

## THE EUROPEAN UNION AND ITS CONTRIBUTION TO THE DEVELOPMENT OF THE INTERNATIONAL CRIMINAL COURT

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*L'étude présente une analyse comparée de la politique du Conseil de l'Union Européenne et du Parlement Européen vis-à-vis de la Cour Pénale Internationale. Le Conseil de l'Union Européenne représente les États Membres tandis que le Parlement représente les peuples de l'Europe. Si les résolutions du Parlement Européen ne s'imposent pas au Conseil Européen, la présidence du Conseil doit consulter le Parlement sur les aspects généraux et les choix fondamentaux de la politique étrangère et de sécurité commune. En fait, le Parlement Européen semble avoir une approche plus libérale que le Conseil. L'étude présente également les positions délicates qui concernaient les États Membres de l'Union Européenne, lors de la Conférence Diplomatique de Rome. Sur certains points, la France et le Royaume-Uni protégèrent leurs intérêts particuliers en tant que membres permanents du Conseil de Sécurité des Nations Unies, ayant ainsi une influence néfaste sur l'issue de la Conférence de Rome. L'étude souligne également le rôle indirect de l'Union Européenne sur le développement de la Cour Pénale Internationale, grâce à l'appui et au financement offerts à des Organisations Non-gouvernementales ayant cette mission précise. Enfin, les développements consécutifs de la Conférence de Rome sont présentés et des perspectives de la relation entre l'Union Européenne et la Cour Pénale Internationale sont proposées.*

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*The following essay compares and contrasts the positions of the Council and Parliament of the European Union regarding the International Criminal Court. The European Council represents the governments of the EU Member States whereas the European Parliament represents the European peoples. Although the European Council is not bound by the European Parliament's resolutions, the presidency must consult the Parliament on the main aspects and the basic choices of common foreign and security policy. Overall, the Parliament's positions appear more liberal than those of the Council. The essay highlights the controversial issues raised at the Rome Diplomatic Conference involving EU Member States. On certain key issues, France and the United Kingdom adopted attitudes clearly protective of their individual interests as permanent members of the United Nations Security Council and thus negatively affected the outcome in Rome. The essay also illustrates the European Union's indirect role in the development of the International Criminal Court through the support and funding of Non-governmental Organisations for that specific purpose. It describes developments since the Rome Conference, and outlines some future considerations regarding the relationship between the European union and the ICC.*

(2002-03) 33 R.D.U.S.	<i>The European Union and its contribution to the development of the International Criminal Court</i>	401
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## TABLE OF CONTENTS

<b>Introduction</b>	.....	403
<b>I. The European Council's position</b>	.....	405
<b>II. The Compatibility of the Council's position with that of the European Parliament</b>	.....	406
<b>III. Actions of NGO's Supported by the European Union</b>	.....	408
<b>IV. The controversies at the Rome Conference</b>	.....	410
a) The crime of aggression	.....	411
b) War crimes opt-out	.....	413
c) Prohibited means and methods of warfare	.....	414
d) The Security Council's right of deferral	.....	416
<b>V. Developments following the adoption of the <i>ICC Statute</i></b>	.....	418
<b>Conclusion</b>	.....	422



## Introduction

The *Treaty on European Union*<sup>1</sup> created the second pillar that deals with common foreign and security policy<sup>2</sup>. The five objectives of the EU CFSP are: the safeguarding of the common values, fundamental interests, independence and integrity of the Union; the strengthening of the security of the Union in all ways; the preservation of peace and the strengthening of international security; the promotion of international cooperation and, finally, the development and consolidation of democracy and the rule of law, and respect for human rights and fundamental freedoms<sup>3</sup>. The objectives set out in the *TEU* are intricately linked to the notion of conflict prevention which dates back to the Treaties establishing the European Coal and Steel Community<sup>4</sup> and the European Atomic Energy Community<sup>5</sup> which had the goal of using the means of production of warfare for peaceful purposes.

The Council of the European Union is presently in the process of establishing three new permanent political and military bodies in order to progressively frame a common defence policy<sup>6</sup> and achieve the aforementioned objectives. The standing Political and Security Committee, the Military Committee and the Military Staff will work together in order to enforce the Union's security and defence policy<sup>7</sup>. The *TEU* enumerates several "tasks" that fall within this framework such as humanitarian missions, rescue tasks, peacekeeping tasks and tasks of combat in crisis management including peacemaking<sup>8</sup>.

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1. EC, *Treaty on European Union*, 10 November 1997, [1997] O.J. C. 340/145 [hereinafter *TEU*]; based primarily on the *Maastricht Treaty*, 7 February 1992, 31 I.L.M. 247.
  2. Hereinafter CFSP; *TEU*, *ibid.* at Title V.
  3. *Ibid.*, art. 11 (1).
  4. *Treaty Establishing the European Coal and Steel Community*, 18 April 1951, 261 U.N.T.S. 140.
  5. *Treaty Establishing the European Atomic Energy Community (EURATOM)*, 25 March 1957, 298 U.N.T.S. 167.
  6. *TEU*, *supra* note 1, art. 17 (1).
  7. On line : Council of the European Union <<http://ue.eu.int/pesc/military/en/homeen.htm>> (date accessed : 14 December 2001).
  8. *TEU*, *supra* note 1, art. 17 (2).

The execution of said tasks by armed forces acting on behalf of the Union in armed conflicts could engage the International Criminal Court's jurisdiction over genocide, crimes against humanity and war crimes<sup>9</sup>. The International Criminal Court was created to bring an end to impunity and prevent the commission of the most serious breaches of International Humanitarian Law<sup>10</sup>. The principle of individual criminal responsibility for both commanders and subordinates was established at Nuremberg in order to assure that those responsible for the atrocities of World War II would be brought to justice. This was also the driving force behind the creation of the ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda by the UN Security Council. The ICC will have a direct impact in the political decisions of the Union regarding the forms of intervention it chooses as well as the military decisions taken on the field by commanders.

Although the Statute of the International Criminal Court does not bind the European Union, it is in the Union's best interest that the treaty be ratified by all Member States in order for them to effectively have a common policy in terms of their international obligations when engaging in tasks for the Union. The degree of variance in the Member States' approach thus far may have important consequences on the Union's common foreign and security policy and its role in the prevention of armed conflicts.

Three months after the adoption of the *ICC Statute* the European Union stated that all the Member States would do their best to ratify the *ICC Statute* without delay<sup>11</sup>. Presently, three years have almost passed since the Rome Diplomatic Conference and not all fifteen Member States have ratified the treaty<sup>12</sup>.

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9. *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9, art. 5-8 [hereinafter *ICC Statute*].

10. Hereinafter IHL.

11. UN Doc., A/C.6/53/SR.9 (1998).

12. Italy, France, Belgium, Luxembourg, Spain, Germany, Austria, Finland, Denmark, Sweden and Netherlands : <<http://www.igc.org/icc/rome/html/ratify.html>> (date accessed 10 September 2001).

The following essay compares and contrasts the positions of the European Council and Parliament regarding the International Criminal Court. It illustrates the European Union's indirect role in the development of the ICC through the support and funding of Nongovernmental Organisations<sup>13</sup> with that specific purpose. It highlights the controversial issues at the Rome Diplomatic Conference that involved EU Member States. On key issues, some of them adopted attitudes that clearly protected their individual interests, thus negatively affecting the outcome in Rome. Furthermore, it describes the developments since the Rome Conference. Finally, it outlines some future considerations regarding the relationship between European Union and the ICC.

## **I. The European Council's position**

At the beginning of the Rome Diplomatic Conference, the Presidency of the European Council announced several important principles to which the Member States were committed<sup>14</sup>. It presented a "reasonable middle-of-the-road position"<sup>15</sup> and all the principles contained therein were incorporated in the *ICC Statute*.

The Council held that the Court should be universal and effective yet be complementary to national jurisdictions. In principle it should be an independent institution yet in relationship with the United Nations. Its prosecutor should be independent from governments. Also, the crimes under its jurisdiction should include genocide, crimes against humanity and war crimes, and the crime of aggression to the extent that the Security Council's role in the maintenance of international peace and security would not be compromised. Moreover, war crimes should cover both international and internal armed conflicts as well as gender-related crimes. The Security Council should have a right of referral to the Court in situations where crimes under the Court's jurisdiction may have been committed. The Court should have the power to award reparations to victims. The Statute's sentencing provisions should not include the death penalty. Finally, the European Council stressed the importance of the establishment of

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13. Hereinafter NGOs.

14. T. Van Boven, "The European Union and the International Criminal Court" (1998) 5 Maastricht J. Eur. Comp. L. 325.

15. *Ibid.* at 326.

an effective state cooperation system with the mandatory obligation to comply with requests for assistance by the Court<sup>16</sup>.

## **II. The Compatibility of the Council's position with that of the European Parliament**

The position taken by the European Union's presidency was more conservative than the European Parliament's. Evidently, the two entities have clearly distinct points of view and concerns given the fact that the European Council represents the governments of the Members of the Union whereas the Parliament represents the European peoples. Although the Council is not bound by the Parliament's resolutions, the Presidency is supposed to consult the Parliament on the main aspects and the basic choices of common foreign and security policy and ensure that the views of the European Parliament are duly taken into consideration<sup>17</sup>. Given the fact that the ICC will have a direct bearing on soldiers acting on behalf of the EU in the context of CFSP, the European Parliament's resolutions are relevant.

In a resolution it adopted in the opening days of the Diplomatic Conference, the European Parliament, in light of its previous resolutions on the matter, spelled out its position regarding the ICC, which differed somewhat from that of the Council<sup>18</sup>.

The Parliament indicated that in order for the Court to represent "an effective complement to national judicial systems"<sup>19</sup>, it had to provide for an independent prosecutor. However, its position was more explicit in requiring that the prosecutor possess the power to initiate and conduct investigations on an own-initiative basis, thus reaffirming its earlier contention of the prosecutor

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16. *Ibid.* at 326.

17. *TEU*, *supra* note 1, art. 21 (1).

18. EC, *Resolution on the International Criminal Court*, 6 July 1998, [1998] O.J. C. 210/175 at 213.

19. *Ibid.* at para. 3.

not being bound by prior consent by the State Parties<sup>20</sup>. This view was shared by many delegations at Rome and eventually prevailed, being incorporated in the Statute<sup>21</sup>.

Regarding the crimes under the Court's jurisdiction, the Parliament held that the Court had to have universal jurisdiction over the crimes of genocide, crimes against humanity and war crimes without any "state consent" requirement<sup>22</sup>. During the Preparatory Committee discussions and at the Rome Diplomatic Conference, the German delegation campaigned for the Court to have universal jurisdiction<sup>23</sup>. Unfortunately, most of the Delegations at Rome were above all concerned with protecting their State sovereignty. As a result, the International Criminal Court has jurisdiction over crimes that either occur on the territory of a State party or are perpetrated by one of its nationals<sup>24</sup>.

The Parliament also affirmed that the Court should have a "constructive" relationship with the United Nations and particularly with the Security Council, in full recognition of their respective roles and competences<sup>25</sup> (the Parliament had indicated in previous resolutions that the Court must be strong and independent and not subject to vetoes by the United Nations Security Council<sup>26</sup>). Also, the Parliament's resolution stated that the Court should itself judge its competence on questions of admissibility<sup>27</sup>, which was later codified in article 17 of the Statute.

Furthermore, the European Parliament reiterated its previous position<sup>28</sup>, again a more progressive one with respect to that of the presidency of the European Council, in that the ICC should not only protect the victims'

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20. EC, *Resolution on the International Criminal Court*, 6 April 1998, [1998] O.J. C. 104/198 at 221, para. 2; EC, *Resolution on a permanent International Criminal Court*, 20 November 1997, [1997] O.J.C. 371/169 at 208, para 2.

21. *ICC Statute*, *supra* note 9, art. 15.

22. *Resolution on the International Criminal Court*, *supra* note 18, para. 3 (a).

23. R. Lee, ed., *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results*, (The Hague: Kluwer, 1999) at 132-133.

24. *ICC Statute*, *supra* note 9, art. 12.

25. *Resolution on the International Criminal Court*, *supra* note 18, para. 3 (d).

26. *Resolution on a permanent International Criminal Court*, *supra* note 20, para. 3.

27. *Resolution on the International Criminal Court*, *supra* note 20, para. 4.

28. *Ibid.*, para. 7; *Resolution on the International Criminal Court*, *supra* note 18, para. 3 (f).

interests<sup>29</sup>, but as it is the case with the Statute, protect the interests of witnesses<sup>30</sup>, as well as have the highest standards of respect for the rights of the accused<sup>31</sup> and of the suspect<sup>32</sup>.

Finally, the Parliament stressed the importance of long-term financing of the ICC in order to ensure both the self-reliance and independence of the Court<sup>33</sup>.

### III. Actions of NGO's Supported by the European Union

The EU budget line B7-706<sup>34</sup> was created with the goal of providing technical assistance to the ICTY and ICTR, providing financial support for the preparatory work for the setting up and the functioning of the ICC as well as training the staff of the Tribunals in field of gender mainstreaming, for instance. From 1996 to 1998 it averaged 3 million euros, most of which was in support of NGO activities<sup>35</sup>.

At the Rome Diplomatic Conference, there were 236 NGOs with an estimated 450 people at their disposal, and although they would not sit at the negotiation tables, they were clearly the largest delegation there<sup>36</sup>. The NGO *Coalition for an International Criminal Court*<sup>37</sup> was formed in February 1995<sup>38</sup>. Its members included *Amnesty International*, *Human Rights Watch*, the

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29. *ICC Statute*, *supra* note 9, art. 68.

30. *Ibid.*, art. 68.

31. *Ibid.*, art. 67.

32. *Ibid.*, art. 55.

33. EC, *Resolution on the establishment of the Permanent International Criminal Court*, 28 October 1996 [1996] O.J. C. 320/132 at 194, para. 3; *Resolution on a permanent International Criminal Court*, *supra* note 20, para. 3; *Resolution on the International Criminal Court*, *supra* note 18, para. 3 (g).

34. Formerly budget line A-3041 created by the European Parliament in 1995.

35. *Report from the Commission on the Implementation of Measures Intended to Promote observance of Human Rights and Democratic Principles in External Relations for 1996-1999*, Brussels, 14.11.2000 COM (2000) 726 final at 30-31, on line : <[http://europa.eu.int/comm/external\\_relations/human\\_rights/doc/com2000\\_0726en01.pdf](http://europa.eu.int/comm/external_relations/human_rights/doc/com2000_0726en01.pdf)>.

36. Lee, *supra* note 23 at 393.

37. Hereinafter CICC.

38. *Ibid.* at 391.

*International Commission of Jurists, the Lawyers Committee for Human Rights and No Peace Without Justice*<sup>39</sup>, which was funded by the European Union.

The Coalition established a network of international law experts in order to take a stance regarding important legal and political issues raised by the proposed Statute<sup>40</sup>. Moreover, the Coalition's various divisions met with representatives of governments and of the UN involved in the negotiations in order to exchange views and raise their level of awareness for instance on gender issues, the rights of victims, peace and disarmament, protection of children and matters of faith<sup>41</sup>. The Coalition also established an electronic information system tracking events and conferences around the world and listing written publications on the Court<sup>42</sup>.

*No Peace Without Justice* began campaigning in 1996 in order to set a date for the holding of the Rome Conference on the establishment of the ICC and it launched an International Appeal, which was signed by more than 30 global leaders<sup>43</sup>. Ms Emma Bonino, who was at the time the European Commissioner on Humanitarian Aid, headed the entire campaign. After the UN General Assembly set the dates of the Rome Conference, NPWJ then launched in 1997 a new International Appeal demanding the establishment of the ICC by 1998 at the latest<sup>44</sup>. In order to add to the momentum and to mobilize public opinion, it organised a series of conferences during 1997 and 1998, mostly co-chaired by Ms Bonino, in Malta, Siracusa (Italy), Montevideo (Uruguay), Atlanta, Rome, New York UN headquarters, Dakar (Senegal), and again in Rome held on the days preceeding the commencement of the Diplomatic Conference<sup>45</sup>. It also held a series of seminars in universities and other institutions from 1996 to 1998 in Rome, New York, Palermo (Italy), Cagliari

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39. Hereinafter NPWJ.

40. *Ibid.* at 392.

41. *Ibid.* at 392.

42. *Ibid.* at 392.

43. No Peace Without Justice 1999 Activities, on line : <<http://www.npwj.org/documents/brochure.pdf>> (date accessed 14 December 2001).

44. *Brussels Declaration in favour of the Establishment of the International Criminal Court in 1998*, Brussels, 26 November 1997, on line : No Peace Without Justice <<http://npwj.org/campaigns/brussels.html>> (date accessed 10 September 2001).

45. *No Peace Without Justice 1999 Activities update*, *supra* note 44 at 10-11.

(Italy), Brussels, Naples, Catania (Italy), Imola (Italy), Padova (Italy), Rome, Salamanca (Italy), New York UN headquarters and in Strasbourg<sup>46</sup>.

Other NPWJ initiatives at the Rome Diplomatic Conference included various public addresses, a candlelight march across Rome, the publication of newspapers and newsletters<sup>47</sup>, and the establishment of a judicial assistance programme providing legal expertise to delegations from various African and other developing countries<sup>48</sup>.

#### **IV. The controversies at the Rome Conference**

The European Union's position on the key principles that had to be reflected in the *ICC Statute* was shared by several of the like-minded states<sup>49</sup> at the Conference. However, there was great divergence among the positions of the individual Member States of the Union on issues over which the Council had not pronounced itself. Although it can be argued that the issues on which the European Council does not pronounce itself are not a part of the Union's CFSP, it would be practically undesirable for the Member states to adopt contradictory positions on such important issues.

The Member States are obligated to coordinate their action at international conferences and to uphold the Union's common positions in such fora<sup>50</sup>. For instance, both France and the United Kingdom, being permanent members of the Security Council, protected their distinct interests above all. Under the *TEU* they have the obligation to ensure the defence of the positions and interests of the Union, without prejudice to their responsibilities under the provisions of the *United Nations Charter*<sup>51</sup>. Thus, several of the provisions that were arrived at through compromise in Rome, would be deemed unsatisfactory by NGOs. The issues that directly involved the permanent Members of the Security Council regarded the crime of aggression, the war crimes opt-out

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46. *Ibid.* at 12-13.

47. *Ibid.* at 9.

48. Lee, *supra* note 23 at 394.

49. Van Boven, *supra* note 14 at 326.

50. *TEU*, *supra* note 1, art. 19 (1).

51. *Ibid.*, art. 19 (2) *in fine*.

provision, prohibited means and methods of warfare and the Security Council's right of deferral.

**a) The crime of aggression**

Article 5 of the Rome Statute indicates that the Court has jurisdiction over genocide, crimes against humanity, war crimes and the crime of aggression. The inclusion of the first three crimes was undisputed<sup>52</sup>, yet the crime of aggression was more controversial and was dealt with separately in Rome.

The argument in favour of including of the crime of aggression in the *ICC Statute* was based primarily on the fact that the *Charter of the Nuremberg Military Tribunal* provided for what were then referred to as "crimes against peace"<sup>53</sup>, and therefore not including aggression would be retrogressive and inconsistent with international law<sup>54</sup>.

It was decided at the Preparatory Committee negotiations that the crime of aggression would be defined by a general definition containing criteria of the crime. This approach was favoured over the two alternatives which were on the one hand a general definition combined with a list of acts of aggression<sup>55</sup> and on the other hand no definition at all, relinquishing the matter to the Security Council in every case<sup>56</sup>.

Of the three proposed definitions of aggression, the one put forward by Germany was the most supported during the Preparatory Committee negotiations. However, it was deemed too restrictive by some delegations at the Diplomatic Conference<sup>57</sup>. Germany had attempted to take an objective approach in defining aggression with the most obvious criteria by focussing on the existence of an armed attack against a State's territorial or political

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52. Lee, *supra* note 23 at 81.

53. *Charter of the International Military Tribunal of Nuremberg*, 82 U.N.T.S. 280, art. 6 (a).

54. Lee, *supra* note 23 at 82.

55. Based on *The Definition of Aggression*, U.N. G.A. Resolution 3314, 14 December 1974, U.N. GAOR, 29<sup>th</sup> Sess., Annexes, Item, 86, A/9890 (1974).

56. Lee, *supra* note 23 at 81-82.

57. *Ibid.* at 83-84.

independence in contravention of the *Charter of the United Nations*. This definition also allowed the choice as to the object of the aggression, being the establishment of an occupation (military or otherwise), or the annexation of a territory<sup>58</sup>.

The delegations opposed to the German proposal favoured a broader definition and wished to include firstly the deprivation of “peoples of their right to self-determination, freedom and independence”<sup>59</sup>, and secondly “resorting to armed force to threaten or violate the sovereignty, territorial integrity or political independence of that State or the inalienable rights of those people”<sup>60</sup>.

Moreover, all five permanent Members of the Security Council took the position that their role in determining an act of aggression as stated in the *Charter of the United Nations*<sup>61</sup> was a *conditio sine qua non* for its inclusion in the Statute<sup>62</sup>.

The debate remained until the very end of the Conference<sup>63</sup> regarding the extent of the Security Council’s role in defining the crime itself and in relation to the Court’s application thereof. The Court under the *ILC Draft Statute* dealt with the crime of aggression subject to the prior determination by the Security Council of the existence of a said act. Although this option was strongly supported by all five permanent Members at Rome<sup>64</sup>, it sparked concerns over the independence of the Court and the right to a fair trial of persons accused.

A definition to the crime of aggression was not reached at the diplomatic conference. However, the second paragraph of Article 5 states that the Court

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58. *Draft Statute for the International Criminal Court Addendum, Part One*. U.N. Doc. A/CONF.183/2/Add.1, 14 April 1998 at 16, option 3.

59. U.N. Doc. A/CONF.183/C.1/L.37/Corr. 1, 10 July 1998, submitted by Algeria, Bahrain, Iran, Iraq, Kuwait, Lebanon, Libya, Oman, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, the United Arab Emirates and Yemen.

60. *Ibid.*

61. *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7 [hereinafter *UN Charter*].

62. Lee, *supra* note 23 at 84.

63. *Ibid.* at 81-82.

64. *Ibid.* at 81.

shall exercise jurisdiction over this crime once a provision is adopted<sup>65</sup>, defining the crime and setting out the conditions under which the Court shall exercise jurisdiction. Moreover, it indicates that the adopted provision “shall be consistent with the relevant provisions of the *Charter of the United Nations*”<sup>66</sup>.

#### **b) War crimes opt-out**

The Statute permits derogation from the Court's competence over war crimes for a period of seven years<sup>67</sup>. This provision was an alternative suggestion by the French delegation<sup>68</sup> to its original requirement of an opt-in provision regarding war crimes<sup>69</sup>.

Although at first glance the opt-out provision might seem insignificant to some, it is important to stress that the war crimes contained in the Rome Statute apply to both international and internal armed conflicts<sup>70</sup> in particular when committed as a part of a plan or policy or as a large-scale commission of such crimes<sup>71</sup>. Also, the war crimes provisions cover a wider spectrum than crimes against humanity and genocide because they have a lengthier list of illegal acts. A war crime has less strict requirements in terms of its constituent elements in comparison to a crime against humanity for instance, which must be committed as part of a widespread or systematic attack against any civilian population, with knowledge of the attack<sup>72</sup>.

#### **c) Prohibited means and methods of warfare**

The *ICC Statute* sets a general prohibition on the employment of weapons and other methods of warfare, deemed to be violations of the laws and customs of war, applicable in international armed conflicts:

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65. In accordance with art. 121 and 123.

66. *ICC Statute*, *supra* note 9, art. 5 (2).

67. *Ibid.*, art. 124; the provisions of this article shall be reviewed at the Review Conference scheduled to be held seven years after the statute comes into force.

68. Lee, *supra* note 23 at 136; Van Boven, *supra* note 14 at 327.

69. Lee, *ibid.* at 135-136; was also supported by China and India.

70. *ICC Statute*, *supra* note 9, art. 8.

71. *Ibid.*, art 8 (1).

72. *Ibid.*, art. 7 (1).

Employing weapons, projectiles and material and methods of warfare which are of the nature to cause superfluous injury or unnecessary suffering of which are inherently indiscriminate in violation of international law of armed conflict, 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<sup>73</sup>.

In addition, the Statute also has specific prohibitions namely on the use of poison or poisoned weapons<sup>74</sup>, the use of asphyxiating, poisonous or other gases and all analogous liquids, materials or devices<sup>75</sup> and the employment of bullets which expand or flatten easily in the human body<sup>76</sup>.

There is in effect an overlap between the general and specific prohibitions. The advantage of the general prohibition is that it covers means and methods of warfare that are not explicitly enumerated in the other provisions of Article 8, such as antipersonnel mines<sup>77</sup>. However, this argument is moot because the means and methods of warfare outlawed by the general prohibition are the subject of a comprehensive prohibition and are to be included within an annex to the statute by an amendment. The Statute can be amended either through consensus or by a two-thirds majority when consensus cannot be reached, only seven years after it came into force<sup>78</sup>. Also, States Parties must ratify any amendment to Articles 5, 6, 7, and 8 of the *ICC Statute* in order to be bound by it<sup>79</sup>.

In effect, the Statute does not outlaw the employment of weapons of mass destruction because the annex does not exist. At the Rome Diplomatic

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73. *Ibid.*, art. 8 (2) (b) (xx).

74. *Ibid.*, art. 8 (2) (b) (xvii).

75. *Ibid.*, art. 8 (2) (b) (xviii).

76. *Ibid.*, art. 8 (2) (b) (xix).

77. *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*, 18 September 1997; on line : <[http://untreaty.un.org/English/millennium/law/disarmament/xxvi\\_5E.htm](http://untreaty.un.org/English/millennium/law/disarmament/xxvi_5E.htm)>.

78. *ICC Statute*, *supra* note 9, art. 121 (1), (3).

79. *Ibid.*, art. 121 (5).

Conference, there was much controversy over the inclusion of the use of biological and chemical weapons as well as nuclear weapons in the Statute:

[...] a no-list approach proved unacceptable, and a list including nuclear weapons likewise proved unacceptable. However, as reactions to the Bureau Proposal demonstrated, excluding nuclear weapons while listing other weapons of mass destruction was equally unacceptable. There was adamant opposition to a provision excluding the 'rich man's weapons of destruction' (nuclear weapons) while prohibiting the 'poor man's weapons of destruction' (biological and chemical weapons). It was feared that prohibiting some weapons of mass destruction while remaining silent on nuclear weapons would give tacit approval to the legality of nuclear weapons<sup>80</sup>.

The first two types of weapons are subject to prohibitions in international law<sup>81</sup>, however there exist no worldwide international conventions prohibiting the use of nuclear weapons. There are on the other hand regional instruments that prohibit the use of such weapons<sup>82</sup> as well as treaties on the non-proliferation of nuclear weapons<sup>83</sup>. There is no clear evidence at present of an emerging international customary rule.

Moreover, the International Court of Justice in its *Advisory Opinion on the threat or use of nuclear weapons* stated that it could not conclude definitively whether the threat or use of nuclear weapons would be lawful or

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80. Lee, *supra* note 23 at 116.

81. *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, UN Doc. A/Res/2826 (XXVI 1972), opened for Signature at London, Moscow and Washington, 10 April 1972; *Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction*, Paris, 13 January 1993, UN Doc. A/Res/47/39 (1992).

82. On line : Transnational Institute <<http://www.tni.org/nwzf/pages/exinwzf.htm>> (date accessed 15 December 2001); *Antarctic Treaty*, 1 December 1959; *Treaty for the Prohibition of Nuclear in Latin America*, 14 February 1967; *South Pacific Nuclear Free Zone Treaty*, 6 August 1985; *Treaty on the Southeast Asia Nuclear-Weapon-Free Zone*, 15 December 1995; *Treaty on the Nuclear-Weapon-Free Zone in Africa*, 11 April 1996; on line : <<http://www.tni.org/nukes/nwzf/exinwzf.htm>> (date accessed 8 September 2001).

83. *Treaty on the Non-Proliferation of Nuclear Weapons*, 1 July 1968.

unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake<sup>84</sup>.

The issue was extremely sensitive for the permanent members of the Security Council as well as many members of NATO. If the *ICC Statute* were to prohibit such weapons, it might have given the entire process a fatal blow<sup>85</sup>, and therefore, as a gesture of compromise, Article 8 (2) (b) (xx) was adopted which is very limited and certainly ineffective.

**d) The Security Council's right of deferral**

As mentioned above, the European Council favoured a prosecutor that would be independent from the States. In addition, it indicated that the Security Council should have a right of referral to the Court in situations where crimes under the Court's jurisdiction may have been committed. The European Parliament also wanted an independent prosecutor with the power to initiate investigations on his or her own initiative.

The ILC Draft Statute had given the Security Council three roles, namely determining acts of aggression<sup>86</sup>, referring matters to the Court under Chapter VII of the *UN Charter*<sup>87</sup>, and authorising the commencement of a prosecution in a situation that was already being dealt with by the Security Council under Chapter VII<sup>88</sup>. However, during the Preparatory Committee's meetings, it was suggested that the Prosecutor should have the power to initiate investigations *proprio motu* in the event of a situation that was not referred to the Court by a State or by the Security Council<sup>89</sup>. This option ensured the independence of the prosecutor. At Rome the debate revolved around the balance between the

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84. *Legality of the Threat or Use of Nuclear Weapons*, [1996] I.C.J. Reports 226, decided by the Casting vote of the President.

85. Lee, *supra* note 23 at 115.

86. UN International Law Commission, *Draft Statute for an International Criminal Court*, UN GAOR, 49<sup>th</sup> Sess., Supp. No. 10, UN Doc. A/49/10 (1994), art. 23 (2) [hereinafter *ILC Draft Statute*].

87. *Ibid.*, art. 23 (1).

88. *Ibid.*, art. 23 (3).

89. Lee, *supra* note 23 at 175-176.

political independence of the prosecutor and the protection of States Parties from an overzealous prosecutor exercising his or her functions abusively<sup>90</sup>:

The inclusion of statutory provisions for an independent Prosecutor with powers to target situations on his or her own motion was received with concern by some but was hailed by many as a major step for in the establishment of an effective, impartial and credible Court<sup>91</sup>.

There was evidently an incompatibility on the one hand with the role of an independent Prosecutor and on the other with the Security Council's role in authorising the commencement of a prosecution in situations dealt by it under Chapter VII as set out in the *ILC Draft Statute*<sup>92</sup>. Any permanent Member could unilaterally prevent the commencement of a prosecution with its veto<sup>93</sup>. A proposal put forward by Singapore, reversing the *Draft Statute*'s formulation, was accepted and now stands as Article 16 of the *ICC Statute*, which states:

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions<sup>94</sup>.

The application of this provision can conceivably impede the administration of justice by the Court given the fact that a deferral of twelve months may cause the loss of important evidence related to the commission of the crime. The rules of procedure and evidence<sup>95</sup> are silent on the question of interim measures in order to preserve evidence, in the case of a deferral. However, the deferral of an investigation or prosecution can only occur if a resolution is adopted under Chapter VII of the Charter namely in the occurrence

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90. *Ibid.* at 176; Unlike the ICTY and ICTR, the prosecutor of the ICC is not appointed by the Security Council.

91. *Ibid.* at 188.

92. *ILC Draft Statute*, *supra* note 86, art. 23 (3).

93. Lee, *supra* note 23 at 150.

94. *ICC Statute*, *supra* note 9, art. 16.

95. Preparatory Commission for the International Criminal Court, *Finalized draft text of the Rules of Procedure and Evidence*, 23<sup>rd</sup> Mtg., UN Doc. PCNICC/2000/1/Add.1 (2000).

of an act of aggression or a threat to international peace and security, which not only requires the approval of all five permanent Members of the Security Council but also requires a total of nine out of the fifteen votes<sup>96</sup>.

## V. Developments following the adoption of the *ICC Statute*

The European Council regulations on the development and consolidation of democracy, the rule of law and respect for human rights and fundamental freedoms<sup>97</sup> were created as suggested by the Comité des Sages report of 1998<sup>98</sup>, in response to the ECJ decision of the 12 May 1998<sup>99</sup>, implementing measures of conflict prevention, support for peace initiatives and addressing the issue of impunity<sup>100</sup>, in consistency with the Union's common foreign and security policy<sup>101</sup>.

They provide the legal authority for preventing, resolving and dealing with the consequences of conflict, including support for establishing Ad Hoc International Criminal Tribunals and setting up a permanent International Criminal Court, as well as support and assistance for the victims of human rights

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96. *UN Charter*, *supra* note 61, art 27.

97. EC, *Council Regulation (EC) No. 975/1999 of 29 April 1999 laying down the requirements for the implementation of development cooperation operations, which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms*, [1999] O.J. L. 130/1 [hereinafter *Council Regulation 975/1999*]; EC, *Council Regulation (EC) No. 976/1999 of 29 April 1999 laying down the requirements for the implementation of Community operations, either than those of development cooperation, which, within the framework of Community cooperation policy, contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms in third countries*, [1999] O.J. L. 120/8 [hereinafter *Council Regulation 976/1999*].

98. Comité des Sages, *Leading by Example: A Human Rights Agenda for the European Union for the Year 2000*, Florence (Italy), European University Institute, 1998, para. 149-155.

99. *United Kingdom v. Commission of the European Communities*, C-106/96 [1998] E.C.R. I-2729.

100. *Council Regulation (EC) No. 975/1999*, *supra* note 97, Preamble para. 11; *Council Regulation (EC) No. 976/1999*, *supra* note 97, Preamble para. 11.

101. *Council Regulation (EC) No. 975/1999*, *ibid.*, Preamble para. 12; *Council Regulation (EC) No. 976/1999*, *ibid.*, Preamble para. 12.

violations<sup>102</sup>. The 1999 *European Initiative for Democracy & Human Rights* implemented and financed the five projects of B7-706, four of which included NGOs: firstly the NGO Coalition for an International Criminal Court and its work in completing the establishment of the ICC<sup>103</sup>, secondly the International Society for Human Rights (ISHR) in raising military and civil awareness of the ICC in Eastern European Countries<sup>104</sup>, thirdly the Parliamentarians for Global Action in their Parliamentary Campaign for ratification of the Statute to establish an International Criminal Court and continued support for International Criminal Tribunals for Former Yugoslavia and Rwanda<sup>105</sup>, and finally the “Ratification Now!” 1999-2000 Campaign by *No Peace Without Justice* for the entry into force of the International Criminal Court<sup>106</sup>.

Further initiatives of *No Peace Without Justice* include the European Intergovernmental Conference in July 2000, on the second anniversary of the adoption of the ICC, in which delegates from Member States of the Council of Europe, Intergovernmental Organisations, Ambassadors, representatives from embassies and delegates from NGOs all participated. The Intergovernmental Conference adopted the *Rome Declaration on the International Criminal Court*<sup>107</sup>. Those who signed it solemnly undertake to do their utmost, both personally and on behalf of their Countries, to firstly ensure that the Court becomes operational, and secondly to have the 17<sup>th</sup> of July of every year recognised and celebrated as the World Day of International Justice. Moreover, the Conference held working sessions on the Rome Statute and its Annexes, on Europe and the Rome Statute and on the ratification and execution of the Statute<sup>108</sup>.

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102. *Council Regulation (EC) No. 975/1999, ibid.*, art. 2 (3) (e); *Council Regulation (EC) No. 976/1999, ibid.*, art. 2 (3) (e).

103. On line : *European Initiative for Democracy and Human Rights Compendium 2000*, <<http://europa.eu.int/comm/europeaid/reports/compendiu.pdf>> (date accessed 14 December 2001).

104. *Ibid.* at 135.

105. *Ibid.* at 136.

106. *Ibid.* at 139.

107. On line : No Peace Without Justice <[http://npwj.org/campaigns/rome\\_conf/rome\\_declaration.htm](http://npwj.org/campaigns/rome_conf/rome_declaration.htm)> (date accessed 14 December 2001).

108. On line : No Peace Without Justice <[http://npwj.org/campaigns/rome\\_conf/summary.htm](http://npwj.org/campaigns/rome_conf/summary.htm)> (date accessed 14 December 2001).

Moreover, the Coalition for an International Criminal Court has been following the discussions of the Preparatory Commission relating to the crime of aggression. The PrepCom has been dealing with several questions including the definition of the crime of aggression, the conditions under which the Court shall exercise jurisdiction and the consistency of the relevant provisions with the UN Charter. There are divided opinions as to the Court's approach following the Security Council's determination of an act of aggression. Also, possible alternatives are being discussed in the case where the Security Council fails to determine in an acceptable period of time that an act of aggression has occurred. Some consider that the matter is then closed, whereas others are either of the opinion of seizing the UN General Assembly with the matter or of referring the issue to the ICJ. Furthermore, others are content with the ICC to simply proceed on its own in such a case<sup>109</sup>. They all can be interpreted as alternatives that are consistent with the UN Charter, according to Article 5 of the *ICC Statute*.

The European Union has participated actively throughout the PrepCom negotiations, and has indicated its commitment to the early establishment of the ICC. It welcomed the adoption of the *Finalised Draft Elements of Crimes*<sup>110</sup> and the *Finalised Rules of Procedure and Evidence*<sup>111</sup>. It supported initiatives promoting the ratification of the Statute and offering legal assistance to countries in relation to its ratification as well as the efforts by NGOs in order to achieve the early entry into force of the Statute<sup>112</sup>.

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109. Preparatory Commission for the International Criminal Court, *Proceedings of the Preparatory Commission at its fifth session*, UN Doc. PCNICC/2000/L.3/Rev.1 (2000).

110. Preparatory Commission for the International Criminal Court, *Finalized draft text of the Elements of Crimes*, 23<sup>rd</sup> Mtg. U.N. Doc. PCNICC/2000/INF/3/Add.2 (2000).

111. Preparatory Commission for the International Criminal Court, *Finalized draft text of the Rules of Procedure and Evidence*, *supra* note 97.

112. "The Finishing Presidency of the European Union at The Preparatory Commission for the International Criminal Court" in No Peace Without Justice, *Prep. Com. Report; General overview on the Proceedings of the 2<sup>nd</sup> session (26 July - 13 August 1999) of the UN Preparatory Commission for the International Criminal Court*, vol. III at 5, on line : No Peace Without Justice <<http://www.npwj.org/documents/1999-3.pdf>> (date accessed 14 December 2001); Address by the President of the Council of the European Union 54<sup>th</sup> session of the General Assembly of the United Nations, New York, 21 September 1999.

Moreover, the Council of the European Union has consistently stated in a number of its responses that most of the Member States are subject to the various legislative and/or constitutional steps in proceeding with ratification and should complete the process in the near future<sup>113</sup>.

In contrast, the European Parliament has consistently supported and congratulated the States that have ratified the *ICC Statute* and has urged the Member States of EU<sup>114</sup> and the applicant countries that have not ratified the Statute to do so<sup>115</sup>.

## Conclusion

The European Union must continue its efforts in promoting democratisation, respect for human rights and the rule of law. Both the European Council and the European Parliament have indicated that the speedy ratification of the *ICC Statute* is a priority. Thus the European Council should closely monitor the progress on this issue. However, a number of other existing measures exist that should be taken by the European Union.

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113. EC, Written Question P-1597/99 by Marco Pannella (NI) to the Council, sitting of 8 September 1999, [1999] O.J. C. 27 E, 29/01/2000 at 141; EC, Written Question E-1521/00 by Michl Ebner (PPE-DE) to the Council, sitting of 15 May 2000, [2000] O.J. C. 89 E, 20/03/2001 at 47.
114. *European Parliament resolution on the ratification of the Rome Treaty to establish the permanent International Criminal Court (18/01/2001)*, based on Document No. A5-0384/2000 - Final Edition; *European Parliament resolution on the ratification of the Rome Treaty to establish the permanent International Criminal Court (16/12/1999)*, based on Document No. B5-0375/1999 - Final Edition; *European Parliament resolution on the ratification of the Statute of the International Criminal Court (06/05/1999)*, based on Document No. B4-0428/99 - Final Edition; *Resolution on the International Criminal Court (19/11/1998)*, based on Document No. C4-0297/98 - Final Edition; EC, *European Parliament resolution on support for the Geneva Conventions of 12 August 1949 and international humanitarian law*, 29 December 2000, [2000] O.J. C. 377/335 at para. 5-6; on line : <<http://www3.europarl.eu.int/omk/omnsapir.so/>> (date accessed 9 September 2001).
115. *European Parliament resolution on the ratification of the Rome Treaty to establish the permanent International Criminal Court (18/01/2001)*, *ibid.*

In its *Resolution on the Annual Report on International Human Rights and European Union Human Rights Policy*<sup>116</sup> the European Parliament recommended that the Council, the Parliament and the Commission should jointly declare their determination to increase human rights and democratisation expenditure in the following years<sup>117</sup>.

Moreover, the role of the European Council's High Representative for common foreign and security policy<sup>118</sup>, Mr PESC, both individually and in the context of Troika<sup>119</sup>, is crucial for effective crisis management<sup>120</sup> and conflict prevention<sup>121</sup>. This would imply monitoring the state of human rights throughout the world, cooperating with organisations seeking the enhancement of human rights, promoting human rights policies as well as responding to violations<sup>122</sup>.

Also, the provisions of the European Council regulations on the development and consolidation of democracy, the rule of law and respect for human rights and fundamental freedoms, provide for reactive measures in emergency situations, presumably by the EU rapid reaction forces. Thus, measures are deemed to be necessary in cases where an urgent and unforeseeable need arises from the sudden suspension of the democratic process or the emergence of a state of crisis or exceptional and imminent danger affecting all or part of the population of a country and posing a grave threat to the fundamental rights and freedoms of the individual<sup>123</sup>. However, coordination

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116. 29 December 2000, O.J. C. 377/336.

117. *Ibid.*, para.18-22.

118. *TEU*, *supra* note 1, art. 18 (3).

119. *Ibid.*, art. 18 (4); The combined efforts of the Council, Mr PESC and the European Commission.

120. J. Solana, "Procedures for Comprehensive-Coherent Crisis Management : Reference Framework", NR: 034/00 (8 December 2000), on line : Council of the European Union <<http://ue.eu.int/solana/list.asp?bid=111>> (date accessed 14 December 2001).

121. J. Solana, "Improving the Coherence and Effectiveness of the EU Action in the Field of Conflict Prevention", NR:033/00 (8 December 2000), on line : Council of the European Union <<http://ue.eu.int/solana/list.asp?bid=111>> (date accessed 14 December 2001).

122. *Leading by Example: A Human Rights Agenda for the European Union for the Year 2000*, *supra* note 98, para. 166-174.

123. *Council Regulation (EC) No. 975/1999*, *supra* note 100, art. 14 (1); *Council Regulation (EC) No. 976/1999*, *supra* note 100, art. 15 (1).

is very important between Mr PESC and specialised agencies, such as the EU Crisis Prevention Network which seeks to gather and disseminate information about situations that are likely to develop into open conflict<sup>124</sup>.

In effect, the European Council's interpretation of these regulations and its political willingness will determine the extent to which the Union will, for instance, intervene on humanitarian grounds in a conflict. However, the Council must ensure unity, consistency and effectiveness of action<sup>125</sup>. Evidently the fact that the ICC will have jurisdiction over genocide, crimes against humanity, war crimes and aggression will have a direct impact on the decision-making process of the EU in terms of its common foreign and security policy. However, the effective support to the ICC by the European Union is the best way for it to set an example and is the true test of determining whether the positions held weren't "euro-rhetoric".

Therefore the EU must take the initiative in the PrepCom negotiations in order for a definition of aggression to be reached, which will serve as an objective definition to evaluate alleged acts thereof, and constrict the highly political approach to the situation in the present scenario. Moreover, a definition of aggression would also be a deterrent where in some cases the crime is committed yet disguised and qualified as something else.

Beyond acting as a deterrent, the International Criminal Court will encourage States to respect and ensure respect of International Humanitarian Law. The primary obligation to prosecute violations of IHL reposes on the Member States. The Union would not be able to initiate a prosecution because it is not a State and therefore is not bound by the ICC treaty. However, situations can occur where the EU Member States would be unwilling to prosecute an individual for any reason. For example, when peacekeepers acting on behalf of EU Member States committed acts of sexual violence in Somalia and

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124. EC, *Resolution on the establishment of a European Centre for Active Crisis Prevention*, 3 July 1997, O.J. C. 166 at 59.

125. *TEU*, *supra* note 1, art. 13 (3) *in fine*; See A. Clapham, "Where is the EU's Human Rights Common Foreign Policy, and How is it Manifested in Multilateral Fora?" in P. Alston, ed., *The EU and Human Rights* (Oxford, Academy of European Law, European University Institute : Oxford University, 1999) 627.

Mozambique were dismissed from the missions and although the UN requested the concerned governments to punish their soldiers, few convictions were obtained<sup>126</sup>. Analogous situations could give the ICC jurisdiction to investigate and prosecute by virtue of the principle of complementarity<sup>127</sup>. Rape is now an offence that can be prosecuted under crimes against humanity<sup>128</sup> and war crimes<sup>129</sup>. Thus, refraining from using the war crimes opt-out becomes even more crucial.

Other actions the EU may take to respect and ensure the respect of the *ICC Statute* are in the context of cooperation with the Court. The State Parties to the Statute have the obligation to cooperate fully with the Court in its investigation and prosecution of crimes within its jurisdiction<sup>130</sup>, which extends to making available procedures under their national law for all forms of cooperation specified within the Statute<sup>131</sup>, the provisional arrest<sup>132</sup> and the surrender of persons to the Court<sup>133</sup> as well as the provision of information and documents<sup>134</sup>. The Court may further request States Parties to assist it in the identification and location of persons, the execution of searches and seizures, the gathering of evidence, etc<sup>135</sup>. Thus, the EU also has the possibility of applying economic sanctions in the context of States not respecting the ICC substantive and cooperation provisions, as it did in analogous situations regarding for instance the Former Yugoslavia<sup>136</sup>.

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126. EC, Committee in Women's Rights and Equal Opportunities, *Report on the participation of women in peaceful conflict resolution*, A5-0308/2000 at 15, O.J. C. 44/104.

127. *ICC Statute*, *supra* note 9, art. 1, 17.

128. *Ibid.*, art. 7; Applicable in times of war and peace.

129. *Ibid.*, art. 8; Applicable to internal and international armed conflicts. The wording of Article 8 (2) (b) (xxii) assimilates rape to grave breaches of the Geneva Conventions within the context of an international armed conflict, something that did not exist in this form previously; see Lee, *supra* note 23 at 361-364.

130. *Ibid.*, art. 86.

131. *Ibid.*, art. 88.

132. *Ibid.*, art. 92.

133. *Ibid.*, art. 89 - 91.

134. *Ibid.*, art. 87 (2); This provision is subject to the limitations provided for in Article 72 regarding the protection of national security information.

135. *Ibid.*, art. 93 (1).

136. *Ebony Maritime SA and Loten Navigation Co. v. Prefetto della Provincia di Brindisi and others*, C-177/95 [1997] E.C.R. I-1111.