject to Article 103 of United Nations Charter, those of previous treaties linking them to other States Parties to the Statute.\textsuperscript{112}

The Statute's entry into force will also, though very indirectly, affect third States, whether signatories or not.

\textsuperscript{106} Ibid., at 304.
\textsuperscript{107} The first being Senegal's on 2 February 1999 and the second Trinidad and Tobago's, on 6 April, something worth noting since this State had abstained from the final vote on the Statute on 17 July 1998.
\textsuperscript{109} Cf. Art. 26 of the 1969 Vienna Convention on the Law of Treaties: '\textit{Pacta sunt servanda}—Every treaty in force is binding upon the parties to it and must be performed by them in good faith.' As has been pointed out (Schabas, supra note 46, at 158), Art. 86 of the Statute is accordingly superfluous.
\textsuperscript{110} Art. 28 of the 1969 Vienna Convention on the Law of Treaties. This general principle did not make it unnecessary to include in the Statute Art. 11 limiting the Court's jurisdiction to crimes committed after the entry into force of the Statute: Art. 27 of the Vienna Convention could have been interpreted as applying only to the institutional and procedural provisions of the Rome Statute.
\textsuperscript{111} Ibid., Art. 27.
\textsuperscript{112} Ibid., Art. 30.
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It is highly exaggerated in this connection to claim that '[i]n fact, the proposed treaty imposes more obligations on non-parties than on party States' 113 and in particular it is not correct that '[i]he latter may opt out of the provisions dealing with war crimes and crimes to be added in the future; the former may not'; 114 on the one hand, an opting-out declaration under Article 124 does not have the effect that this affirmation implies; 115 on the other hand and in any case, it must be considered that States not Parties have 'opted out from the whole treaty', so that they find themselves at worst (or at best) in the position of least active of the States Parties.

This being so, it is not untrue that, to a limited extent, 'the treaty exposes non-parties', 116 as soon as the Statute enters into force:

- Third States can make the declaration specified in Article 12(3), accepting the exercise of jurisdiction by the Court for a specified crime committed on its territory or if the accused is one of its nationals.
- They can respond to an invitation by the Court to provide assistance under Part 9.117
- In the event of competing requests from the Court for the surrender of a person and from a non-Party State for extradition, the latter risks seeing the Court opposing a priority to the request.118
- In accordance with the principles set out in Article 12(2), the Court may exercise its jurisdiction in relation to an accused having the nationality of a State not a Party where the State on the territory of which the crime was committed is a party to the Statute or has accepted the Court's competence pursuant to Article 12(3).119

On none of these assumptions, however, is there any infringement of the principle that pacta tertiis nec nocent nec prostant:120 in the first two cases, the mere faculty voluntarily to take on certain obligations is open to them;121 in the third (Article 90) the priority going to the Court's request applies only if the requested State is not under an international obligation to extradite the person to the requesting

113 T. Meron, 'The Court We Want', ASIL Newsletter (November–December 1998) 9.
114 Ibid.
115 See infra II.B.2.
116 D. J. Scheffer, 'The United States and the International Criminal Court', 93 AJIL (1999) 12, at 18; but the rest of the phrase ('... in ways that parties are not exposed') is no more well-founded than the assertion above (notes 115 and 116) by T. Meron.
117 Art. 87(5).
118 Art. 90(4) and (6).
119 See Ch. 16 below.
120 Cf. Art. 34 of the 1969 Vienna Convention: 'General Rule Regarding Third States—A treaty does not create either obligations or rights for a third State without its consent.'
121 It will be different only if a situation is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter in accordance with Art. 13(b) of the Statute (see Ch. 17.2 below); but, in this case, the source of the obligation incumbent on States not parties is the Security Council's decision, not the Statute.
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State'; as for the last, finally, it imposes obligations not on third States as such but upon their nationals, something quite different despite the thesis the United States and their representatives have endeavoured to accredit;122 additionally, the principle of territoriality of prosecution in criminal matters is well established.

At most, one has to note that States not Parties can benefit from the principle of complementarity: following entry into force of the Statute, it will be permissible for them to have one of their nationals escape the Court's jurisdiction by investigating or prosecuting the case in accordance with the requirements of Article 17 of the Statute.

By itself, entry into force of the Statute will have no mechanical effects on the entry into force of what one might call the law 'induced' by it, which can be called only in part 'derived' law, since while it involves a number of instruments of a 'regulatory' nature approved by the Assembly of States Parties it also includes agreements that have to be concluded by the Court with the United Nations (Relationship Agreement between the Court and the United Nations) or certain States (Agreement on the Privileges and Immunities of the Court and Headquarters Agreement with the Host Country).

The drafting of these instruments has been entrusted to the Preparatory Commission for the International Criminal Court established by Resolution F adopted by the Rome Conference and included in its Final Act.123 In the words of paragraph 5:

The Commission shall prepare proposals for practical arrangements for the establishment and coming into operation of the Court, including the draft texts of:

(a) Rules of Procedure and Evidence;
(b) Elements of Crimes;
(c) A relationship agreement between the Court and the United Nations;
(d) Basic principles governing a headquarters agreement to be negotiated between the court and the host country;
(e) Financial regulations and rules;
(f) An agreement on the privileges and immunities of the Court;
(g) A budget for the first financial year;
(h) The rules of procedure of the Assembly of States Parties.124

Additionally, the Commission has been asked to 'prepare proposals for a provision on aggression'.125

123 This technique of setting up a Preparatory Commission to blaze the path for a complex institutional construction is very frequent, even if it may take on different forms, cf. Daillier and Pellet, supra note 33, at 161–162.
124 Supra note 101.
125 Para. 7. On the work of the Preparatory Commission, see Ch. 2.4 above.
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In accordance with the decision taken in paragraph 6 of the same resolution, the draft texts of the Rules of Procedure and Evidence and of the Elements of Crimes were adopted by the Commission following its fifth session, at the scheduled date of 20 June 2000. These two fundamental texts do not, any more than the other instruments provided for, come into force automatically at the same time as the Statute. They additionally have to be approved by two-thirds majority of the Assembly of States Parties which will, specifically, be formed only after entry into force of the Statute. Though the Statute is silent on this point, it is to be thought that it will meet as from that date (or immediately thereafter): the sixty-day period set by Article 126(1), after deposit of the sixty-sixth instrument of ratification, acceptance, approval, or accession should be enough for finalizing the practical arrangements needed for the meeting. Curiously, paragraph 8 of Resolution F provides that the Preparatory Commission shall remain in existence until the conclusion of the first meeting of the Assembly of States Parties, probably in order to enable the former to report to the latter and promote a harmonious transition.

In addition to these normative tasks, the Assembly of States Parties must at its first meeting elect the Judges and the Prosecutor, and if necessary make recommendations for the election of the Registrar. However, since it is the Judges who are to elect him, this can come only once they have themselves taken up their duties. The same will necessarily be true of the staff of the office of the Prosecutor and of the Registry, who are appointed by the Prosecutor and the Registrar.

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126 See Finalized Draft Text of the Rules of Procedure and Evidence (PCNICC/2000/INF/3/Add. 1 or PCNICC/1/Add. 1) and Finalized Draft Text of the Elements of Crimes (PCNICC/2000/INF/3/Add. 2 or PCNICC/1/Add. 2).
127 Arts. 9 and 51; by contrast, no ratification by the States Parties is required (contra regarding the Elements of Crimes: M. H. Arsanjani, ‘The Rome Statute of the International Criminal Court’, 93 AJIL (1999) 22, at 42; but, if it were so, the Elements of Crimes would amount to amendments to the Statute, quod non, see Ch. 11.5 below). All the other instruments drafting of which has been entrusted to the Preparatory Commission must, failing consensus, be approved by the Assembly of States Parties by a two-thirds majority (cf. Art. 112(7)(a) of the Statute); for the Agreement between the Court and the United Nations, see Art. 2; for the Headquarters Agreement, Art. 3(2); for the Financial Regulations and Rules, Art. 113; for the budget, Art. 112(2)(d), and for the Rules of Procedure of the Assembly itself, Art. 112(9); presumably inadvertently the Statute does not specify that the Agreement on the Privileges and Immunities of the Court must also be approved by the Assembly of States Parties (cf. Art. 48), but it would be contrary to the general spirit of the Statute and the general functions of the Assembly (Art. 112) for it to be otherwise.
128 Emphasis in text.
129 Para. 9.
130 Nothing prevents the Assembly of States Parties from amending drafts produced by the Preparatory Commission, even if it may be thought that it will look twice at this before breaking carefully balanced equilibria, see Ch. 2.4 above.
131 Cf. Arts. 36 and 42 of the Statute; assistant Prosecutors are to be chosen from a list of candidates provided by the Prosecutor; therefore they can be chosen only after the Prosecutor and not necessarily at the Assembly’s first session.
132 Cf. Art. 43(4).
133 Ibid.
respectively, on conditions of employment to be laid down by the Staff Regulations proposed by the Registrar with the agreement of the Presidency and the Prosecutor and approved by the Assembly of States Parties. Additionally, Article 52(1) of the Statute asks the Judges to adopt, after consultation of the Prosecutor and of the Registrar, 'the Regulations of the Court necessary for its routine functioning'.

Thus, entry into force of the Statute will not be enough to make the Court an institution immediately operational, even if it is certain that the work of the Preparatory Commission will considerably facilitate the rapid setting up of the Court's organs and subsequently the effective implementation of the provisions of the Statute.

One might instead fear that the long proceedings of the Preparatory Commission might be merely a pretext for some sapping work by the States opposed to the Statute, in particular the United States. Paragraph 4 of Resolution 53/105 of the General Assembly of the United Nations adopted by consensus on 8 December 1998 which requested 'the Secretary-General to convene the Preparatory Committee in accordance with resolution F adopted by the [Rome] Conference ... to carry out the mandate of that resolution and, in that connection, to discuss ways to enhance the effectiveness and acceptance of the Court' (emphasis added) could not but strengthen fears in this respect.

The latency period between adoption of the Statute and its entry into force allows one to imagine an endeavour like the one that led to the emasculation of Part XI of the 1982 UN Convention on the Law of the Sea by the New York Agreement of 29 July 1994, and there can be no doubt that the United States had thought of this. As has been written, 'Montego Bay docet ...'. However, this has not to date happened. It may be thought that the extreme sensitization of public opinion and the NGOs to everything concerning the Statute, the short period that should pass between its adoption and entry into force, and the in-built flexibility factors should make such an undesirable outcome unlikely. 'Cautious vigilance' is nonetheless in order.

134 Cf. Art. 44(1).
135 Cf. Art. 44(3).
137 Condorelli, supra note 48, at 19.
138 Ibid., at 8.
2. The Flexibility Factors Built into the Statute

Despite the bar in principle on reservations, the Rome Statute presents some flexibility that gives it an evolutionary character:

- First, States not Parties may have relations with the Court either by being invited to operate with it or in that they may accept the exercise of jurisdiction by the Court with respect to a particular crime.

- Second, the Statute gives the States Parties possibilities of withdrawal, necessarily restricted given the Statute's goal and object, but sufficiently flexible not to seem like a definitive block on their will.

- Moreover, the fastidious drafting of the provisions relating to amendments to the Statute and its revision show that the drafters attempted to achieve a compromise between the equilibria laboriously accepted in Rome and the desire of a majority to complete an imperfect construction.

- This concern is particularly evident in relation to the list of crimes coming within the Court's province and the definition of aggression, on which the Preparatory Commission undertook to reflect even before the entry into force of the Statute, in accordance with the invitation appearing in paragraph 7 of Resolution F adopted in Rome.

- Additionally, absent reservations, parties may make interpretative declarations which, though not binding the Court nor able to be brought against the other parties, may nonetheless influence future interpretation of the Statute.

At any rate, the bar on reservations is not total, since Article 124 provides that one specific reservation may be made. This provision, headed 'Transitional Provision', states:

Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.

This provision is aimed at reassuring States that were concerned about the Court investigating isolated cases of individual war crimes by providing a period.

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139 See supra II.A.2.
140 Cf. Art. 12(3) of the Statute; see supra II.B.1.
141 Arts. 121 to 123; see III below.
142 See supra note 125 above and Ch. 2.4 above.
143 See supra II.A.2.
144 See supra II.A.2.
145 Italics indicate corrections made by the Secretary-General on 10 November 1998; see supra note 18.
allowing States to grow accustomed to the Court's operation and to observe its interpretation and application of the war crimes provision. A heavy concession made to conservative interests at the Conference, Article 124 made its appearance late 'in order to secure the acceptance of the Statute by certain States, but in particular that of France'. This country, which like the other permanent members of the Security Council had throughout the Conference argued in favour of optional competence for the Court for crimes against humanity and war crimes on the basis of an opting-in clause, launched through an informal proposal the idea of an optional additional protocol the object of which would be to enable Parties to exclude the Court's jurisdiction for these two crimes for a specified period (which could have corresponded to the duration of the moratorium preceding the first revision, which had been suggested to be ten years). This proposal was supported by China, the United States, and Russia and accepted in principle by Japan and the United Kingdom which, on 15 July 1998, took it up in a 'non-paper' presented at a meeting of the European Union in a rather different form: concluded for ten years, the protocol would be extendable by simple majority of the Assembly of States Parties; at the same time the United Kingdom, keen to secure the support of the United States, proposed, on certain conditions, excluding the Court's competence 'over a crime, if the act in question is an act of State of a third State, not party to the Statute and is acknowledged as such by that State'. In response to this proposal, hastily accepted by all permanent members of the Security Council, a German counter-proposal doubly limited the scope of the opting-out possibility, ratione materiae to war crimes only (or some of them), and ratione temporis to three years, non-renewable. Following intense consultations by the Bureau of the Committee of the Whole, this proposal was included in its present form in the latter's final proposal dated 16 July.

To date (1 March 2002), only France has accompanied its ratification of the Statute by a declaration pursuant to Article 124. In response to an enquiry from the French Coalition for the ICC dated 15 February 1999, Mr Jacques Chirac, President of the French Republic, justified this awkward precaution as follows:

The definition of war crimes within the meaning of the Statute is distinct from those of crimes against humanity and of genocide in the sense that it can cover isolated acts. Unfounded complaints tinged with political ulterior motives could thus more easily be directed against personnel of countries which, like ours, are engaged in

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147 M. Polid, 'Le Statut de Rome de la Cour pénale internationale: Le Point de vue d'un négociateur', 103 RGDIP (1999) 817, at 837.
149 Zimmermann, supra note 58, at 1282.
150 A/CONF.183/C.1/L.76.
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external theatres, particularly in connection with peace-keeping operations. Experience will allow the efficacy of the guarantees incorporated in the Statute in order to avoid such dysfunctionality to be verified.\(^{151}\)

"The justifications furnished are without foundation":\(^{152}\) whether in connection with isolated acts or with crimes 'committed as a part of a plan or policy or as part of a large-scale commission of such crimes' (which Article 8(1) encourages the Court to give priority to pursuing), the complementarity principle guarantees law-abiding States priority in effective prosecutions that nullifies the fears expressed by the French Head of State. Additionally, this is evidence beforehand of mistrust towards the new institution that says much about the state of mind of some of the signatories and even of the Contracting States and their despicable desire to keep severe offences against the law of armed conflict committed by their military away from any international investigation (indeed any enquiry, even if exclusively national).

But they gained here no more than a 'Pyrrhic victory', however immoral and unpleasant. Being a 'transitional provision', Article 124 allows Parties to make only a non-renewable declaration, the effects of which cease on expiry of a period of seven years following entry into force of the Statute in relation to them. After expiry of this period two courses, and only two, are open to a State that has seen fit to make such a declaration: (i) either, not taking any special initiative, it (finally) joins the club of 'virtuous' Parties who accept the Court's normal competence as it results from Articles 5, 8, and 12 of the Statute; or (ii), at the risk of probable and strong reproof from national and international public opinion, it takes advantage of the power of withdrawal opened up by Article 127 of the Statute, through the obligation to respect a year's notice required by the provision.

There is of course another possibility, mentioned in Article 124 itself, consisting in changing the time limit imposed on declarations made under the provision, of which the Review Conference to be held seven years after the entry into force of the Statute might decide to authorize renewal. But despite the likely attacks by France,\(^ {153}\) this possibility depends on a favourable vote by two-thirds of States Parties and ratification of the amendments so adopted by seven-eighths of them.\(^ {154}\) Additionally, in order for such amendments, which it may be hoped will not be adopted, to apply to States already Parties to the Statute that have made the declaration under Article 124, the Review Conference would have to give it retroactive effect, failing which the latter would irredeemably be bound by Article 8 (unless they withdraw in order to deposit a new instrument of ratification, a

\(^{151}\) Cited in Bourdon, \textit{supra} note 105, at 298.

\(^{152}\) Ibid.

\(^{153}\) See the cautious formulations employed by J. P. Dobelle, 'La Convention de Rome portant Statut de la Cour pénale internationale', \textit{44 AFDI} (1998) 356, at 361.

\(^{154}\) Cf. Arts. 123(3) and 121(4); see infra III.
politically delicate and legally dubious manoeuvre). The same remark would apply *a fortiori* if, and there is nothing to forbid this, Article 124 were to be amended not at the first Review Conference but at a later date, in accordance with the procedures opened up by Articles 121 or 123. 155

While there can be no doubt as to the duration of validity of declarations made under Article 124, the same is not true of their scope *ratione materiae*, or even *ratione personae*. First, by contrast with what the German proposal envisaged, 156 it is silent as to the possibility of selective acceptance of certain provisions of Article 8. The solution to this problem is uncertain: on the one hand, one might maintain that ‘those who can do more can do the lesser’ and that it is in line with the very nature of the Statute to interpret the reservation clause under Article 124 restrictively; on the other, a textual argument militates in the opposite direction: for the text of this provision refers to ‘the category of crimes referred to in Article 8’, which seems to exclude selectivity. 157

Second, if an accused has several nationalities the fact that only one of the States of those nationalities had made the declaration under Article 124 could not exempt that person from prosecution. 158

Third and especially, as has been pointed out, ‘there may be situations in which a conflict of jurisdiction may arise as between two states parties in relation to war crimes. For example, the territorial state has consented to the court’s jurisdiction unconditionally, while the state of nationality of the accused has opted out of the court’s jurisdiction over war crimes for seven years. The statute is silent on the interpretation of Article 12 on the jurisdiction of the court in the event of such conflict’. 159

It has been suggested that the preparatory work suggests adopting the interpretation that ‘such opting-out completely bars the exercise of jurisdiction by the Court in regard of alleged war crimes committed either by nationals or on the territory of the State which has made the declaration’. 160 This position comes up against serious objections, if only because recourse to the preparatory work should not be made if the ordinary meaning of a treaty provision does not lend itself to confusion. 161 But in the case in point Article 12(3) is limpid: ‘the Court may exercise jurisdiction if the territorial State or the State of the nationality of the accused are Parties to the Statute'; and nothing in Article 124 runs counter to such a position; moreover, the contrary interpretation would have the severe drawback of

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155 In this sense: Stade and Clark in Lee (ed.), *supra* note 15, at 443.
156 See text *supra* note 150.
157 In this sense: Zimmermann, *supra* note 58, at 1284.
158 Ibid.
159 Arsanjani, *supra* note 127, at 42.
160 Zimmermann, *supra* note 58, at 1282.

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enabling a State Party unilaterally to limit the scope of another State Party’s commitment, something that goes very far beyond the scope attributable to a unilateral act.\textsuperscript{162} In any case, recourse to the preparatory work is particularly questionable in relation to the Statute, the text of which (particularly Article 124) is largely the outcome of oral debates that have not been published, as well as of informal consultations.

In any case, "[d]eclarations made under article 124 are only relevant when the Court is exercising its jurisdiction by virtue of a State referral under article 14 or when the Prosecutor has initiated investigations \textit{proprio motu}. Where a situation is referred to the Court by the Security Council, any such declarations are irrelevant . . ."\textsuperscript{163}

It is therefore best not to exaggerate the scope of Article 124, which appears more negatively symbolic than truly limitative. In any case, this 'wicked provision'\textsuperscript{164} is undoubtedly less devastating to the Court's very credibility than would have been adoption of the original French or British proposals, still less that made by the United States on the last day of the Rome Conference, to exclude in general terms and with no time limit the Court's competence for the nationals of States that have not explicitly accepted it, which would have 'irreparably altered the balance that had been achieved'.\textsuperscript{165}

More classical, less 'infamous',\textsuperscript{166} but in reality more threatening to the Court's universality and future functioning would ultimately seem to be Article 127 on 'Withdrawal' from the Statute.

The principle of the possibility for States Parties to withdraw was scarcely disputed: it rapidly appeared able to assuage the fears of certain States, and particularly certain Parliaments, keen not to make irreversible commitments\textsuperscript{167} (or ones subject to the very strict conditions for termination or withdrawal laid down by the general law of treaties in this respect\textsuperscript{168}), all the more effectively since

\textsuperscript{162} Since Art. 124 constitutes a reservation (see text \textit{supra} note 144), one might consider, in order to avoid all ambiguity, advising other Parties to respond to a declaration made under this provision by specifying that it could not limit the scope of their own commitments under Art. 12. However, since temporary reservations under Art. 124 are explicitly provided for by the Statute, this sort of response cannot be analysed as an objection within the meaning of Art. 20 of the Vienna Convention and could appear only as a sort of interpretive declaration, which leaves the problem in suspense.

\textsuperscript{163} Zimmermann, \textit{supra} note 58, at 1283.


\textsuperscript{165} Kirsch, \textit{supra} note 147, at 837.

\textsuperscript{166} Judge Rosalyn Higgins talks about 'the famous, or infamous, Article 124' ('The Relationship between the International Criminal Court and the International Court of Justice', in von Hebel \textit{et al.} (eds.), \textit{supra} note 2, 163, at 167).

\textsuperscript{167} Bourdon, \textit{supra} note 105, at 305.

withdrawal need not be accompanied by the giving of reasons. The Preparatory Committee's report\textsuperscript{169} contained no square brackets in paragraph 1 of the Draft Article 115 regarding the one-year period between the point when written notification of withdrawal is sent to the Secretary-General and the date on which it has effect 'unless the notification specifies a later date'.\textsuperscript{170} The second paragraph of this draft provided in two different forms, differing only by their greater or lesser exactitude, for continuation of financial obligations to and cooperation with the Court arising before the date of effective withdrawal, which is moreover not to 'prejudice in any way the continued consideration of any matter which is already under consideration by the Court' prior to that date. Subject to minor editorial adjustments these drafts passed into Article 127 of the Statute.

Though this is a common clause in acts establishing international organizations\textsuperscript{171} or in human-rights treaties,\textsuperscript{172} despite its relatively specific character it does not solve all the problems that might be caused by withdrawal of a State Party. While it is clear that paragraph 2 rules out the possibility of withdrawal ending proceedings in hand,\textsuperscript{173} the question arises whether proceedings may be begun during the preliminary notice period or even after withdrawal but in relation to a crime committed before its expiry.

Article 70 of the Vienna Convention on the Law of Treaties supplies a guideline allowing an answer. By paragraph 1(b) of this provision, the termination of a treaty 'does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination'; its seems reasonable to consider that any action begun before expiry of the notice can continue its course thereafter. By contrast, whatever might have been the intention of certain participants in the Rome Conference,\textsuperscript{174} it would not be in line with the natural meaning of words to consider that a relevant 'legal situation' would have been 'created through the execution of the treaty' by the mere fact that commission of a crime had not been referred to the Prosecutor or that it would not have been such that he or she would have initiated investigations prior to actual withdrawal.\textsuperscript{175} It goes without saying that this sort of conclusion has no effect on any wrongfulness in

\textsuperscript{169} Supra note 25, Art. 115.
\textsuperscript{170} Art. 121(6) provides for an exception to this rule, by accepting that a State rejecting an amendment that has entered into force may withdraw with immediate effect, see infra III.B.
\textsuperscript{171} See e.g. Art. 1(3) of the League of Nations Covenant or Art. XV of the Agreement setting up the WTO.
\textsuperscript{172} See e.g. Art. XIV of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; Art. 12 of the Optional Protocol to the International Covenant on Civil and Political Rights; or Art. 65 of the European Convention on Human Rights.
\textsuperscript{173} In this sense, see e.g.: Slade and Clark, in Lee (ed.), supra note 15, at 446–447 or Jarasch, supra note 148, at 177.
\textsuperscript{175} Contra: R. S. Clark, 'Art. 127', in Triffterer (ed.), supra note 21, 1291, at 1293.
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international law of the acts in question; it is merely that expiry of the notice prevents commencement of any action by the Court in relation to them.

If following one or more withdrawals pursuant to Article 127, the number of Parties to the Statute falls to a figure less than that required for its entry into force, this situation has no effect on the continued existence of the treaty or maintenance of the Court's activity.

III. Modification of the Statute

Procedures for amendment and review of the Statute constitute another feature of cautious flexibility put in by the negotiators. These provisions in fact guarantee the perpetuity of the essential provisions while not totally ruling out improvements, from which in certain cases a small reluctant minority could rule themselves out.

To this end, Articles 121/123 make a twofold distinction of a purely procedural nature between:

- basic amendments, on the one hand, and those concerning 'provisions of an institutional nature', on the other
- the procedure for 'amendments' stricto sensu, on the one hand, and 'review of the Statute', on the other.

The latter distinction, concerning only amendments other than those contemplated in Article 122, has only limited scope: while amendments can be adopted by the Assembly of States Parties (Article 121), review is to be by a special Conference convened by the Secretary-General of the United Nations (Article 123); but the object and the conditions for entry into force of the amendments adopted by either of these methods are identical.

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176 See ICJ, 4 December 1998, Judgment, *Fisheries Jurisdiction (Spain v. Canada)*, para. 65; see also Higgins, *supra* note 166, at 167.

177 Cf. Art. 55 of the 1969 Vienna Convention on the Law of Treaties: "Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force." In theory the Statute would come up against impossibility of application if the number of Parties fell below 18: in that case it would no longer be possible to hold the election of Judges pursuant to Art. 36(1), (4), and (7).

178 Cf. Bourdon, *supra* note 105, at 296: "The mechanisms laid down by Articles 121 ff. are complex and cumbersome. But they make the Statute fairly untouchable in its essential provisions while opening up some possibilities of rediscussing it, and in certain cases the freedom for a State to keep out."

179 Art. 122 lays down a special rule derogating from the general rule of Arts. 121 and 123, which indeed seems to rule out the latter.
Moreover, Article 121 draws another distinction, this time of substance, relating on the one hand to the effects of amendments to Articles 5–8 and on the other to the other fundamental provisions.

A. Amendment Procedure under Article 122

Article 122 of the Statute relates specifically to 'amendments to provisions . . . which are of an exclusively institutional nature, namely, article 35, article 36, paragraphs 8 and 9, article 37, article 38, article 39, paragraphs 1 (first two sentences), 2 and 4, article 42, paragraphs 4 to 9, article 43, paragraphs 2 and 3, and articles 44, 46, 47 and 49'.

Introduced by the word 'namely', this strictly limitative list reflects a restrictive conception of the notion of 'exclusively institutional nature' which the drafters of the Statute have narrowly circumscribed: the two most important provisions appearing in the list in Article 122 are probably Articles 36(8) and (9), relating to the qualifications of judges, and 42(4)–(9), relating in particular to the way of electing the Prosecutor, and Article 46 on the removal from office of judges, the Prosecutor and Deputy Prosecutors, the Registrar and Deputy Registrar; the other points are fairly anodyne. It is noteworthy that the possibilities of amending the provisions of Article 39 on the Chambers are confined to the first two sentences of paragraph 1 and to paragraphs 2 and 4, excluding the principle of the organization into divisions and even the duration of assignment of judges to the divisions.

This shows the extent to which participants in the Rome Conference were reluctant over what we might call the 'minor revision' of the Statute provided for by Article 122. This procedure differs from those laid down by Articles 121 and 123 for amending all the other provisions of the Statute by its (relative) flexibility, its

181 Art. 36(2) institutes another simplified procedure on the initiative of the Presidency of the Court, to allow adjustment of the number of judges to the Court's workload.
182 Para. 4.
183 Art. 35 relates to the 'Service of judges'; Art. 37 to 'Judicial vacancies'; Art. 38 to the 'Presidency '; Art. 43(2) and (3) concern minor aspects (indeed almost obvious ones) of the functioning of the Registry; Article 44 concerns 'Staff' (with the curious exception of the 'Solemn Undertaking', covered by Art. 45); Art. 47 is on 'Disciplinary measures'; and Art. 49 on 'Salaries, allowances and expenses'.
185 COVERED BY ART. 34(b) AND THE FIRST TWO SENTENCES OF PARA. 1.
185 Covered by para. 3.
186 By analogy with the 'minor revision' of the Paris Treaty creating the ECSC (Art. 95), which is much more informal, it is true; see also the 'simplified procedure' of Art. 313 of the 1982 United Nations Convention on the Law of the Sea. These more flexible procedures for amending treaties, including acts establishing international organizations, are in no way exceptional (see Dailly and Pellet, supra note 33, at 297–298).
187 See B. below.
188 Be they substantive or institutional in nature, since the articles to which Art. 122 limitatively refers are far from including all the 'provisions of an institutional nature'.
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(supposed) rapidity and its effects, which are more binding on States Parties. By contrast with the former, Article 122 amendments:

1. 'may be proposed at any time'—and thus without awaiting the expiry of a seven-year period following entry into force of the Statute, as required by Articles 121 and 123;

2. shall be submitted either to the Secretary-General or to 'such other person designated by the Assembly of States Parties' (this 'other person' could very well be the Registrar)—and not solely to the Secretary-General as provided for by Article 121;

3. shall be circulated 'to all States Parties and to others participating in the Assembly' (including the observers, signatories of the Final Act, mentioned in Article 112(1) )—whereas only States Parties are addressees of Article 121 proposed amendments; and

4. 'shall enter into force for all States Parties six months after their adoption by the Assembly [of States Parties] or, as the case may be, by the [Review] Conference'—by contrast with Article 121 or 123 amendments, which do not enter into force till a year after being ratified by seven-eighths of the States Parties, and offer States that have not ratified them, according to the case, a right to refuse to apply them, or to immediate withdrawal.189

The points common to the two procedures are thus limited to two. On the one hand, like all the others, Article 122 amendments must be adopted either by consensus or, failing that, by a two-thirds majority of States Parties.191 On the other, they may be submitted, indifferently, to an Assembly of States Parties or to a Review Conference, without the Statute indicating any criterion whatever for choosing between these two channels, which it must be said are not very different from each other;192 at most one might think that the cumbersomeness of the latter would as a general rule make the former preferable, except where a Review Conference happened to be sitting at the time an amendment proposal was formulated on the basis of Article 122(1).193

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189 See infra III.B.

190 It follows from the silence of Art. 122 that the only possibility of withdrawal open to States hostile to an amendment coming into force in accordance with this procedure would be to base it on Art. 127, respecting the conditions (notably as regards notice) laid down by this provision, see supra II.A.2.

191 This (logical) limitation to States Parties only leads one to wonder about the objective pursued by the requirement laid down in Art. 122(1) for circulation of the proposed amendments to the observers.

192 See B. below.

193 In this sense, see Slade and Clark, in Lee (ed.), supra note 15, at 439; and R. S. Clark, 'Art. 122', in Triffterer (ed.), supra note 21, 1273, at 1275.
The Path to Rome and Beyond

Introduced on a Swiss initiative at the Rome Conference, the Article 122 procedure "permits fast tracks amendments" to provisions less "of an institutional nature", which are secondary, or—and this is the original concern inspiring it—liable to require rapid adjustment to the decisions taken in Rome.

To tell the truth, it was while debating Article 36 that awareness came that it might perhaps be necessary to make changes to the number of judges making up the Court according to its workload and that it would be unrealistic for this purpose to have recourse to the slow, cumbersome Article 121 procedure, still less the Article 123 one. This concern led to adoption of Article 36(2), allowing an increase or reduction in the number of judges to be made by a simplified, accelerated procedure.

Though this procedure, the main lines of which were established already in the preparatory phase, is partly different from the one adopted in Article 122, it nonetheless constitutes the source of inspiration for the "minor revision" regulated by both provisions. This is certainly faster and less impracticable than the "normal" procedure: it is nonetheless fairly cumbersome, and might be slower to apply than expected if an amendment initiative is taken when the Assembly of States Parties is not sitting.

It is true that this scarcely matters given how secondary the provisions to which "fast" amendments can be made are, on the whole—even though some articles not covered by Article 122 might instead call for urgent adjustment. The concern not to threaten the equilibria laboriously reached in Rome led to restricting to the bare minimum the fast procedure, at the cost of a risk of immobilism that Articles 121 and 123 clearly favour.

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194 Cf. Jarsch, supra note 148, at 175. The Draft Statute for the International Criminal Court appearing in the Report of the Preparatory Committee (supra note 25) drew a distinction between 'Amendments' and 'Review of the Statute' (Draft Arts. 110 and 111), but not between amendments to 'provisions of institutional nature' and to other provisions.

195 R. S. Clark, 'Art. 121', in Triffterer (ed.), supra note 21, 1265, at 1267.

196 This is one of the risks incurred because of the often excessively detailed nature of the Statute.

197 Draft Art. 37 in the Draft Statute prepared by the Preparatory Committee, supra note 25.

198 On the model of what had been necessary for the ICTR and ICTY, cf. SC Res. 1165 and 1166 (1998) dated 30 April and 13 May 1998, increasing by three the number of Judges on each Tribunal.

199 See note 197 above.

200 The initiative for this (with reason given) is to be taken by the Presidency of the Court; the proposal is circulated by the Registrar to all States Parties; it is 'considered at a meeting of the Assembly of States Parties to be convened in accordance with article 112' (an odd specification, since Art. 122 gives no specification as to the convening and meeting of the Assembly—another sign of the haste with which the Statute was adopted) and adopted 'by a vote of two-thirds of the members of the Assembly of States Parties', which decides the date it is to enter into force.

201 Esp. given the arrangements for in principle annual sessions provided for by Art. 112(6) of the Statute.

202 Esp. the financial provisions in Part 12.
Entry into Force and Amendment

B. The Articles 121 and 123 Amendment and Revision Procedures

Given the narrow limits enclosing the possibilities of recourse to the minor revision under Article 122, the amending procedure in ordinary law is the one laid down in Articles 121 and 123, without there being any need to dwell overmuch on the distinction they draw between 'Amendments' (Article 121) and 'Review of the Statute' (Article 123); as in the case of the 'amendments to provisions of an institutional nature', these two procedures are largely interchangeable, to the point that one may wonder what objectives this differentiation is intended to meet.

One particularly well-informed participant in the Rome Conference explains that for a number of States, recourse to a Review Conference, by contrast with the less solemn procedure of Article 122, 'would ensure that the "big picture" did not get overlooked among the minutiae of management that will inevitably take up most of the meeting time of the routine annual gatherings of the Assembly'. This is, to tell the truth, only half convincing: on the one hand, everything would depend on the organization of the agenda for the Assembly of States Parties; on the other, Article 112(6) authorizes the latter to hold special sessions on the initiative of its Bureau or of one-third of States Parties, and nothing would prevent such a session being convened in order to deal exclusively with a review of provisions of the Statute.

That being said, this twofold procedure is not unheard of, and Articles 108 and 109 in the United Nations Charter itself give an example, the idea being that a review would be broader and more systematic in nature than a mere amendment, or even a series of amendments. This is not a particularly convincing precedent: no Review Conference has to date been called in application of Article 109. By contrast, Article 123 of the Statute involves a guarantee of automaticity that does not appear in the Charter: it requires the holding of a Review Conference, convened by the Secretary-General, seven years after the entry into force of the Statute.

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203 See supra III.A.
204 Some delegations proposed to eliminate it by merging Draft Arts. 110 and 111 during the work of the Preparatory Committee (Draft Statute, supra note 25).
205 Professor R. S. Clark was one of the chief negotiators of the final clauses during the Rome Conference.
208 Art. 109(3) confines itself to providing that: 'If such a conference [for the purpose of reviewing the present Charter] has not been held before the tenth annual session of the General Assembly following the coming into force of the present Charter, the proposal to call such a conference shall be placed on the agenda of that session of the General Assembly, and the conference shall be held if so decided by a majority vote of the General Assembly and by a vote of any seven members of the Security Council', emphasis added.
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Additionally, the agenda for this first Conference is, partly, predetermined by the Statute itself, since Article 123(1) specifies that 'such review may include, but is not limited to, the list of crimes contained in article 5'. Moreover, Resolutions E and F adopted by the Rome Conference recommend, respectively:

- 'that a Review Conference pursuant to article (123) of the Statute of the International Criminal Court consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court'
- that the Preparatory Commission submit 'to the Assembly of States Parties at a Review Conference' proposals 'for a provision on aggression including the definition of Elements of Crimes of aggression and the conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime'.

However, while it seems in line with the spirit of these two texts for the first Review Conference to deal with the latter two points, it is not legally bound to do so, still less to adopt amendments in connection with them. And since the matter is one of mere recommendations, the Assembly of States Parties could even, if it so wished, itself do this job.

Once the first Review Conference is over, the Assembly of States Parties, after deciding whether to take (or not) the proposal, may deal with it 'directly or convene a Review Conference if the issue so warrants'. But since the Statute contains no guideline to determine whether such a warrant exists, it has to be concluded that the Assembly has discretionary power in this connection. At most, the combination of Articles 121 and 123, and the very 'tone' of the words 'review' and 'amendments', might lead one to think that a Review Conference would preferentially be convened for major and substantive amendments.

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209 While the text of Art. 121(5) has been corrected so as to include in it, in addition to Art. 5, explicit mention of Arts. 6, 7, and 8 (see infra III.C.), the text of Art. 123 has not been the object of any correction. The only obligation bearing on the first Review Conference is therefore to examine the list of crimes contained in Art. 5, not the definitions in Arts. 6 to 8.

210 The original text wrongly indicated 'Ill'.

211 The phrase in italics testifies to the uncertainty of this distinction between Assembly of States Parties and Review Conference, and consequently between the Art. 121 and Art. 123 procedures.

212 The reference in Art. 5(2) to 'Articles 121 and 123' confirms this interpretation: if the definition of aggression cannot be adopted at the first Review Conference, the question can be re-examined later, on the basis of either of these provisions without distinction.

213 Art. 121(2), Art. 123(2) seems to imply that formal request by a State Party is necessary in order for the Assembly to decide to call a Review Conference.

214 In the same sense, see Clark, supra note 195, 1265, at 1268. This position contrasts sharply with the one taken by M. C. Bassiouni, who in the Draft Statute he had drawn up in 1993 (supra note 32, at 112), proposed instead recourse to a simplified procedure to amend the scheduled offences listed in Annexes 2 and 3 (optional, to be sure).
Entry into Force and Amendment

In any case, this is of minor importance: not only are the functions of the two bodies the same, but even their composition\(^{215}\) and the procedures followed are almost identical.

The initiative for an amendment or for the calling of a Review Conference must come from a State Party and be addressed to the Secretary-General,\(^{216}\) who submits it to the States Parties. However, it is these who decide whether or not to follow it up,\(^{217}\) by different majorities, since Article 123(2) subordinates convening of the Conference to 'approval by a majority of States Parties', whereas Article 121(2) limits the required majority to Members 'present and voting',\(^{218}\) something easier to reach.

Here again the difference is of little import: in both cases adoption of the amendments themselves is, failing consensus, subordinated to 'a two-thirds majority of States Parties',\(^{219}\) stricter than the one normally needed on matters of substance,\(^{220}\) and more generally Article 123(3) refers to the provisions of Article 121(3)-(7), as regards 'the amendment and entry into force of any amendment to the Statute considered at a Review Conference'.

Once the amendment is adopted the Secretary-General circulates it\(^{221}\) and in principle it enters 'into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them'.\(^{222}\)

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\(^{215}\) Cf. Art. 123(1), last sentence: 'The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.'

\(^{216}\) Arts. 121(1) and 123(2): Art. 121 specifies that the Secretary-General circulates the proposed amendment promptly to all States Parties. The omission of this specification in Art. 123 probably has to do with the fact that the State taking the initiative to request the convocation of a Review Conference is not bound to make formal proposals for amendments.

\(^{217}\) Art. 121(2) states that the decision shall be taken by the Assembly of States Parties 'in no sooner than three months from the date of notification', while Art. 123(2) is silent as to both the time that has to elapse between notification of the proposal and its adoption (necessary to enable States Parties to examine it) and as to the context in which it is decided to follow it up. This decision might be taken by correspondence and within a shorter period (though this is undoubtedly more realistic and scarcely fits the solemnity intended to be given to the review procedure); however, it would undoubtedly be wise for the rules of procedure of the Assembly of States Parties to settle the point.

\(^{218}\) Though curiously without imposing any quorum requirement, cf. Art. 112(7), infra note 220.

\(^{219}\) Art. 121(3).

\(^{220}\) Cf. Art. 112(7)(a) which requires 'a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting'.

\(^{221}\) Art. 121(7).

\(^{222}\) Art. 121(4).
This particularly high threshold,\(^{223}\) coming on top of the requirement to adopt amendments by a two-thirds majority\(^{224}\) is a likely pointer to almost total paralysis of the amendment procedure, which, subject to the provisions of Article 121(5),\(^{225}\) 'wedges' the Statute into a low-grade voluntarism. It does not, however, seem to have constituted sufficient precaution in the eyes of certain participants in the Rome Conference who, failing to secure entry into force of amendments only if they received approval unanimously by States Parties, further required that recalcitrant States withdraw during the year following into force with immediate effect, i.e. without having to comply with the delay conditions in Article 127(1).\(^{226}\)

To do so, Article 121(6) only demands that notification\(^{227}\) be given 'no later than one year after the entry into force' of the amendment. Since this possibility is open '[i]f an amendment has been *accepted* by seven-eighths of States Parties\(^{228}\) and since the amendment enters into force only one year after receipt by the depository of its last instrument of ratification, '[e]ffectively this gives a non-accepting State a two-year window to withdraw'.\(^{229}\)

**C. Procedures for Amending Articles 5 to 8**

Independently of the special procedures of limited scope in Articles 36(2)\(^{230}\) and 122,\(^{231}\) the general provisions for amendments to the Statute still contain an exception. By Article 121(5) '[a]ny amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance', with the Court's competence remaining unchanged in relation to States that have not accepted the amendment.

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\(^{223}\) The Draft Statute annexed to the Report of the Preparatory Committee (*supra* note 25) proposed, in square brackets, to subject entry into force of the amendments to ratification by two-thirds or three-quarters of States Parties; the final Report of the Coordinator on the Final Clauses to the Committee of the Whole (A/CONF.183/C.1/L.61) raised the alternative to five-sixths or seven-eighths; it was this maximum that the Bureau of the Committee finally adopted.

\(^{224}\) Regarding which it has been noted that the upshot is that '[o]ne third plus one of the States Parties can effectively block adoption of an amendment by voting no, by abstaining, by not participating in the vote, or even by failing to provide a quorum' (Clark. *supra* note 195, at 1268).

\(^{225}\) See C. below.

\(^{226}\) See *supra* note 122. By contrast, withdrawal of a State pursuant to Art. 121(6) is 'subject to article 127, paragraph 2'.

\(^{227}\) Art. 121(6) does not state to whom this notification is to be addressed; in accordance with the habitual practice codified by Art. 78(a) of the 1969 Vienna Convention on the Law of Treaties, it should be the depository: in this case the Secretary-General of the United Nations.

\(^{228}\) Emphasis added. Those would have been still clearer had para. 6 specified: 'when an amendment has been accepted ...'. The proposed interpretation seems, moreover, to conform to the drafters' intentions (cf. Slade and Clark, in Lee (ed.), *supra* note 15, at 437).

\(^{229}\) Clark, *supra* note 195, at 1270. Of course, a State may also notify its withdrawal immediately on adoption of the amendments; but in this case it is bound to comply with all the conditions set out in Art. 127.

\(^{230}\) See *supra* note 200.

\(^{231}\) See A. above.
The text reproduced above is the one resulting from a correction made by the Secretary-General on 10 November 1998 to Article 121, which in the text signed in Rome referred to Article 5 only. However, as the Chairman of the Committee of the Whole, Ambassador Philippe Kirsch, Legal Adviser of the Department of Foreign Affairs and International Trade of Canada, indicated in a letter addressed on 3 September 1998 to the Under-Secretary-General and Legal Counsel of the United Nations, the text should refer not to Article 5 only, but to Articles 5 to 8:

during the elaboration of the Statute, Article 5 contained both the list of the crimes within the jurisdiction of the Court as well as their definitions. Article 5 remained undivided until very late in the Diplomatic Conference. References to Article 5 elsewhere in the Statute, therefore, necessarily referred to the entire article, that is, the listing of crimes and their definitions. That is the case for Article 121, paragraph 5.[234]

When the Bureau of the Committee of the Whole of the Conference assigned new numbers to the definitions of the crimes, members of my staff made the consequent change to Article 121, paragraph 5, so that it referred to Article 5-8. However, that change was inadvertently not included in the July 17th version of the Statute. The oversight was not noticed by members of the Bureau or my staff until after the Rome Conference.

I have contacted the members of the Bureau of the Committee of the Whole of the Conference who confirm that a technical error as described above was made. It was not the intention of the Bureau in Rome to make a substantive change to Article 121, paragraph 5, by having it refer only to the new Article 5. We would be grateful if you would ensure that the United Nations, as depositary, takes the necessary steps to correct this inadvertent technical error.[235]

And this was done, even though there could be no doubt that the special procedure of Article 121(5) indeed applied to Articles 5 to 8 of the Statute, not just to Article 5.

Nor, moreover, does it differ from the procedure in ordinary law described above, except as regards entry into force of the amendments and their effects. On the one hand, amendments to paragraph 5 enter into force in relation to each of the States that have ratified them one year after deposit of their instrument of ratification or acceptance, without any minimum number of ratifications being required—something that fits the non-reciprocal nature of the provisions relating to the Court's
competence, which are on this point related to norms protecting human rights. On
the other hand, and as a consequence, entry into force of these amendments clearly
does not authorize the other Parties to withdraw with immediate effect, since their
legal position is in no way modified thereby.

It is not true in this connection that the Statute creates some sort of 'asymmetric
immunities for treaty parties'.\textsuperscript{238} Entry into force of an amendment to Articles 5
to 8 leaves both third States and those who, though parties to the Statute, have not
ratified the amendment in an exactly identical position: each are unaffected by the
amendment. The fact that the amendment may apply not to them as States, but,
should the case arise, to their nationals (and without any discrimination between
nationals of States Parties to the Statute and those of third States\textsuperscript{239}) has absolutely
nothing to do with the amending procedures; it is the normal consequence of the
territoriality of penal competence.\textsuperscript{240}

On one point, however, the Parties and third States are not on a totally even foot­
ing: for if a State becomes a Party to the Statute after the entry into force of the
amendment, it will, pursuant to the rule codified by Article 40(5) of the 1969
Vienna Convention on the Law of Treaties, be 'considered as a party to the treaty
as amended' except 'in relation to any party to the [Statute] not bound by the
amending agreement'. But this inequality of position in relation to States Parties
at the time of entry into force of the amendment is part of general international
law, not of the Statute as such. In any case, the Assembly of States Parties or the
Review Conference adopting amendments of this nature could provide for an
option right in favour of States acceding to the Statute after entry into force of
such an amendment; one might think this would be a wise precaution.

In other respects the procedure for adopting amendments to Articles 5 to 8 does
not differ from the one applying to the other fundamental provisions:

\begin{itemize}
  \item Subject to automatic entry on the agenda for the first Review Conference of
    reconsideration of the list of crimes contained in Article 5 and the recommenda­
    tions adopted in this respect by the Rome Conference,\textsuperscript{241} the initiative for
    amendment to Articles 5 to 8 may be taken by any State Party.
  \item The Assembly of States Parties must decide on the follow-up to give, and may
    either consider it directly or refer it to a Review Conference.\textsuperscript{242}
  \item The majority rules do not differ from those laid down in paragraphs 2 and 3
    of Article 12.\textsuperscript{243}
\end{itemize}

\begin{footnotes}
\textsuperscript{238} Wedgwood, \textit{supra} note 75, at 104.
\textsuperscript{239} However, this mechanism does create an asymmetry; not between nationals of States Parties
and of non-States Parties, but between nationals of States Parties depending on whether the latter have
ratified the amendment or not.
\textsuperscript{240} See \textit{supra} II.B.1.
\textsuperscript{241} See \textit{supra} III.B.
\textsuperscript{242} See ibid.
\textsuperscript{243} See ibid.
\end{footnotes}
Similarly, in connection specifically with the exercise of the Court’s competence over the crime of aggression, it seems hard to maintain that a change might come before the expiry of the seven-year period from entry into force of the Statute, which Articles 121(1) and 123(1) make a cardinal rule.244 Certainly, paragraph 7 of Resolution F adopted by the Conference and annexed to the Final Act gives the Preparatory Commission a remit to prepare proposals for a provision on aggression,245 and it may seem surprising that these proposals can be considered and adopted, if appropriate, only seven years after their submission ‘to the Assembly of States Parties at a Review Conference’,246 especially since the Preparatory Commission is due to disappear following the first Assembly of States Parties.247 Nonetheless, it is scarcely possible to claim that adoption of a provision in accordance with Article 5(2) should not be analysed as an amendment,248 given that this provision refers explicitly to Articles 121 and 123,249 and that Resolution F itself states that ‘[t]he provisions relating to the crime of aggression shall enter into force for the States Parties in accordance with the relevant provisions of this Statute’.250

Perhaps more than any of the Statute’s other provisions, the final clauses highlight the omnipresence of intergovernmentalism in a grand design that nonetheless lays claim to a ‘communitarian’ and generous inspiration.251 All through them one can read the reticence of the States, which as if frightened at their own boldness, increase the number of small steps backward—Article 124 being a wretched caricature example of them—and the petty safeguard mechanisms one cannot help fearing may compromise the future by:

- preventing all progress in the seven years following entry into force of the Statute;
- making any further evolution extremely difficult
- organizing at best a ‘two-speeds Court’ if, very unexpectedly, the Court’s jurisdiction were expanded.

244 This period, intermediate between the five- and ten-year periods that received most votes was the object of vigorous controversy and was adopted by the Bureau of the Conference of the Whole at the end of the Conference. See Slade and Clark, in Lee (ed.), supra note 15, at 433.
245 See supra III.B.
246 On this curious expression, see supra note 211.
247 See supra II.B.1.
249 See supra note 212. See also A. Zimmermann, ‘Art. 5’, in Triffterer (ed.), supra note 21, at 102–103 and 105 (margin 16 and 26).
250 It might be imagined that Parties so desiring could conclude a collateral agreement among themselves giving the Court competence to exercise its jurisdiction over the crime of aggression. However, despite the inclusion of the crime of aggression among those the Court is competent to take cognizance of (Art. 5(1)), it is doubtful that it would agree to exercise it on an assumption of this type: Art. 5(2) subordinates exercise of competence to a provision ‘adopted in accordance with Articles 121 and 123’; this would not be the case.
251 On the Statute’s constant oscillation between these two goals, see Pellet, supra note 164, at 143–163.
This is certainly not 'the Court we want'; it will at least, tomorrow, have the merit of existing, and as one great moral figure in French political life wrote: 'even limply, we advance . . .'.