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AMBIGUITIES IN ARTICLES 5(2), 121 AND 123 OF THE ROME STATUTE

*Roger S. Clark**

There is a fundamental ambiguity in the Rome Statute's requirements dealing with entry into force of the provision on aggression that is necessary for the Court to exercise jurisdiction over the crime of aggression. On one interpretation of Article 121, the provision (or provisions) will apply to all States Parties once seven-eighths of them have accepted the provision. On another interpretation, the provisions will apply only to those States (no matter how few) that specifically agree to it. The author examines the relevant language of the Statute, the less-than-conclusive preparatory work, and the political considerations that might lead to some kind of compromise or "fix" in time for the Review Conference in 2010.

I. INTRODUCTION

In Article 5(1) of the Rome Statute of the International Criminal Court (Rome Statute), "[t]he crime of aggression" is listed as one of the four "[c]rimes within the jurisdiction of the Court."¹ Article 5(2) of the Rome Statute provides, however, that:

[t]he Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to the crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.²

Resolution F of the Final Act of the Rome Conference instructed the Preparatory Commission for the Court (PrepCom) to "prepare proposals for a

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¹ Rome Statute of the International Criminal Court art. 5(1), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

² *Id.* art. 5(2). Articles 121 and 123 deal with amendments, the first of which may not be made until seven years after the entry into force of the Statute. Article 121 contemplates amendments agreed upon at regular meetings of the Assembly of States Parties; article 123 deals with Review Conferences to consider amendments. Some essential machinery provisions of an "institutional" nature may be proposed at any time by a simplified procedure under article 122.

provision on aggression, including the definition and Elements of Crimes of aggression and conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime.”³ These proposals, for a “definition” and “conditions,” were to be submitted “to the Assembly of States Parties at a Review Conference, with a view to arriving at an acceptable provision on the crime of aggression for inclusion in the Rome Statute.”⁴ The PrepCom was not successful in finalizing the proposals before it expired in 2002 and the Special Working Group on the Crime of Aggression (Special Working Group), open to all States, is carrying forward that work.

II. THE PROBLEM: HOW IS THE “PROVISION” ON AGGRESSION TO BE BROUGHT INTO EFFECT?

Exactly how Articles 121 and 123 of the Rome Statute play out with respect to aggression is a fundamental issue of interpretation that was not addressed during the PrepCom but which received some attention at the 2004 and 2005 informal inter-sessional meetings of the Special Working Group⁵ and was discussed again at a formal meeting of the group in 2008.⁶ It is not clear from the language of the Rome Statute what procedure has to be followed in order for the Court to exercise its jurisdiction over the crime of aggression. Article 5(2) speaks of a “provision” on aggression to be “adopted in accordance with Articles 121 and 123.”⁷ Article 121 relates to “Amendments”⁸ and Article 123, headed “Review of the Statute,” contemplates Review Conferences which are to “consider any amendments to this

³ U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15–July 17, 1998, *Final Act*, Annex I, Resolution F, ¶ 7, U.N. Doc. A/CONF.183/10.

⁴ *Id.*

⁵ See Informal Intersessional Meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School of Public and International Affairs, Princeton University, New Jersey, June 13–15, 2005, Doc. ICC-ASP/4/32 at 357, ¶¶ 5-17 (2005) [hereinafter 2005 Special Working Group Report].

⁶ Report of the Special Working Group on the Crime of Aggression at the Assembly of States Parties to the Rome Statute of the International Criminal Court, resumed sixth session, New York June 2–6, 2008, Doc. ICC-ASP/6/20/Add.1, Annex II, at ¶¶ 6-16 [hereinafter 2008 Working Group Report]. The issues were again canvassed but left unresolved at the final meeting of the Special Working Group in 2009. See Report of the Special Working Group on the Crime of Aggression at the Assembly of States Parties to the Rome Statute of the International Criminal Court, seventh session (second resumption), New York Feb. 9-13, 2009, Doc. ICC-ASP/7/SWGCA/at 2-3, ¶¶ 6-11, 2 (2009) [hereinafter 2009 Special Working Group Report].

⁷ Rome Statute, *supra* note 1, art. 5(2).

⁸ *Id.* art. 121.

Statute.”⁹ In essence these two have the same effect; the relevant provisions of Article 121 are incorporated by reference in Article 123. Those provisions of Article 121 assert:

3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.

4. Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after the instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.

5. Any 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. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party’s nationals or on its territory.¹⁰

Some general interpretative questions leap off the page. What is the effect of the phrase “in accordance with” as used in Article 5(2)?¹¹ Does it mean that all of Article 121 applies in the same manner as it would if aggression were being added as an “amendment” to the Statute? Note that Article 5(2) does not use the noun “amendment;” it uses the verb “adopted.”¹² What is meant by “is adopted?” Given the reference to Articles 121 and 123, the provision on aggression must be an “amendment” in some respects. However, is it an “amendment” to *Article 5*? “Amendment” normally implies that something is being changed or altered. One could contend strongly that it is not necessary to change the wording or effect of Article 5 in order to fulfil the expectations of the drafters. Article 5(2), on this argument, provides a way forward and explains when jurisdiction can be exercised, namely “once a provision is adopted.”¹³ It is arguably an example of a facilitative or enabling provision which is a condition to be met, rather than an obstacle that needs to be changed. Does it need to be “applied” rather than “amended?” Is the provision on aggression a “completion” of, rather than an amendment to, Article 5? Is it filling an anticipated gap rather than changing something in the Statute?

The best argument on the other side, I think, is that Article 5(2) contains a state of affairs that has to be changed: an inability to exercise juris-

⁹ *Id.* art. 123.

¹⁰ *Id.* art. 121.

¹¹ *Id.* art 5(2).

¹² *Id.*

¹³ *Id.*

diction. Article 5, on this argument, needs to be amended to remove the inability.

I believe that the more natural interpretation of the paragraph is the “enabling” one. Adding new crimes like drugs or terrorism to Article 5(1) is subject to Article 121(5); completing the negotiation on Article 5(2) is subject to Article 121(4).

It will be noted that in the various drafts that have appeared from the Special Working Group, there is nothing that alters any wording in Article 5. The only language produced that is clearly an amendment to a particular existing article is the leadership language designed to amend Article 25(3) of the Statute.¹⁴ Other proposals on the table (8 bis,¹⁵ and 15 bis¹⁶) obviously amend the Statute by adding new material to it, but are they *functionally* amendments to Article 5?¹⁷ Can it be argued that there is a distinction between a *formal* alteration of Article 5 (by adding or deleting text) and a *functional* one (affecting it in some way but by text included elsewhere in the Statute)?

There are (at least) three¹⁸ possible interpretations of Article 121 (and thus of Article 123) as applied to Article 5(2). Which interpretation is the most plausible was vigorously debated in the Special working Groups in 2005 and 2008 but not resolved.

The first interpretation is simply that, once the Assembly of States Parties has agreed upon the relevant language, it is binding on all parties. Bear in mind Article 5(2)’s words “is adopted.” Article 121(3) provides that “The *adoption* of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.”¹⁹ It is apparent that the

¹⁴ 2008 Working Group Report, *supra* note 6, ¶ 22.

¹⁵ *Id.* ¶ 20 (regarding the crime of aggression).

¹⁶ *Id.* ¶ 21 (regarding exercise of jurisdiction over aggression).

¹⁷ With hindsight, the reference to “a provision” in Article 5(2) was awkward. Rome Statute, *supra* note 1, art. 5(2). Allowing the exercise of the jurisdiction already contemplated by Article 5(2) requires several (possibly complex) changes in Parts Two and Three of the Statute, consisting of both the addition of new articles and the express modification of others. It should probably be the case, though, that all of the changes required to bring the jurisdiction over aggression into play must be adopted through the same procedure. The initial draft of what became Article 5(2), while itself ambiguous on the procedure for bringing it into force, spoke of “provisions” in the plural. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Movement of Non-Aligned Countries Proposal*, A/CONF.183/C.1/L.75 (July 14, 1998), III U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June–17 July, 1998, Official Records, Reports and other Documents at 248, U.N. Doc. A/CONF.183/13 (Vol. III) (2002). *See infra* note 39

¹⁸ For a fourth, which is perhaps not an “interpretation”, *see infra* note 30.

¹⁹ Rome Statute, *supra* note 1, art. 121(3) (emphasis added).

word “adoption” is used in Article 121(3), at least in part, as it is typically in modern treaty practice: to speak of agreement on a text, which is then sent to capitals for nations to decide whether to ratify. But how does that apply when read in context with Article 5(2)? That provision says nothing about ratification or acceptance; it, like Article 121(3), merely refers to adoption. Could it be, then, that “adoption” means the same thing in both Article 5(2) and Article 121(3)—acceptance by the Assembly of States Parties? Could “adoption” in this way be all that is required? It is notable also that the drafters of the Statute contemplated that some amendments could become applicable to all parties merely upon adoption by the Assembly or a Review Conference. Article 122²⁰ deals with certain “Amendments to provisions of an institutional nature.”²¹ Such amendments come into force thus:

Amendments under this article on which consensus cannot be reached shall be adopted by the Assembly of States Parties or by a Review Conference, by a two-thirds majority of States Parties. Such amendments shall enter into force for all States Parties six months after their adoption by the Assembly or, as the case may be, by the Conference.²²

Could it be that this provided the model for Article 5(2)? The last sentence, clarifying the result and the timeframe, was perhaps forgotten in the excitement of the final days of the Rome Conference. Nothing more than agreement in the Assembly or a Review Conference is required for “amendments” under Article 122(2). Literally, this may be all that is required under Article 121. Defining aggression is certainly more politically significant than making the “institutional” or “technical” changes with which Article 122²³ deals, but nevertheless, as in the case of those changes, the question is making the Court’s jurisdiction functional. On the other hand, are we to conclude that the drafters of Article 5(2) were using the word “adoption” in the present context to include something more than agreement on a text, namely whatever is required by paragraphs 4 or 5? Some participants in the Special Working Group have argued that there are practical problems of how a State faced with a significant decision like this

²⁰ See generally Roger S. Clark, *Article 122*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE 1759 (Otto Triffterer ed., 2d ed. 2008). For other examples of treaties containing provisions for amendments not requiring ratification or accession, see FREDERIC L. KIRGIS, INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING 302–32 (2d ed. 1993), which discusses the International Civil Aviation Organization and the International Maritime Organization.

²¹ Rome Statute, *supra* note 1, art. 122.

²² *Id.* art. 122(2). Here the word “amendment” is used, but all that is required is “adoption”. Notice that, as is the case with art. 121(3), a two-thirds majority of all States Parties is required, not just those participating in the vote.

²³ *Id.* art. 122.

can cope with the necessary changes in domestic law without going through the ratification process. Some have been adamant that their Governments could not possibly contemplate an amendment of this magnitude that did not go through the ratification process and, since crimes are involved, legislative action would be necessary.²⁴ The argument that “adoption” must mean something different contextually here in Article 121 than in Article 5(2), it will be noted, cuts simple approval by the Assembly of States Parties or the Review Conference out of the picture, but does not resolve the issue as between paragraphs 4 and 5, to which I now turn.

A second interpretation of Article 121 is that Article 121(3)'s “adoption” has to be accompanied by the procedure of paragraph 4, which reads:

Except as provided in paragraph 5, an amendment shall enter 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.²⁵

If this applies, then the provision would have no effect for anyone until the seven-eighths is reached and then it would apply to all States Parties to the Rome Statute, including those that do not ratify the amendment.²⁶ It is the normal rule for amendments to the Rome Statute. This interpretation proceeds on the basis that the provision on aggression would be “an amendment” to the Rome Statute, but not an amendment to Article 5.

A third interpretation of Article 121 is suggested by the words “[e]xcept as provided in paragraph 5” which introduce paragraph 4.²⁷ Paragraph 5 establishes a different procedure for “[a]ny amendment to Articles 5, 6, 7 and 8” of the Rome Statute. It says that:

Any 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. In respect of a State Party which has not accepted the amendment, the Court

²⁴ It might be possible to ameliorate some of these concerns by delaying the effect of the “provision” on aggression (say for one or two years) to enable domestic action. There is probably an implied power on the part of the Review Conference to include such machinery in its work product. At the final meeting of the Special Working Group, some delegations were prepared to accept the argument based on paragraph 3 at least to the extent of agreeing that the Court could exercise jurisdiction over aggression on the basis of a Security Council resolution once the provision had been adopted – no actual ratifications would be necessary. See 2009 Special Working Group Report, *supra* note 6, ¶ 29.

²⁵ Rome Statute, *supra* note 1, art. 121(4).

²⁶ A State Party in the objecting one-eighth has a right of withdrawal from the Statute under Rome Statute art. 121(6).

²⁷ Rome Statute, *supra* note 1, art. 121(4).

shall not exercise jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.²⁸

If this applies, then the practical result is starkly different: the crime of aggression would be applicable only on the territory or to the nationals of States that accept it.²⁹ It would, on the other hand, apply to each State when it accepted (subject to the time requirement). It would be the proper procedure if the aggression provision can be characterized as an amendment to Article 5.³⁰ But, once again, is it a fulfilment of, rather an amendment to, the article?³¹ It is certainly not an amendment to Article 5(1)—the list of crimes

²⁸ *Id.* art. 121(5).

²⁹ There is a potential anomaly here between Parties and non-Parties to the Statute. A Party, by not accepting the crime of aggression, could preclude application of it to both its territory and its citizens; a non-Party avoids exposure for what it does on its own territory but might find its citizens before the Court for what they did on the territory of a Party accepting the provision. See David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 20 (1999).

³⁰ The discussion of paragraph 5 in the 2005 Special Working Group Report suggests a fourth way to approach the problem, one which involves reaching out beyond interpreting the text to creating a new solution:

The view was expressed that, if anything, an “opt out” approach was preferable to the “opt in” approach reflected in article 121, paragraph 5. In this connection, reference was made to the “opt out” clause contained in article 124, with some States repeating their criticism of that provision. The view was expressed that an “opt out” provision would provide for a more unified legal regime than an “opt in” approach.

2005 Special Working Group Report, *supra* note 5, ¶9. This would presumably require an art. 121 (4) amendment to the Statute to achieve a reverse art. 121 (5) solution. Combining all possibilities often has an attraction to the diplomatic mind, so this may not be beyond the realms of possibility. Note the following: “It was also suggested that it might be feasible to combine paragraphs 4 and 5 of article 121; it was argued, however, that those two paragraphs were incompatible.” *Id.* ¶13. It is a nice question whether art. 121 (5) can be amended by an art. 121 (4) procedure.

³¹ Yet another ambiguous model is art. 8(2)(b)(xx) of the Statute which deals with certain prohibited methods of warfare, namely “[e]mploying weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict.” Rome Statute, *supra* note 1, art. 8(2)(b)(xx); see generally Roger S. Clark, *The Rome Statute of the International Criminal Court and Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering, or Which are Inherently Indiscriminate*, in HUMANITARIAN LAW: CHALLENGES 259 (John Carey et al. eds., 2004); Roger S. Clark, *Article 8 (2)(b)(xx): Weapons and Methods of Warfare*, NEW CRIM. L. REV. (forthcoming 2009). The use of such items will be included as an offense, “provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123.” Rome Statute, *supra* note 1, art. 8(2)(b)(xx). Notice the specific use of the word “amendment” here, but the absence of the word “adopted” (as used in art. 5(2)). This provision, which has its history in attempts to

remains the same. But is it functionally an amendment to paragraph 2? The best argument I can think of for this position (and I find it less than convincing) goes something like this: paragraph 2 contains a barrier to the exercise of jurisdiction; removing that barrier requires an amendment to cast it aside.

A paragraph from the 2005 Report of the Informal Inter-sessional is worth quoting here:

The first approach posited that article 121, paragraph 4, would be applicable and that it was of the essence to maintain a unified legal regime with regard to the crimes over which the Court had jurisdiction. According to this approach, once seven eighths of the States Parties had ratified or accepted an amendment to the Statute, the amendment would become binding on all States Parties, including States that subsequently became parties. Furthermore, it was argued that the crime of aggression was already included in the Statute and that State Parties had therefore already accepted it by becoming parties thereto; accordingly an "opt-in" approach for the crime of aggression as foreseen under article 121, paragraph 5, was contrary to the Statute. Another argument in favour of paragraph 4 was that the crime of aggression should not be treated differently from the other crimes within the jurisdiction of the Court. As a further argument against the applicability of article 121, paragraph 5, it was stated that the Statute should constitute a coherent whole. Caution was thus required in order to avoid "B la carte" regimes, something the Statute had carefully avoided, with the sole exception of article 124, which included a temporal limitation regarding war crimes.³²

A potential anomaly in the approach utilizing paragraph 5 is (perhaps unwittingly) revealed in a passage in the most recent Report of the Special Working Group.³³ The passage reads:

While some delegations reserved their position on the question of article 5, paragraph 2, of the Statute, no objection was raised regarding its suggested deletion. It was pointed out that this paragraph would indeed become obsolete after the adoption of a provision on the crime of aggression.³⁴

If Article 121(4) provides the procedure, it is easy enough to contemplate deletion applicable to all. On the other hand, if paragraph 5 applies, then it could be argued that the deletion would be applicable only to

include the use or threat of use of nuclear weapons as crimes within the jurisdiction of the Court, arguably involves an amendment to art. 8 and thus invokes art. 121(3) and (5). One could argue, to the contrary, that placing, say, anti-personnel mines in an annex is not an amendment to art. 8, rather, it is a completion or a fulfillment of it, and therefore art. 121(4) applies. What are the "relevant provisions set forth in articles 121 and 123"?

³² 2005 Working Group Report, *supra* note 5, ¶ 8.

³³ 2008 Working Group Report, *supra* note 6.

³⁴ *Id.* ¶15.

those who agree to it. Or, in another subtle shift of meaning, is “adopted” being used in the sense of adoption of a text which would then be available for States to accept? Thus the “adoption” could result in the deletion of the paragraph? Deleting something from the Statute by means of adoption by the Review Conference is perhaps a bit close to asking whether following paragraph 3 of Article 121 is all that is required by way of fulfilling the requirements of Article 5(2).³⁵

Another curiosity if Article 121(5) is applied is whether the Security Council gains authority to refer aggression cases involving non-parties to the Court. (Parties who do not accept the aggression amendment are presumably as exempt from Security Council referral as they are from State referrals or the Prosecutor acting *proprio motu*).³⁶ If there is only a handful of acceptance of the aggression “provision” has it been sufficiently “adopted” for Security Council referrals?

III. THE PREPARATORY WORK OF THE RELEVANT PROVISIONS OF THE STATUTE

The preparatory work³⁷ on Articles 5 and 121 is not conclusive on this crucial point of the applicable procedure.³⁸ It is, however, worth rehearsing for what light it does shine on the matter.

The ultimate compromise that included aggression in the Statute, subject to later elaboration, was foreshadowed in a proposal from the Non-Aligned Countries introduced late in the Rome Conference on July 14, 1998. It read:

1. Add a new sub-paragraph (d) to article 5, as follows:

³⁵ *Supra* text accompanying notes 18–24.

³⁶ *See* Rome Statute, *supra* note 1, art. 121(5); Scheffer, *supra* note 29, 20.

³⁷ Article 32 of the Vienna Convention on the Law of Treaties permits recourse to the preparatory work to confirm the meaning resulting from the application of article 31 (“ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”), or where the meaning is “ambiguous or obscure”. Vienna Convention on the Law of Treaties arts. 31–32, May 23, 1969, 1155 U.N.T.S. 331.

³⁸ The most definitive accounts of the negotiations at Rome by some of those closely involved do not even mention the issue. Herman von Hebel & Darryl Robinson, *Crimes within the Jurisdiction of the Court*, in THE INTERNATIONAL CRIMINAL COURT, THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 79, 81–85 (Roy Lee ed., 1999); Manoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT’L L. 22, 29–30 (1999). Then-Ambassador Kirsch, Chair of the Committee of the Whole in Rome, and Mr. Holmes, his right-hand person there, state that art. 5 “includes the crime of aggression but specifies that the court shall not exercise jurisdiction over the crime of aggression until a definition of aggression and the applicable preconditions are settled on in a review conference, in accordance with the amendment procedures of the statute.” Philippe Kirsch & John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 AM. J. INT’L L. 2, 10 n. 30 (1999). Ah, yes, but which procedures?

(d) The crime of aggression.

2. Add a new article 5 quinquies, reading:

The Preparatory Commission shall elaborate the definition and elements of the crime of aggression and recommend its adoption to the Assembly of States Parties. The International Criminal Court shall not exercise its jurisdiction with regard to this crime until such a definition has been adopted. The provisions relating to the crime of aggression shall enter into force for the States Parties in accordance with the Statute.³⁹

Note that the word “amendment” does not appear, and that the words “in accordance with the Statute” in the third sentence of the “new article” are delightfully vague.

Meanwhile, the head of the Samoan Delegation, then-Ambassador Tuiloma Neroni Slade, acting as Coordinator of the negotiations on the Final Clauses, had forwarded his final document to the Committee of the Whole on July 11.⁴⁰ At that point, paragraph 4 of Article 121 was essentially in its final shape, except that the Coordinator had bracketed five-sixths and seven-eighths as options for bringing an amendment into force. He had been unable to resolve this.⁴¹ What is now paragraph 5 had emerged from his efforts essentially deadlocked in the following form:

Any amendment to article 5 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 [, unless the Assembly or the Conference has decided that the amendment shall come into force for all States Parties once it has been accepted by [5/6] [7/8] of them.]⁴²

³⁹ See *Movement of Non-Aligned Countries Proposal*, *supra* note 17.

⁴⁰ U.N. Doc. A/CONF. 183/C.1/L.61 and Corr. 1 (July 11, 1998). The dynamics of the timetable to enable the Conference to end as scheduled on July 17 meant that the numerous negotiating groups to which pieces of the draft had been delegated had to report back to the Committee of the Whole around the 11th. As was the case with the Final Clauses, this meant that some issues would still be unresolved and reported in bracketed language. Participants saw the “final” product in installments on July 16 and 17 which were consolidated at U.N. Doc. A/CONF.183/8. For Doc. 183/8, see *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Vol. III at 93, U.N. Doc. A/CONF.183/13 (2002) (Report of the Committee of the Whole). After some post-Rome “corrections,” the Statute emerged as U.N. Doc. A/CONF.183/9 in volume I of the Official Records.

⁴¹ The Bureau of the Committee of the Whole apparently accepted the wish of one or more of the major powers for the higher number.

⁴² At the time what is now Article 121 was being negotiated, all of what became Articles 5–8 was contained in draft Article 5 (which was being negotiated in a different group). The Bureau of the Committee of the Whole made the split into what is now Articles 5-8 some time in the last two or three days of the Conference. On the last night in Rome, Article

The brackets around the whole paragraph recognized that many participants, perhaps most, did not want to distinguish between different kinds of amendments. Paragraph 4 on that view would apply to all except those technical amendments covered by the simplified procedure in Article 122(2). The internal brackets within the draft for paragraph 5 reflected a fallback position of leaving it to the Assembly to decide whether or not a particular amendment would apply to all.⁴³ The Coordinator's draft had been vigorously negotiated against the backdrop of the debate that had been raging throughout the Diplomatic Conference on the inclusion or exclusion of aggression and nuclear weapons in the Statute. Those who wanted them in (even if later) wanted more flexible amendment procedures; those opposed wanted to close the door for as long as possible. No one negotiating the Final Clauses could know at that point, less than a week before the end of the Diplomatic Conference, what would happen with these items.⁴⁴ Since the Non-Aligned compromise on aggression had not yet been presented, it is

121(5) contained a reference only to amendments to Article 5. This led some to think that the paragraph (5) procedure applied only to adding new categories of crimes (such as terrorism) to Article 5 and not to alterations of Articles 6, 7 and 8. The Chair of the Committee of the Whole later corrected what he said was a "technical error" and the paragraph now refers to Articles 5, 6, 7 and 8. *See generally* Clark, *supra* note 20.

⁴³ An option providing that amendments done by a Review Conference making "additions to the list of crimes [within the jurisdiction of the Court]" in Article 5 would apply only to those who accepted them was contained in draft Article 111 of the Statute forwarded by the PrepCom to Rome in U.N. Doc. A/CONF.183/2 (1998). (The "list of crimes" at this point included "the crime of aggression" and assorted options for defining it. As the Conference progressed there was some pressure to delete aggression from the list, pressure that found adamant opposition from the Non-Aligned Group.) Modifications to the draft for Rome that led ultimately to the addition of the simplified procedure of what is now Article 122 and to the Coordinator's heavily bracketed draft for Article 121(5), *supra* note 42, were introduced by Switzerland in U.N. Doc. A/CONF.183/C.1/L.24 (1998). The PrepCom provision had a bracketed number of ten parties as the minimum number for an amendment to Article 5 to come into force. The Swiss proposal did not distinguish between Article 5 and other amendments. It provided generally that:

When adopting an amendment, the Assembly of States Parties shall decide whether the amendment shall enter into force for all States Parties once it has been accepted by [five sixths] of them or whether it shall enter into force only with regard to States Parties which shall have accepted it. In the latter case, the Assembly may also specify how many States Parties must have accepted the amendment before it enters into force for any of them.

In informal negotiations, the distinction between paragraph 4 and paragraph 5 amendments was insisted upon by some and opposed by others, but the ten States minimum from the PrepCom and the option for a minimum in the Swiss proposal failed to garner support and were omitted.

⁴⁴ Nuclear weapons were ultimately not included in the Statute and neither were other weapons of mass destruction. *See* Kirsch & Holmes, *supra* note 38, at 11 n.32.

not surprising that the group working on the Final Clauses did not consider it.⁴⁵

No further discussion can be found on the public record. The crucial last-minute decisions on the “package” by the Bureau of the Committee of the Whole both to Article 5 and to what would become Article 121 were not accompanied by any explanation.⁴⁶ Nor, apparently, were they passed on by the Drafting Committee, certainly not formally.⁴⁷ What perhaps emerges

⁴⁵ For the sake of completeness, other statements espousing a position not found in the Reports of the Special Working Group should be mentioned. The PrepCom Coordinator seems to have elided Article 121, paragraphs 4 and 5 when she wrote the following:

An amendment would have to be voted in favor by a two-third majority of States Parties at a review conference to be convened seven years after the entry into force of the Statute. This amendment will enter into force only if it is ratified by seven-eighths of them, but, even then, it will not enter into force in respect of those who have not accepted the amendment.

Silvia A. Fernandez de Gurmendi, *The Working Group on Aggression at the preparatory Commission of the International Criminal Court*, 25 *FORDHAM INT'L L. J.*, 589, 604 (2002) (footnotes referring to Article 121 omitted). To the same effect is David J Scheffer, *Staying the Course with the International Criminal Court*, 35 *CORNELL INT'L L. J.* 47, 83 (2002):

Any amendment including an actionable crime of aggression would have to achieve ratification by seven-eighths of all States Parties, which is a very high bar. If the United States were to be a State Party prior to such an amendment, it could “opt out” of the crime of aggression pursuant to the Article 121(5) right for States Parties.

A footnote after the first of these sentences refers to Article 121(6) which deals with withdrawal by a party objecting to amendments achieved pursuant to Article 121(4). It is plainly inapposite to the point made in the sentence. These two comments from the last PrepCom Coordinator and the Head of the U.S. delegation to Rome treat paragraphs 4 and 5 of Article 121 as *cumulative* rather than as disjunctive *alternatives* applying to different types of amendment. They seem to be flatly contradictory to the plain meaning of the article and find no support in the preparatory work discussed above. Another major player at Rome, the Head of the Norwegian delegation, now Focal Point for the Review Conference, writes that “[s]uch an amendment would require adoption through a particularly qualified majority (7/8) at the Assembly of States Parties to the Statute.” Rolf Einar Fife, *Criminalizing individuals for acts of aggression committed by States*, in *HUMAN RIGHTS AND CRIMINAL JUSTICE FOR THE DOWNTRODDEN: ESSAYS IN HONOUR OF ASBJØRN EIDE* 53, 56 (Morten Bergsmo ed., 2003). This confuses the two-thirds vote required for adoption at the Assembly (or more probably a Review Conference) with that required for ratification or acceptance.

⁴⁶ See material in U.N. Doc. A/CONF. 183/13, *supra* note 40, Vol. III at 93.

⁴⁷ The Chair of the Drafting Committee, Cherif Bassiouni, wrote shortly after the Conference:

It was truly a tribute to the Drafting Committee that on July 15, the Committee of the Whole in less than two hours approved the Drafting Committee’s text, *save for* Part 2, Articles 5-21 and *some of the “Final Clauses,” which the Chairman of the Committee of the Whole presented on behalf of the Bureau on the last day of the Conference.*

THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 31 (M. Cherif Bassiouni comp. 1998) (emphasis added); *see also* Report of the Drafting Committee

from this story is the determination of many players to include aggression as one of the crimes on which the ICC would have jurisdiction—one of what the preamble to the Statute calls “the most serious crimes of concern to the international community as a whole.” As such, the history probably points in the direction of the application of Paragraph 4 and its seven-eighths rule. On this argument, a way has to be found for the crime to apply, like the other crimes within the jurisdiction of the Court, in a “unified legal regime,”⁴⁸ to all and not only to those who agree specifically to the provision on aggression.⁴⁹ Otherwise, the States most likely to commit aggression may simply opt out.

On the other hand, perhaps the ultimate compromise tends in the direction of acknowledging that those determined to get aggression “in” might have to concede that they could not make it applicable to all. On such an analysis, they need to take what they can get and wait out the ratification process State by State, hoping that confidence in the ability of the Court to deal with these issues will mount as cases involving some of those with the faith to send them slowly accumulate.

to the Committee of the Whole, in U.N. Doc. A/CONF.183/13, *supra* note 40, Vol. III at 149 (which apparently contains everything that came out of the Drafting Committee and includes only genocide provisions of Article 5 and does not include Article 121).

⁴⁸ 2005 Special Working Group Report, *supra* note 5, ¶ 8. Nicolaos Strapatsas has a thoughtful 2005 paper, *Analysis of the Amendment Rules Applicable to the Inclusion of the “Crime of Aggression” Into the ICC Statute*, published by the Committee for Effective International Criminal Law, in which he suggests some creative ways out of the dilemma discussed above. He suggests that the Review Conference has a formal choice which it can exercise as a drafting matter. Thus, aggression could be placed in art. 5 (2) by an amendment to that provision, thereby invoking art. 121 (5); or it could be done, say, by making a new art. 8 bis, thereby invoking art. 121 (4). Some would regard the Strapatsas solution as collapsing form with substance.

⁴⁹ There is the further question of what to do about those who become parties to the Statute after the provision on aggression becomes applicable. If it applies to all existing parties, it ought in principle to apply to future ones as well. If existing ones can choose whether or not to become parties, then future ones should also have that choice. Article 40 (5) of the Vienna Convention on the Law of Treaties has a puzzling default rule that appears to give subsequent parties to an amended multilateral treaty power to choose whether to become a party to the amendments or not. Parties to the United Nations Charter and the constituent treaties of other international organizations take the treaty as amended. That is surely the result that should be sought here. The issues are carefully canvassed in Jutta F. Bertram-Nothnagel, *Some Thoughts About the Question if a State Which is Becoming a Party to the Rome Statute of the International Criminal Court After the Adoption of the Provision on the Crime of Aggression May Choose Not to be Bound by that Provision* (unpublished paper circulated at the 2005 meeting of the Special Working Group on the Crime of Aggression) (on file with the author).

IV. A "FIX"?

Personally, I think the argument in favor of the seven-eighths solution is stronger on the basis of the plain language and it is consistent with the complex preparatory history. Nonetheless, some members of the small group involved in the less-than-transparent negotiations in the last few days of the Diplomatic Conference are convinced that they had a deal to the effect that the "provision" would apply only to those who expressly accepted it. They do not appear to have put this on the contemporary record.⁵⁰

I am not sure whether there is a consensus to be reached on the legal issue of what the treaty requires. Given that the ultimate stake here is putting someone on trial for a major crime, it is always possible that the Court itself would ultimately have to face the question of whether the correct choice had been made. The wrong choice could well result in a nullity and a lack of jurisdiction. There are those who believe that politically it would be wise to go with the paragraph 5 approach and then adopt a wait-and-see position as (hopefully) more and more people come aboard with the passage of time. Is this feasible? One possible answer is to simply proceed on this basis and ignore the question, or perhaps to include an agreed "interpretation" of the situation in what is adopted at the Review Conference.

Another option is to try to expressly "amend" Article 121 so that it chooses one or other of the seven-eighths or one-by-one options. On its face, Article 121 would require amendment by the seven-eighths procedure. That is cold comfort, at least in the short run, to those who would like to go the other route. But can it be amended by fiat in the aggression provision as finally promulgated? Perhaps there is a precedent in the "fix" done to the United Nations Convention on the Law of the Sea.⁵¹ As the Convention was on its way to coming into force, having achieved the necessary ratifications or accessions to do so, the United Nations General Assembly bypassed the amending procedures of the treaty and adopted an Agreement effectively amending Part XI of the Convention dealing with the deep seabed regime.⁵²

⁵⁰ At the final plenary meeting on the last night of the Conference, the leader of the United Kingdom delegation, Sir Franklin Berman, staked out an interpretive position on Article 5(2) but did not address the amending process. He "said that the United Kingdom interpreted the reference to aggression in article 5 and, in particular, the last sentence of paragraph 2 of that article, which mentioned the Charter of the United Nations, as a reference to the requirement of prior determination by the Security Council that an act of aggression had occurred." U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, June 15– July 17, 1998, Official Records, Vol. II at 124, U.N. Doc. 83/13 (2002) (summary record of 9th plenary meeting, July 17, 1998).

⁵¹ See generally United Nations Convention on the Law of the Sea, U.N. Doc.A/CONF.62/121 (1982).

⁵² Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of December 10, 1982, U.N. Doc. A/RES/48/1994.

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Is there a potential precedent here, or was that easier because the Convention on the Law of the Sea was not yet in force when the fix was made?