

HUMAN RIGHTS, GENOCIDE AND THE INTERNATIONAL CRIMINAL COURT

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I. HUMAN RIGHTS IN INTERNATIONAL LAW SEEN AGAINST THE BACKGROUND OF THE SOCIAL DOCTRINE OF THE CHURCH

1. In the past, apart from the position of aliens, international law regarded the situation of the human person as one belonging to the domestic jurisdiction of each State. Thus rights of individuals only exceptionally became the subject of international regulation and protection. Examples are freedom of religion guaranteed by some treaties, rights of individuals under the laws of war (especially the Red Cross Convention of 1864 and the Hague Conventions of 1899 and 1907) or rights of members of certain minorities.

2. This restrictive approach began to be eroded after the First World War. Also, in the twenties and thirties there developed a systematic doctrinal discussion on the situation of the individual in international law. The breakthrough resulted from the atrocities committed during the Second World War; among these, the extermination of Jews in Europe by the German Reich (the 'Third' Reich), with the aid of some of its allies and collaborators, particularly stood out. Under the Charter of the United Nations (1945), one of the purposes of the Organization it created is to achieve international cooperation 'in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion' (Article 1, § 3). In its preamble, the Charter reaffirms faith 'in the dignity and worth of the human person'. In his paper on the social doctrine of the Church and the subjective rights of the person (presented at this Session) Msgr Roland Minnerath explained why for a long time the Church has entertained the most serious reservations with regard to the very notion of the subjective human right (*droit humain subjectif*). While I agree with his diagnosis, my paper deals with the present position of the social

doctrine of the Church with regard to the international law on human rights and fundamental freedoms. The successful growth of this law can be regarded as the most significant hallmark of the post-1945 development of international law, though its implementation is another matter.

3. From the very outset the United Nations embarked on a multifaceted activity to pursue the goal of respect for human rights. It acted on the universal plane. Its first basic instrument in this field was the Universal Declaration of Human Rights adopted as a UN General Assembly resolution in 1948.¹ The Declaration was proclaimed 'as a common standard of achievement'. This feature, and the fact that the Declaration was no more than an Assembly resolution, made it a non-binding instrument. However, after its adoption, there was a development which led to its becoming part of general (customary) international law on human rights. In accordance with its vocation, the Declaration is now not only universal in its name and contents, but it also gives expression to rules that are universally binding. All States have to abide by them. For, depending on circumstances and various requirements, some UN General Assembly resolutions can generate customary international law.² It is recognised both in the practice of States and by writers that human rights were one of the matters where the UN General Assembly resolutions helped to bring about customary legal rules.

4. It can be further assumed that the Universal Declaration of Human Rights now belongs to the peremptory norms of general law (*jus cogens*) on human rights. According to Article 53 of the Vienna Convention on the Law of Treaties (1969)³ 'a peremptory norm of general international law is a

¹ Resolution 217 (III), International Bill of Human Rights, 10 December 1948, Universal Declaration of Human Rights. No State voted against it, there were eight abstentions. For a critique, from the standpoint of the social doctrine of the Church, of some other pronouncements of the United Nations in the field of human rights, see M. Schooyans, *La face cachée de l'ONU*, Le Sarment, Paris 2000 and the paper by Msgr R. Minnerath, especially part III.

² This process and other legal problems of the U.N. General Assembly resolutions are subject of a vast literature. See, in particular, the work accomplished by the *Institut de Droit International, Annuaire*, vol. 61, part I, Session of Helsinki, 1985 (Travaux préparatoires) and vol. 62, part II, Session of Cairo, 1987; B. Sloan, General Assembly Resolutions Revisited (Forty Years Later), *British Year Book of International Law*, vol. 58, 1987, pp. 39-150 (in 1948 Sloan wrote in the same *Year Book* a pioneering study on this matter); and W. Hensel, 'Weiches' Völkerrecht. Eine vergleichende Untersuchung typischer Erscheinungsformen, Nomos, Baden-Baden 1991.

³ *United Nations Treaty Series (UNTS)*, vol. 1155, p. 331; *International Legal Materials (ILM)* vol. 8, 1969, p. 679.

norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’.

5. ‘The Church’s Magisterium has not failed to note the positive value of the *Universal Declaration of Human Rights* [...] which Pope John Paul II defined as “a true milestone on the path of humanity’s moral progress”. On another occasion John Paul II said that the Declaration ‘remain[ed] one of the highest expressions of the human conscience of our time’ (*Compendium*,⁴ § 152).

6. With the Encyclical *Pacem in Terris* Pope John XXIII inaugurated a long series of papal pronouncements on human rights. This Encyclical was a turning point in the Church’s approach to human rights (see Msgr Minerath’s paper) and to the work done on them by international organizations, though the Church remained highly critical of some of that work’s aspects. Also, one has to note the documents of the Second Vatican Ecumenical Council, especially the Declaration *Dignitatis Humanae* and the Pastoral Constitution *Gaudium et Spes* (1965). Teachings of Popes Paul VI, John Paul II (in particular the Encyclical *Centesimus Annus*) and Benedict XVI have specified various human rights and have called for their protection. Theological anthropology constitutes the foundation of human rights in the social doctrine of the Church. They belong to an objective order created by God. There is an intrinsic and inherent link between human dignity and human rights.⁵ The existence of that link has been emphasized by the Second Vatican Ecumenical Council. The Magisterium also underlines the connection between rights and duties: when rights are affirmed, corresponding responsibilities have to be acknowledged (*Compendium*, § 156; Encyclical *Caritas in Veritate*, § 43).

7. Human rights are ‘universal, inviolable, inalienable’ (*Compendium*, § 153).

8. In particular, a word should be said about universality. The Church teaches that human rights are universal, ‘because they are present in all

⁴ Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church*, Libreria Editrice Vaticana 2004 (cited hereinafter as *Compendium*).

⁵ The existence of that link has been emphasized by the Second Vatican Ecumenical Council, see Declaration *Dignitatis Humanae* and Pastoral Constitution *Gaudium et Spes*, § 22, 27 and 41. For a recent analysis of the subject, see C. McCrudden, Human Dignity and Judicial Interpretation of Human Rights, *European Journal of International Law*, vol. 19, 2008, pp. 655-724.

human beings, without exception of time, place or subject', and there is 'the duty of respecting them by all people, everywhere, and for all people' (*Compendium*, § 153). Indeed, the principles of universality and indivisibility of human rights are the cornerstone of legal regulation and of practices based on law. The universality stems from the equal dignity of all human persons which is the material source of human rights.

9. However, the problem, as we know, is not simple. At least two arguments are adduced to weaken universality.

The first consists in the economic differentiation of the world, which accounts for divergent priorities in the policies of States affecting people. There is also a rather confusing discussion on the conditionality of human rights protection. At any rate, poverty is the enemy of human rights. Pope Benedict XVI emphasizes

a flagrant contrast between the equal *attribution* of rights and the unequal *access* to the means of attaining those rights. For Christians who regularly ask God to 'give us this day our daily bread', it is a shameful tragedy that one-fifth of humanity still goes hungry. Assuring an adequate food supply, like the protection of vital resources such as water and energy, requires all international leaders to collaborate in showing a readiness to work in good faith, respecting the natural law and promoting solidarity with the weakest regions and peoples of the planet as the most effective strategy for eliminating social inequalities between countries and societies and for increasing global security.⁶

The second argument against universality bases itself on cultural peculiarities: they are said to prevent the full application of some human rights as defined in the Universal Declaration either completely or with regard to certain categories of persons, e.g. women or minorities. To this it should be responded that we all have to respect different cultures and civilizations: they are our mutual heritage and enrichment. But cultural diversity is no reason for lowering or diluting human rights enjoyment and protection. Any relativization of human rights leads to their denial.

10. We encounter such relativization in civilizations and customs prevailing in some regions of the world. However, regulation and implementa-

⁶ Address to the Pontifical Academy of Social Sciences, 4 May 2009, *L'Osservatore Romano*, no. 102, 4-5 May 2009, p. 7. See also the Encyclical *Caritas in Veritate* by Benedict XVI, § 29 and 43.

tion of human rights at the regional level can be helpful in promoting and encouraging their respect. All depends on what the regional approach is, i.e., whether it conforms to universal standards. There are instances in which regional law-making and especially regional action enhance the universality of human rights.

11. In fact, the United Nations' activity in the field of human rights was soon supplemented and, at least in one instance, even surpassed on the regional level. The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and its Protocols⁷ created the most developed and advanced system and mechanism for the protection of human rights. Nothing comparable exists within or without the United Nations, although a model similar to the European one can be found in the American Convention on Human Rights (1978).⁸

12. The consequence of the regulation of human rights by and in international law is that their protection and implementation no longer belong to the exclusive jurisdiction of any State. Thus the system of government of each State and the practice of its organs, including the conduct of its foreign policy, must conform to general international law on human rights and to treaties the State has concluded thereon. In the international forum, any State can raise any encroachment on human rights by another State. The plea of State sovereignty is no longer valid here.

13. Needless to say, Governments do not always comply with the laws guaranteeing human rights and fundamental freedoms, whether domestic or international. In a democratic system there are some remedies. A more serious problem is with authoritarian or totalitarian regimes which, even if they accept international treaties or other instruments on the protection of human rights, more often than not do not go beyond their formal acceptance because they actually do not implement them. The same is true of the attitude of such regimes towards the international customary law on human rights. Sometimes their respect for human rights, if there is any, is highly selective. It has been said that that these regimes recognize human

⁷ UNTS, vol. 213, p. 221. In particular, Protocol No. 11 (1994) restructuring the control machinery established by the Convention, ILM, vol. 33, 1994, p. 960, should be noted.

⁸ UNTS, vol. 1144, p. 123. The present paper does not discuss the issue of the relation between the Universal Declaration and some other instruments on human rights e.g., the African Charter on Human Rights (1981), ILM, vol. 21, 1982, p. 58, Islamic Declarations and Arab Charter on Human Rights; on the Islamic and Arab instruments and, generally, the regional instruments, see the paper by prof. O. Fumagalli Carulli.

rights by non-observance. The Church's '*essentially religious mission includes the defence and promotion of human rights*' (*Compendium*, § 159). The Church is fully aware of the many and persistent violations of human rights in the contemporary world. In the first place, the Church points to genocide (*Compendium*, § 158). The notion of genocide is the subject of Part II of this paper.⁹

II. GENOCIDE

1. *Origin of the Concept*

14. The author of the notion and the concept of genocide was Rafał (Raphaël) Lemkin (1900-1959), a Polish lawyer and scholar who worked until 1939 in Warsaw, Poland, and from 1940 in the United States.¹⁰ He dis-

⁹ Apart from the texts already mentioned, attention should be drawn to the United Nations Covenants, *viz.*, the International Covenant on Economic, Social and Cultural Rights, UNTS, vol. 993, p. 3, and the International Covenant on Civil and Political Rights, *ibid.*, vol. 999, p. 171. See also the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief proclaimed by U.N. General Assembly Resolution 36/55 of 25 November 1981. On a recent pronouncement by Pope Benedict XVI on the right to religious freedom, see the Encyclical *Caritas in Veritate*, § 29.

¹⁰ He was born in Bezwodne (where his father owned a farm) near the town of Wołkowysk in what then constituted the Polish part of Russia. This area returned to Poland when she regained her independence as a result of the First World War (since 1945 the said area belonged to the Soviet Union, now to Belarus). The fact that the mass killings of Armenians in Turkey during the First World War and the pogroms of Jews in Ukraine in 1918-1919 went unpunished led to Lemkin's deep involvement in combatting the crime of extermination of individuals as members of a group, and, consequently, extermination of the group as a whole. He decided to discontinue his linguistic studies and read law instead. After graduating from the John Casimir University at Lwów (then in Poland, now in Ukraine) in 1926, he became a secretary in the Warsaw Court of Appeals. He was subsequently appointed assistant prosecutor first in southern Poland and soon thereafter at the District Court in Warsaw. He resigned from this post in 1934 to practise law. He participated in the work of the Penal Section of the Polish Codification Commission. He also gave lectures on various issues of criminal law and was very active in international cooperation in the field of that law. When the Second World War broke out in 1939 he fled Poland (thus avoiding the Holocaust) and went to the United States (1940) where he fully devoted himself to the problem of genocide. R. Szawłowski, Rafał Lemkin (1900-1959). Polski prawnik twórcą pojęcia 'ludobójstwo', *Sprawy Międzynarodowe*, vol. 58, No. 2, 2005, p. 103. See also J.L. Panné's introduction to the writings of R. Lemkin, *Qu'est-ce qu'un génocide?*, Éditions du Rocher, Paris 2008.

tinguished genocide from other crimes under which its various elements and manifestations could have been and occasionally were earlier subsumed. He also coined the very term 'to denote an old practice in its modern development'.¹¹ He was more than right in referring to 'old practice': genocide is as ancient as humanity's recorded history.

15. By genocide Lemkin means 'the destruction of a nation or of an ethnic group'. His definition has two essential features. First, there is the biological aspect, i.e., extermination of a community, whether by killing or by causing its progressive decline leading to its disappearance. Second, the actions involved are directed against individuals, not in their individual capacity, but as members of the nation or the ethnic group.¹²

16. Lemkin, who speaks of genocide with regard to a nation or an ethnic group, did not lose sight of other groups. He saw them rather as 'elements of nationhood' or 'fields', in which genocide is carried out. Describing German practices of 1939-1944, such fields, he said, are political, social, cultural, economic, biological, physical, religious and moral.¹³

17. In 1933, Lemkin submitted to the Fifth International Conference for the Unification of Penal Law proposals to the effect that actions aiming at the destruction and oppression of populations should be penalized as a separate crime. What he meant were actions 'directed against individuals as members of a national, religious, or racial group' (the crime of barbarity) and the destruction of works of art and culture 'because they represent the specific creations of the genius of such groups'.¹⁴

18. Lemkin presented a strong plea in favour of nations as 'essential elements of the world community' while making a basic distinction between the idea of a nation and that of nationalism. The latter must be rejected. 'The world represents only so much culture and intellectual vigor as are created by its component national groups'.¹⁵ In his 'Recommendations for the Future', Lemkin emphasized that since the regulation of land warfare by the Hague Convention of 1899 and 1907 'the evolution of international law [...] has brought about a considerable interest in national groups as distin-

¹¹ R. Lemkin, *Axis Rule in Occupied Europe. Laws of Occupation – Analysis of Government – Proposals of Redress*, Carnegie Endowment for International Peace, Washington 1944, p. 79.

¹² *Ibid.*

¹³ *Ibid.*, pp. 82-90.

¹⁴ *Ibid.*, p. 91. At p. 93, he enumerates the criteria of nationhood, religion or race.

¹⁵ *Ibid.*, p. 91.

guished from state and individuals',¹⁶ while German practices in occupied Europe during the Second World War led to 'the need to review international law'. He also referred to the well-known example of the protection of minorities originating with the peace settlements of the First World War and with the League of Nations.¹⁷

2. Definition

19. On 8 August 1945, after some preparations during the war, France, the United Kingdom, the United States and the USSR concluded in London the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis. Several other States acceded to this Agreement which provided for the establishment of an International Military Tribunal to try those war criminals whose crimes had no particular geographical location. The Charter of the Tribunal was annexed to the Agreement.¹⁸ The Tribunal had its seat at Nuremberg, Germany. In fact, only one trial took place before this Tribunal, i.e., that of the major German war criminals. The Tribunal did not try any persons from other countries which belonged to the 'European Axis'.

20. Under Article 6 of the Charter the jurisdiction of the Tribunal included three categories of crimes:

- (a) *Crimes against Peace*: namely, planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
- (b) *War Crimes*: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment, or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities,

¹⁶ *Ibid.*, p. 90.

¹⁷ It may here be added that that protection was selective, which was its weakness. It covered the minorities in some countries only, while other countries were left free not to accept any international obligations in this respect.

¹⁸ For the texts of the Agreement and the Charter, see *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg 14 November 1945-1 October 1946* (Trial), Nuremberg 1947, vol. 1, p. 8. For the Tokyo Tribunal, see § 43 below.

towns, or villages, or devastation not justified by military necessity; (c) *Crimes against Humanity*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

21. It can be seen from the above that the term 'genocide' does not figure in the list of 'crimes against humanity'; yet it certainly belongs to that category; when committed during the war, it is also a war crime. It is under the latter rubric that genocide was expressly mentioned by the Indictment submitted to the Nuremberg Tribunal. In Count Three (relating to war crimes) the Indictment refers to

deliberate and systematic genocide, viz. the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, and Gypsies and others.¹⁹

22. The judgement of the Tribunal, read on 30 September and 1 October 1946, found several of the defendants guilty of crimes against humanity.²⁰ In connection with the Nuremberg Trial attention should be drawn to the contemporary importance of the doctrine of command or superior responsibility. In the exercise of international criminal jurisdiction it is critical to reach the leadership level.

23. During the second part of its First Session the U.N. General Assembly affirmed 'the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal' (Resolution 95 (I) of 11 December 1946). It also took up the issue of genocide. In its Reso-

¹⁹ Trial, vol. 1, pp. 43-44. The following information can be added here on other instances of genocide. There was extermination through hunger of certain groups of Ukrainian population during forced collectivization of agriculture in the thirties by the Soviet Union (under its Stalinist regime). The same regime committed genocide in time of war with regard to some groups of Poles, in particular the officers of the Polish Armed Forces, taken prisoner as a result of Soviet aggression against Poland in 1939, who were all executed in the Katyń Forest and other places in 1940. There was systematic extermination of thousands of Polish civilians in German-occupied Eastern Poland in 1943 with the participation of some Ukrainian nationalists.

²⁰ Trial, vol. 22, p. 411.

lution 96 (I) of the same date the Assembly affirmed that genocide is a crime under international law and provided for studies on the matter with a view to drafting a convention on genocide.²¹

24. The Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the General Assembly on 9 December 1948.²²

25. According to the Convention, genocide, 'whether committed in times of peace or in time of war, is a crime under international law' (Article I). Article II of the Convention provides that genocide consists of 'acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such'. Those acts are:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.²³

Apart from genocide itself, conspiracy, direct and public incitement and attempt to commit genocide and also complicity in genocide are punishable (Article III). Persons committing genocide or any of the foregoing acts²⁴ shall be punished, 'whether they are constitutionally responsible rulers, public officials or private individuals' (Article IV).

26. In 1951, acting on the request of the U.N. General Assembly, the International Court of Justice gave an Advisory Opinion concerning reservations made to the Convention.²⁵ The very issue of reservations, which is

²¹ H. Abtahi and P. Webb, *The Genocide Convention: The Travaux Préparatoires*, Nijhoff (Brill), 2 vols., Leiden 2008. See Also A. Cassese, *International Law*, Oxford University Press 2001, pp. 252-254, where he points to various national and international judicial decisions on genocide.

²² UNTS, vol. 78, p. 277.

²³ Article II. The Convention does not mention cultural and political groups. However, their annihilation also amounts to genocide. There is no reason for excluding them. It may be added that the Statute of the International Criminal Court (see below § 52) in its Article 6 repeats the definition of the Convention.

²⁴ For the purpose of extradition, genocide or any of these acts shall not be considered as political crimes (Article VII). Extradition treaties normally exclude political offenders from extradition. Article VII eliminates any political plea to protect perpetrators of genocide or acts connected therewith.

²⁵ *Reservations to the Convention on Genocide*, Advisory Opinion, 28 May 1951, *ICJ Reports 1951*, p. 15.

part of the law of treaties, need not be discussed here. Suffice it to say that the Court held, *inter alia*, that any such reservation had to be 'compatible with the object and purpose of the Convention'.²⁶ The Court explains:

The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention.²⁷

27. In the reasons for the Opinion the Court also mentions 'the special characteristics' of the Convention and refers to its origin. The Court says that 'a denial of the right of existence of entire human groups [...] shocks the conscience of mankind and results in great losses to humanity'; it 'is contrary to moral law'. According to the Court, two consequences follow from this conception. The first is that

the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention).²⁸

28. The foregoing dictum on the nature of the Convention principles (the 'first consequence') is to be noted. It is an elucidation and reaffirmation of the earlier position of the United Nations that genocide is a crime under international law (§ 23 above) – international law means here universally binding international law, i.e., the criminality of genocide does not depend on or follow from treaty obligations entered into by States, but is part of general law. Under its Statute, the International Court of Justice

²⁶ *Ibid.*, p. 18.

²⁷ *Ibid.*, p. 23. The Court repeated this dictum in its Judgment on the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections* (Bosnia and Herzegovina v. Yugoslavia), *ICJ Reports 1996*, p. 595, at p. 611, § 22.

²⁸ *ICJ Reports 1951*, p. 23. In his Dissenting Opinion in that case Judge Alvarez discussed the Genocide Convention from the perspective of what he termed 'new international law', *ibid.*, pp. 51-53.

applies not only treaties and customary law, but also ‘the general principles of law recognized by civilised nations’ (Article 38, § 1, letter c).²⁹ They belong to the *corpus juris* binding on States and other subjects of international law. The criminality of genocide also has its basis in customary international law (letter *b* of the same provision).

29. In the case concerning the *Application of the Convention, Preliminary Objections* (1996, cited in note 27) the Court referred to the 1951 Advisory Opinion and concluded that ‘the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*’.³⁰ It also specified that ‘the obligation each State thus has to prevent and punish the crime of genocide is not territorially limited by the Convention’.³¹

30. In another case, viz. that concerning *Armed Activities on the Territory of the Congo (New Application: 2002), Jurisdiction of the Court and Admissibility of the Application* (Democratic Republic of the Congo v. Rwanda), the Court, referring to its previous dicta on genocide, qualified the prohibition of genocide as a peremptory norm of general international law (*jus cogens*).³²

31. On 6 February 2007 the International Court of Justice issued its Judgment in the case concerning the merits of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*.³³ It is generally agreed that this Judgment constitutes the fundamental judicial pronouncement on the meaning and scope of the Convention.

32. This Judgment resolved, *inter alia*, the dispute between the two States on whether the Convention provided for the responsibility of States

²⁹ The Court’s Statute ‘forms an integral part’ of the U.N. Charter (Article 92) and is annexed to it. For the text of the Statute, see ICJ, *Acts and Documents concerning the Organization of the Court*, No. 5, 1989, p. 61.

³⁰ ICJ Reports 1996, p. 616, § 31 *in fine*. This conclusion followed a dictum which the Court made much earlier, viz. in 1970, see *Barcelona Traction, Light and Power Company, Limited (New Application: 1962)*, Second Phase (Belgium v. Spain), ICJ Reports, 1970, p. 3, at 32, where the Court included the prohibition of genocide among ‘the basic rights of the human person’; they are ‘the concern of all States’. The Court added: ‘In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*’, *ibid.*, § 33. The Court said that, *inter alia*, the outlawing of genocide had ‘entered into the body of general international law’ and cited the Genocide Convention, *ibid.*, § 34.

³¹ ICJ Reports 1996, p. 616, § 31 *in fine*.

³² Judgment of 3 February 2006, ICJ Reports 2006, § 64. For the definition of *jus cogens* under the Vienna Convention on the Law of Treaties, see § 4 above.

³³ ICJ Reports 2007, p. 43.

for acts of genocide as such. The question was whether State responsibility existed under the Convention, irrespective of responsibility of individuals or their groups and organizations. It seems that for most non-lawyers and at least some lawyers (including the present rapporteur) the question would seem to be moot in view of a State's obligation to prevent and punish genocide; that obligation (which, it is to be recalled, is one *erga omnes* and has the nature of *jus cogens*, see § 29 and § 30 above) *eo ipso* means that the State itself is prohibited from committing genocide; if it acts against this prohibition, it bears responsibility under international law. Yet the Court could not avoid considering this question: the Parties were in dispute on it. While Bosnia and Herzegovina contended that the Convention created State responsibility for genocide, Serbia and Montenegro defended the interpretation that the Convention was limited to the responsibility of States for the prevention and punishment of genocide alone.

33. The Court rejected the latter interpretation.³⁴ The Court concluded that 'the effect of Article I of the Convention is to prohibit States from themselves committing genocide'; 'the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide'.³⁵ The 'Contracting Parties to the Convention are bound not to commit genocide, through the actions of their organs or groups whose acts are attributable to them'.³⁶

34. As already indicated (§ 12 above) matters pertaining to human rights do not belong to the exclusive jurisdiction of States. This principle finds corroboration in Article VIII of the Convention which provides as follows:

Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.

35. It maybe assumed that the Magisterium fully supports the implementation of the U.N. Convention on Genocide. It speaks in favour of the protection of rights and duties of minorities. Their basic right is to exist; 'overt or indirect forms of genocide' constitute the most extreme denial of that right (*Compendium*, § 387). The Magisterium states (*Compendium*, § 506):

Attempts to eliminate entire national, ethnic, religious or linguistic groups are crimes against God and humanity itself, and those respon-

³⁴ For a discussion of that issue by the Court, see *ibid.*, pp. 108-119, § 155-179.

³⁵ *Ibid.*, p. 113, § 166.

³⁶ *Ibid.*, p. 114 § 167.

sible for such crimes must answer for them before justice. The twentieth century bears the tragic mark of different genocides from that of the Armenians to that of the Ukrainians,³⁷ from that of the Cambodians to those perpetrated in Africa³⁸ and in the Balkans.³⁹ Among these, the Holocaust of the Jewish people, the Shoah, stands out: ‘the days of the *Shoah* marked a true night of history, with unimaginable crimes against God and humanity’.

36. These tragic facts have started to influence, too late one has to say, the development, interpretation and implementation of law; the prohibition of intervention could not apply to genocide or other large-scale humanitarian atrocities. In such situations there is an international responsibility to protect and if, for whatever reason, there is no collective exercise of that responsibility by the United Nations, individual States or groups thereof can act within the limits of what is absolutely necessary to save human lives and health, when other measures have failed. International humanitarian law must be vindicated.⁴⁰

37. The Church concurs in that approach. Referring to attempts to eliminate entire national, ethnic, religious or linguistic groups, the Church emphasizes that States, as members of the international community, ‘cannot remain indifferent: on the contrary, if all other available means should prove ineffective, it is “legitimate and even obligatory to take concrete measures to disarm the aggressor”’. ‘The principle of national sovereignty cannot be claimed as a motive for preventing an intervention in defence of innocent victims’ (*Compendium*, § 506).

38. The foregoing position adopted by the social doctrine of the Church means that States should treat the prevention of genocide as a priority. States should be watchful about the danger of genocide, irrespective of its

³⁷ See note 19.

³⁸ Somalia, Rwanda and Sudan (genocide committed in Darfur). For the practice of the International Criminal Tribunal for Rwanda, see Cassese, *op. cit.*, p. 235.

³⁹ In Yugoslavia during its dismemberment and the armed conflict there. In its Judgment referred to in § 31 above the International Court of Justice found that Serbia had violated her obligations under the Genocide Convention by not preventing the genocide that occurred in Srebrenica in July 1995 and by having failed to transfer General Ratko Mladić for trial by the International Criminal Tribunal for the former Yugoslavia (ICTY). *ICJ Reports 2007*, p. 238, § 471, subparagraphs 5 and 6. The ICTY dealt with genocide in several of its judgments.

⁴⁰ See the Panel on State Sovereignty and Humanitarian Intervention: The Duty to Protect, present Session of the Academy.

geographical location. Whenever there are any signs of it to happen, they have to cooperate to restore respect for law and, as the case might be, to hinder an aggravation of the situation, by resorting to diplomatic, economic or other peaceful sanctions. Only swift reaction can be effective. However, States still lack a policy for preventing and opposing genocide. This has been amply shown by circumstances surrounding genocides committed after the conclusion of the 1948 Convention (see § 35 above). Resort to military force by another State or States (as set forth in § 36 above) in the territory where genocide is about to take place or already occurs is a possibility of which the potential or actual perpetrators of genocide should always be kept aware.

III. INTERNATIONAL CRIMINAL COURT AND OTHER JUDICIAL ORGANS: A BRIEF COMPARATIVE SURVEY

39. Article VI of the Genocide Convention provides that

[p]ersons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

40. The idea of an international penal tribunal goes back to the end of the First World War and the work of the League of Nations. In the inter war period, it was discussed by legal scholars.⁴¹

41. By virtue of Article 227 of the Peace Treaty with Germany, signed on 28 June 1919 at Versailles, the Allied and Associated Powers 'publicly arraigned' Wilhelm II, formerly German Emperor, 'for a supreme offence against international morality and the sanctity of treaties'.⁴² The Peace Treaty of Versailles provided for the constitution of a special tribunal to try him. It was to be composed of five judges; Japan, France, Great Britain,

⁴¹ For bibliographical indications, see L. Oppenheim, *International Law. A Treatise*, 7th edition by H. Lauterpacht, Longmans, Green and Co., London/New York/Toronto, p. 586, note 1. See also V.V. Pella, *La répression des crimes contre la personnalité de l'État*, Académie de Droit International de La Haye, *Recueil des Cours*, vol. 33, p. 671.

⁴² For the French text of the Versailles Treaty, see L. Le Fur and G. Chklaver, *Recueil de textes de droit international public*, 2nd ed., Dalloz, Paris 1934, p. 297.

Italy and the United States were to each appoint one judge. However, no such tribunal was ever set up because The Netherlands refused to extradite the former Emperor who sought refuge there in 1918.

42. Nor was another attempt to create an international criminal court successful, though this time the scope of the jurisdiction would be broader, i.e., not limited to one particular individual. In reaction to the terrorist assassination of King Alexander I of Yugoslavia in Marseilles on 9 October 1934 (another victim was the then French Foreign Minister Louis Barthou) there was drafted, under the auspices of the League of Nations, a Convention against Terrorism together with a supplementary Convention providing for an International Criminal Court to try terrorists (16 November 1937).⁴³ Neither Convention entered into force.

43. On the other hand, immediately after hostilities of the Second World War ended, the victorious Allies established two Tribunals: one in Nuremberg, which tried the leaders of Nazi Germany (see § 19 above), and another in Tokyo, the International Military Tribunal for the Far East, to try the Japanese leaders.⁴⁴ The judgements of these Tribunal were rendered in 1946 and 1948, respectively. They constitute a significant contribution to the development of international criminal law and, in particular, the concepts of crimes against peace, conventional war crimes and crimes against humanity. Though the two Tribunals were created by the victors, the latter did not act arbitrarily. At the time the Nuremberg and the Tokyo Tribunals were set up, international law empowered belligents to punish enemy war criminals during the war or during occupation of enemy territory (in the present context we do not need to consider the punishment of foreign nationals when the war and occupation ended). As to an aggressive war, at that time the law already provided for criminal responsibility for it. True, there was an element of novelty in the notion of crimes against humanity. However, when committed during the war (which was the case of the accused in the Nuremberg and Tokyo Trials) they constituted war crimes and for that reason there

⁴³ For the texts of these two instruments, see M.O. Hudson, *International Legislation*, vol. VII, pp. 862 and 878.

⁴⁴ B.V.A. Röling and C.F. Rüter (eds.), *The Tokyo Judgment*, APA-University Press Amsterdam 1977 and 1981, vols. 1-3. The following States at war with Japan each appointed one Member of the Tribunal: Australia, Canada, China, France, Great Britain, India, The Netherlands, New Zealand, Philippines, United States and USSR. As to the Nuremberg Tribunal, each of the four Powers occupying Germany (France, Great Britain, USA and USSR) appointed its Member and Alternative Member to serve on the Tribunal.

could have been no doubt as to the conformity of the said trials with international law also in respect of this category of crimes.

44. While the Nuremberg and Tokyo trials were a step forward in the enforcement of the laws of war, prohibition of aggression and the humanitarian law in general, and therefore, in the enforcement of many human rights, it was clear that the model for the future would be to act in advance and constitute a permanent court having jurisdiction conferred on it for all conflicts by a treaty or treaties to which practically all the States would be parties. Such a court had to be international: there are circumstances where national courts may not be the adequate solution. Hence the Genocide Convention, while providing for national jurisdiction, mentioned the possibility of establishing an 'international penal tribunal' to try persons charged with crimes under it (§ 38 above).

45. The next stage was the work of the U.N. International Law Commission on the Code of Offences against the Peace and Security of Mankind. Though it started in the first decade of the United Nations, it took many years before the Commission submitted to the U.N. General Assembly in 1994 a draft statute for a permanent international criminal court.⁴⁵ The Assembly's and the Commission's work on the draft statute was triggered by the grave and massive humanitarian crises in former Yugoslavia and Rwanda and by the response to them by the Security Council.

46. For it was beyond doubt that before the work on a permanent court could come to fruition, much earlier action was necessary to deal with the responsibility for the atrocities committed in those countries. It is for that purpose that the Security Council established two criminal judicial organs.

47. The Security Council first created, by its Resolution 827 of 25 May 1993, the International Criminal Tribunal for the Former Yugoslavia to prosecute persons responsible for serious violations of humanitarian law committed in the territory of that former State since 1 January 1991.⁴⁶ These violations comprised grave breaches of the Geneva Conventions for

⁴⁵ *Yearbook of the International Law Commission*, 1994, vol. II, part two (Report of the Commission to U.N. General Assembly). For a discussion of the draft, see same *Yearbook*, vol. I.

⁴⁶ The Resolution is reprinted in ILM, vol. 32, 1993, p. 1203. For the Statute of the Tribunal, see *ibid.*, p. 1192. The Tribunal for the Former Yugoslavia may be regarded to partially fulfil the expectation that eventually an international penal tribunal will be established, see the Genocide Convention (§ 39 above) and Article V of the International Convention on the Suppression and Punishment of the Crime of 'Apartheid' adopted by the U.N. General Assembly on 30 November 1978, Resolution 3068 (XVIII), ILM, vol. 13, 1974, p. 50.

the Protection of War Victims of 1949,⁴⁷ violations of the law or customs of war, genocide and other crimes against humanity (Articles 2-5 of the Statute of the Tribunal). The decision of the Security Council was based on Chapter VII of the U.N. Charter which provides for action with respect to threats to the peace, breaches of the peace and acts of aggression. It was a decision binding on all Members of the United Nations. There was some criticism of the mode adopted for the creation of the Tribunal (i.e., a Security Council resolution instead of a treaty),⁴⁸ yet choosing that way guaranteed a speedy organization of the Tribunal and beginning of its functioning. It held its first session at the end of 1993 and issued its first indictment and warrant for arrest in November 1994.

48. The Tribunal and national courts have concurrent jurisdiction. Yet the former has 'primacy over national courts', i.e., at any stage of the procedure the Tribunal may request national courts to defer to its competence (Article 9 of the Statute).

49. Though an *ad hoc* institution, the Tribunal for the former Yugoslavia constitutes a breakthrough in the efforts to have an international organ effectively exercising criminal jurisdiction and judicially enforcing international humanitarian law. Through its case law the Tribunal made a very important contribution to the development, enhancement and strengthening of humanitarian law.⁴⁹

50. A year later, i.e., in 1994, the Security Council established the International Tribunal for Rwanda.⁵⁰ The Tribunal was created at the request of the

⁴⁷ Conventions I, II, III and IV, UNTS, vol. 75, pp. 31, 85, 135 and 287, respectively. Also Additional Protocols I and II to these Conventions, *ibid.*, vol 1125, pp. 3 and 609, respectively.

⁴⁸ See, *inter alia*, K. Zemanek, Is the Security Council the Sole Judge of its Own Legality?, E. Yakpo and T. Boumedra (eds.), *Liber Amicorum Judge Mohammed Bedjaoui*, Kluwer Law International, The Hague/London/Boston 1999, p. 629, at pp. 637-640 and G. Arango-Ruiz, On the Security Council's Law-Making, *Rivista di Diritto Internazionale*, vol. 83, 2000, p. 609, especially at pp. 720-724.

⁴⁹ The first volumes of the Tribunal's *Reports* were published by Kluwer Law International, vols. I and II (1994-1995) and vol. 1 (1996) *et sequentes*. They are now published by M. Nijhoff Publishers. For a selection of the Tribunal's case law, see J.E. Ackerman and E. O'Sullivan, *Practice and Procedure of the International Criminal Court for the Former Yugoslavia with Selected Materials from the International Criminal Tribunal for Rwanda*, Kluwer Law International, The Hague/London/Boston 2000.

⁵⁰ Resolution 955 (1994) dated 8 November 1994 to which the Statute of the Tribunal was annexed, reprinted in ILM, vol 33, 1994, p. 1600. The full name of the Tribunal is given in the preamble to the Statute.

Government of Rwanda (§ 1 of the Resolution). What happened in Rwanda in 1994 was the worst genocide since the Holocaust during the Second World War and the mass extermination of the two million or more Cambodians, that is one fourth of the population of Cambodia, by the Khmer Rouge regime. The world, including the United Nations, though cognizant of the situation, remained passive.⁵¹ One writer recalls that 'it has been suggested that the plight of African victims would not generate the same outcry as the suffering of Europeans. In other words, the Rwanda Tribunal was established because of the precedential effect of the Yugoslav Tribunal'.⁵² Indeed, the Tribunal for Rwanda certainly owes its existence to the same policy that led to the earlier creation of the Tribunal for the Former Yugoslavia.

51. The jurisdiction of the Rwanda Tribunal comprises genocide, crimes against humanity and 'serious violations of Article 3' common to the 1949 Geneva Conventions and the 1977 Additional Protocol No. II thereto (that Article sets forth the minimum protection each Party is bound to apply to the victims of an armed conflict *not* of an international character).⁵³ Like the Tribunal for the former Yugoslavia, the Rwanda Tribunal has concurrent jurisdiction with national courts, with primacy of the Tribunal's jurisdiction over the latter (Article 8; § 48 above).

52. As already indicated (§ 45 above), it is only in the nineties that the United Nations resumed and speeded up its interrupted work on the creation of a permanent criminal court. The contribution by the International Law Commission has already been mentioned (§ 45 above). Subsequently, the U.N. General Assembly set up the Ad Hoc and Preparatory Committees which elaborated a draft statute (1995-1998). The Statute of the International Criminal Court (ICC) was adopted on 17 July 1998 by a United Nations conference convened for that purpose at Rome.⁵⁴ It entered into

⁵¹ See B. Boutros-Ghali, *Unvanquished: A U.S.-U.N. Saga*, Tauris, London/New York 1999, pp. 129-140. The former U.N. Secretary-General concludes: 'The Security Council did nothing', *ibid.*, p. 140.

⁵² P. Akhavan, The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment, *American Journal of International Law (AJIL)*, vol. 90, 1996, p. 501.

⁵³ Articles 2-4 of the Statute. The Tribunal's competence also extended to Rwandan citizens responsible for such crimes in the territory of neighbouring States. For the Geneva Conventions and Protocol II see note 47 above. That Protocol relates to the protection of victims of non-international armed conflicts. The seat of the Rwanda Tribunal is in Arusha, Tanzania.

⁵⁴ I.L.M., vol. 37, 1998, p. 1002. Ph. Kirsch and J.T. Holmes, The Rome Conference on an International Criminal Court: The Negotiating Process, *AJIL*, vol. 93, 1999, p. 2.

force in 2002. With the election of its judges and Prosecutor and the appointment of its staff the ICC began to function in 2003; the first 'situations' under the Statute were referred to it in 2004. Yet it took some more years before the first trial began in 2009 (against the Congolese warlord Thomas Lubanga). The Court was criticised for being slow in getting on with its task.

53. The ICC is 'a permanent institution' and has 'the power to exercise its jurisdiction over persons for the most serious crimes of international concern'. They are the crime of genocide, crimes against humanity, war crimes and the crime of aggression (Articles 5-8).

54. However, the exercise of jurisdiction over the crime of aggression has been suspended until the time

a provision is adopted [...] 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' (Article 5, § 2).

If one day the State Parties to the Rome Statute agree on a definition, that provision will be adopted in accordance with Articles 121 (Amendments) and 123 (Review of the Statute) of the Statute. Why this gap in the Statute of the ICC? The problem is highly political. States still differ on the definition of aggression despite rich legal practice on it. Thus, some treaties (only regional ones, it is true) defining aggression were concluded in the 1930s. Further, substantial case law exists on the subject, resulting from trials before both national and international courts that took place in consequence of the Second World War. And last, but not least, long before the setting up of the ICC the UN General Assembly in 1974 by its Resolution 3314 (XXIX) adopted the definition of aggression; that Resolution, obviously, does not have the force of a treaty. The conclusion of the Statute of Rome could not be adjourned until an agreement on the definition of aggression was reached. Otherwise, we would still await the establishment of the Court – and in 1998 the delay was already great.

55. The jurisdiction of the ICC is 'complementary to national criminal jurisdictions' (principle of complementarity, Article 1 of the Rome Statute; see also Articles 17-20). Thus the ICC is competent when a State is 'unwilling or unable genuinely to carry out the investigation or prosecution' (Article 17, § 1(a)).⁵⁵ The ICC has no jurisdiction when a State acting on strong

⁵⁵ For other exclusions of admissibility, see the remaining provisions of that Article.

grounds decided not to prosecute or, when there was prosecution, the accused was acquitted after a fair trial. The principle of complementarity has been described as 'the decisive basis for the entire ICC system'.⁵⁶ In this respect one should note a difference with the former Yugoslavia and Rwanda Tribunals (§ 48 and § 51 above, respectively). But in those two Tribunals it could not have been otherwise. The successor States of Yugoslavia were torn by strong feelings of hatred and enmity and the deep conflicts among them, though stopped on the military plane, still persisted. In those years, when several of the accused were to be tried, the usefulness of national criminal courts in the relevant successor States of Yugoslavia was none. Subsequently, prosecutions started also in national courts of some of those States and this very fact was due exclusively to the activity of the Yugoslavia Tribunal. Total impunity in the Balkans was avoided solely thanks to the International Tribunal. The ICC will certainly be confronted with the problem of national *versus* international jurisdiction in similar circumstances; indeed, it already deals with it, namely with regard to Darfur (see § 56 below). Thus, the principle of complementarity has its own limitations. They follow from State practice and policies. In various situations resort to the ICC will be the only alternative to impunity. A truce and reconciliation commission, no matter how important, is something else.

56. The ICC has jurisdiction over nationals of States Parties or offences committed on their territories (Article 12, § 2). This provision constitutes a limitation of the ICC jurisdiction. Only if the criterion of nationality or that of territory is met, may a State Party refer a case to the Prosecutor for investigating and determining whether the person or persons involved should be charged with a crime or crimes within the jurisdiction of the Tribunal (Article 14). As of this writing such referrals were made by the Democratic Republic of Congo, Central African Republic and Uganda. They are sometimes called 'auto-referrals' because the State relinquishes its jurisdiction in favour of the ICC. Further, the Prosecutor may 'initiate investigation *proprio motu* on the basis of information on crimes within the jurisdiction of the court' (Article 15); to investigate, the Prosecutor needs the authorization of the Pre-Trial Chamber. The Court is thus able, independently of a State's request, to decide whether to proceed in a case. Finally, in a situation in

⁵⁶ H.-P. Kaul, *The International Criminal Court – Its Relationship to Domestic Jurisdiction* in: C. Stahn and G. Sluiter, *The Emerging Practice of the International Criminal Court*, Nijhoff, Leiden/Boston 2009, p. 33.

which one or more crimes within the jurisdiction of the ICC appears to have been committed, the Security Council, acting under Chapter VII of the Charter of the United Nations (Article 13),⁵⁷ may refer this situation to the Prosecutor; the Security Council enjoys here full freedom, i.e., it can act irrespective of the nationality of the person or the location of the crime. Such a referral took place on 31 March 2005 with regard to the genocidal situation in Darfur in Sudan, a non-party to the Statute of Rome which was and is unwilling to accept the jurisdiction of the ICC.⁵⁸ In this case the ICC Prosecutor acted on the basis of the Security Council's referral and the Tribunal issued an arrest warrant against the president of Sudan, Omar Hassan Ahmad al-Bashir (4 March 2009).

57. While a Security Council referral favours, generally speaking, the administration of justice, the Rome Statute also provides for deferrals to take place. The Security Council, acting again under Chapter VIII, can request the Court not to commence a case or not to proceed in a case already pending for a period of 12 months; such a request may be renewed (Article 16). Though each instance of the exercise by the Security Council of that competence should be judged on its own merits, there is room for the view that a deferral might have a negative influence on the Court's functioning. For it constitutes interference by a political body which prevents proceedings from being instituted or stops them when they have already started. In this context one may recall the notorious fact that the Permanent Members of the Security Council are the biggest producers and exporters of weapons.

58. Another weak side of the ICC is the fact that many States whose concurrence would increase the number of cases decided by it are non-Parties to the Statute. They are, *inter alia*, China, India, Iran, Iraq, Israel, Pakistan, Russia and the United States; the entire Middle East, with the exception of Jordan, remains out of the Court.

59. Nor did the adoption of the Statute of Rome forbear States from setting up *ad hoc* tribunals to try those who committed certain crimes. Their establishment attests to the usefulness of such tribunals, to preferences of States and to possibilities dictated by circumstances surrounding the criminal act or acts.

⁵⁷ Consequently, such a referral is binding on all Members of the United Nations.

⁵⁸ S.C. Resolution 1593 (2005).

60. Thus a Special Court for Sierra Leone was established by virtue of the Agreement between that country and the United Nations done at Freetown on 16 January 2002.⁵⁹

The Special Court shall [...] have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone (Article 1, § 1, of the Court's Statute).

These violations are crimes against humanity, violations of Article 3 common to the Geneva Conventions and Additional Protocol II,⁶⁰ some other violations of international humanitarian law and certain crimes under Sierra Leonean law (Articles 2-5). But '[a]ny transgressions by peace keepers and related personnel [...] shall be within the primary jurisdiction of the sending State' (Article 1, § 2). Thirteen indictments were issued by the Prosecutor; two of them were subsequently withdrawn (due to the deaths of the accused). When this paper went to press, the trial of former Liberian President Charles Taylor was in its final phase.

61. After a long delay, Cambodia established the 'Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea', i.e. from 17 April 1975 to 6 January 1979 under the Khmer Rouge regime. In particular, that regime was guilty of genocide in which some two million or more Cambodians perished. The Extraordinary Chambers are a national court with international participation. The prosecution of the said crimes became the subject of an Agreement signed between the United Nations and Cambodia at Phnom Penh on 6 June 2003. These crimes comprised genocide, other crimes against humanity and grave breaches of the 1949 Geneva Conventions; they also included 'crimes and serious violations of Cambodian penal law' (Articles 1 and 9 of the Agreement). The Extraordinary Chambers have personal jurisdiction over senior leaders of Kampuchea and 'those who were most responsible for the [said] crimes'. The Parties to the Agreement cooperate in bringing to trial those persons.

⁵⁹ E. Hilwig, R. van Laar and W.-J. van der Wolf, *International Courts and Tribunals: Selected Documents and Materials*, Wolf Legal Publishers, Nijmegen 2004. p. 67.

⁶⁰ See § 51 above.

62. There is also a Special Tribunal for Lebanon to try all those responsible for the bombing of 14 February 2005 in Beirut that killed former Lebanese Prime Minister Rafiq Hariri and twenty two others. The Tribunal's jurisdiction could be extended to some other attacks in Lebanon, both preceding and following that bombing. The Tribunal was established by virtue of an Agreement between the United Nations and Lebanon (see Security Council Resolutions 1664 (2006) and 1757 (2007)). The Tribunal consists of Lebanese judges and judges from other countries. It applies the Lebanese Criminal Code taking into account the standards accepted in international tribunals.

63. To sum up, it is too early to say whether the establishment of the International Criminal Court is a milestone in the administration of international criminal justice and, therefore, in the development of international law and its implementation. It is, no doubt, a very significant step towards achieving such tenets. 'The Magisterium has not failed to encourage this initiative time and again' (*Compendium*, § 506). But it still remains to be seen whether it will become a constant, firm and effective institution for the exercise of international criminal jurisdiction in the world at large. While any international body relies on the cooperation of States, there are different degrees of it. To fulfil its task the ICC depends rather heavily on States. The absence of some States from the Tribunal (§ 58 above) is limiting its jurisdiction. The same is true of the politics of the administration of justice under the Statute of Rome. The Prosecutor, who enjoys a strong position in the ICC, should not take political considerations into account. Unavoidably, the Security Council which potentially plays a key role in the functioning of the ICC (§ 56 and § 57 above) is guided by political motives. Much will depend on how the Security Council conceives of that role.⁶¹

⁶¹ Only some of the numerous writings on the Court can be indicated here: M.C. Bassiouni, *The Statute of the International Criminal Court: A Documentary History*, Transnational Publishers, Ardsley 1998; W. Bourdon and E. Duverger, *La Cour pénale internationale. Le Statut de Rome*, preface by Robert Badinter, Éditions du Seuil, Paris 2000; A. Cassese, P. Gaeta and J. Jones, (eds.), *The Rome Statute of the International Criminal Court*, Oxford University Press 2002, 3 vols.; O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., C.H. Beck, Hart, Nomos, München/Oxford/Baden-Baden 2008 (1st ed., 1999); and Stahn and Sluiter, *op cit.* in note 56 above.