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Implementation of international humanitarian law

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Abstract
Today reciprocity and reprisals seen to have lost their traditional relevance when it comes to the implementation of IHL, atleast in international armed conflicts. The Geneva convention and their additional protocols provide that measures of implementation must be adopted by the contracting parties in times of peace as well as in times of war. This obligation is reinforced by the provisions of common Art 1 under the Geneva conventions, the contracting parties are under the obligation to adopt legislative measures to prevent and sanction the abusive use of the protective emblems. This paper is an effort to look into the working mechanism of international Tribunals and courts.

Keywords: implementation, tribunals, obligation, adopted, mechanism, IHL

I. Introduction
Rules of IHL create a nexus of rights and obligations for the parties to an armed conflict. Once the rules have been adopted, it is essential to ensure that they will be respected. Several mechanisms have been developed to reach that goal. Most of them are provided by the Geneva Conventions. Others involve the United Nations. in turn, the implementing measures adopted in Canada to ensure compliance with IHL are informed by those mechanisms [1].

II. Implementation of IHL under international law
1) Implementation of IHL under the Geneva Conventions
Traditionally, respect for IHL was based on the principle of reciprocity and its corollary the notion of reprisals. Thus, following the railed raid on Dieppe in 1942, orders to handcuff German prisoners of war were discovered on the body of a Canadian officer. In response, Canadian prisoners of war were shackled by their German captors for long periods of time. As a measure of reprisals, German prisoners of war heI44n the United Kingdom and in Canada were also shackled [2].
In lieu of reprisals, specific mechanisms intended to secure compliance with rules of IHL are provided by the Geneva Conventions and by Additional Protocol I. Some deal with the implementation of the Geneva Conventions within the domestic law of the contracting parties. Other mechanisms are intended to monitor the application of IHL by belligerents. Others still are used to settle disputes relating to the application of IIIL, and finally some are aimed at prosecuting individuals suspected of having committed serious violations of IHL [3].

a) Adoption of national measures of implementation
Moreover, State parties to the Geneva Conventions and their Additional Protocols I, II and III undertake to disseminate their provisions as widely as possible in their respective countries, in particular among members of the armed forces and, if possible, among the civilian population (G.C. I, Art. 47; G.C. II, Art. 48; G.C. III Art. 127; G.C. IV, Art. 144; A.P. I, Art. 83; A.P. II, Art. 19; A.P. III, Art, 7). In particular, military or civilian authorities which in time of armed conflict exercise responsibilities relating to the application of the Geneva Conventions and their Additional Protocol I must be familiar with the provisions (G.C. III, Art. 127 (2); G.G. IV, Art. 144(2), and A.P. I, Art 83(2). In the same vein, under Article 6(1) of Additional Protocol I, the contracting parties must endeavour in peacetime "to train qualified personnel to facilitate the application of the Conventions and of this Protocol and in particular the activities of the Protecting Powers [4].

b) Mechanisms intended to monitor the application of IHL
When confronted with violations of IHL, the ICRC will reprimand the authors of such violations and demand their immediate cessation. It will also remind the parties to the conflict of their obligations under the Geneva Conventions. As a rule, the ICUC prefers to act confidentially on a one on one basis with the parties concerned. However, in extreme Cases, it may decide to publicly denounce the violations provided that the following conditions are met:
- The violations are massive and repeated;
- Other efforts have failed;
- It is felt to be in the interest of the victims to publicly denounce the violations;
- The violations have been established.

However, the ICRC lacks the power to impose other types of an sanctions onto warring parties which do not corn ply with rules of IHL [5].

c) Mechanisms to settle disputes relating to the application of IHL
In the same vein, Additional Protocol I provides for the establishment of an International Fact-Finding Commission to enquire into alleged grave breaches of the Geneva Conventions and of the Protocol, and to lend its good offices to help restore compliance With these instruments (Art. 90(2) (c)). The Commission consists of "fifteen members of high moral standing and acknowledged impartiality" (Art. 50(1) (a)). In a concrete case, its jurisdiction may be grounded in two ways: 1) the States concerned have, in advance, recognized, on a reciprocal basis, the general competence of the Commission to operate "*ipso facto* and without special agreement"; (2) its

intervention is requested by a contracting party and the other party(ies) concerned agree (Art, 90(2)(a) and (d)). The Commission was established in 1991 after twenty States accepted its competence (Art. 90(1)(b)), but it was never used. Instead fact-finding missions have been executed by *ad hoc* commissions established the Security, Council under Chapter VII of the UN Charter [6].

d) Mechanisms to repress grave breaches of the Geneva Conventions and of Additional Protocol I

Under Additional Protocol I, a number of grave breaches to obligations intended to protect the physical or mental health and integrity of persons who are in the hands of an adverse party, are added (Art. 11). Other ones relate to attacks against civilians; indiscriminate attacks or attacks against works or installations containing dangerous forces with "the knowledge that such attacks will cause excessive loss of life, injury to civilians or damage to civilian object"; attacks against non-defended localities and demilitarized zones; attacks against a person *hors de combat*; the perfidious use of the distinctive signs and a number of other acts when committed wilfully: the transfer by art occupying power "of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory"; "unjustifiable delay in the repatriation of prisoners of war or civilians"; practices of apartheid and other practices based on racial discrimination; attacks which special protection has been granted by arrangement without against historic monuments, works of art or places of worship to justification; depriving protected persons of the right to a fair trial (Art. 85). Under Article 86 an Omission to act may constitute a breach [7].

2) Implementation of IHL withiin the UN system

Since the end of the Cold War, the United Nations, and in particular its Security Council, has been increasingly involved in the implementation of IHL. This increased involvement has led to the establishment of international tribunals intended to sanction serious violations of IHL [8].

a) Implementation of IHL through the Security Council

Acting under Chapter VII of the UN Charter, the Security Council has, for the past 15 years, taken an active part in ensuring compliance with roles of IHL. In so doing, the Security Council has equated some violations of IHL with threats to international peace and security, including when such violations were committed during a non-international armed conflict. Thus, the Security Council has adopted numerous resolutions reaffirming the obligation of the parties to an armed conflict to comply with IHL in general and with the Geneva Conventions in particular [9].

Furthermore, the Security Council has established fact-finding and investigative commissions on an ad hoc basis to examine alleged violations of IHL and of human rights, as well as alleged acts of genocide. Thus, by way of Resolution 446 (1979), the Security Council established a Commission 'to examine the situation relating to settlements in Arab territories occupied since 1967, including Jerusalem". Then, commissions of experts were established to investigate reports of serious violations of IHL in the former Yugoslavia and in Rwanda, including possible acts of genocide in the latter case. Again an international Commission of enquiry was organized in 2004, to investigate reports of violations of LHL and of human rights law in Darfur and to identify the perpetrators of such violations. Other fact-finding missions as well as commissions of enquiry were established to investigate situations in various parts of the world [10].

b.1) General background

The idea of prosecuting authors of serious violations of IHL before an international tribunal or court is not new. In 1474, Sir Peter von Hagenbach was indicted before a tribunal of 28 judges from the different States constituting the Holy Roman Empire. Tried for violations of the laws of God and Man during the occupation of the town of Breisach (Austria), he was found guilty, stripped of his knighthood and sentenced to death. In 1872, Gustave Moynier, one of the founders of the Comity of Geneva and by then its president, proposed the creation of an international criminal court to the Institute of International Law. His proposal as considered premature and failed [11].

The 1948 Genocide Convention alluded to an international penal which was finally established in 1998. Efforts to establish an international criminal court were undertaken by the International Law Commission in 1948. Draft Statutes were prepared, but the idea of creating a international criminal court was temporarily abandoned in 1954 [12].

The idea was revived in the 1980's in relation to the adoption of a draft Code of Offences against the Peace and Security of Mankind. Eventually both issues were split, and in 1994 the International Law Commission adopted a draft statute for an international criminal court. The draft was substantially influenced by the Statute of the ICTY. It was then studied within the framework of an *ad hoc* committee set up in 1994 by the U.N. General Assembly. In 1995, a preparatory committee was entrusted with the drafting of a proposed convention to be considered by an international conference in 1998. The Statute providing for the establishment of an International Criminal Court was adopted in Rome in 1998. The adoption of the Rome Statute was facilitated by the existence of the ICTY and of the ICTR established in 1993 and 1994 respectively [13].

b.2) The International Criminal Tribunal for the former Yugoslavia (ICTY)

The ICTY was established in 1993 on the basis of U.N. Security Council Resolutions 808 and 827 adopted under Chapter VII of the U.N. Charter. The decision to create the ICTY was taken in response grave breaches of IHL committed in the former Yugoslavia which were considered to constitute a threat to international peace and security. The legality of the creation of the Tribunal by the Security Council, its jurisdiction over the crimes for which it was established, as well as its primacy over domestic courts were uphold by the Appeals Chamber of the ICTY. Under its Statute, the ICTY has jurisdiction over serious violations of IHL committed in the territory of the former Yugoslavia since 1991 (Art. 1) [14].

The Tribunal and national courts have concurrent jurisdiction. However, the jurisdiction of the Tribunal overrides that of domestic courts (Art, 9). In order to prevent a person who was tried by the Tribunal to be retried for the same crime by a national court, the Statute codifies the principle *non bis in idem*. On the other hand, it emphasizes that a person who was tried by a domestic court may be prosecuted for the same acts before the Tribunal, if those acts were wrongfully characterized

as an ordinary crime or, if the domestic court did not deal with the case properly (Art, 10) [15].

As per Article 18 of the Statute of the ICTY, investigations may be initiated by the Prosecutor of his/her own accord or on the basis of information coming from governments as well as from intergovernmental arid non-governmental organizations. He/she may question suspects, victims and witnesses; collect evidence and conduct on site investigations. Upon determining that a *prima facie* case exists, the Prosecutor prepares an indictment including a statement of the facts and indicating the crime or crimes with which the accused is charged. The indictment is transferred to a judge of the Trial Chamber for review. If the judge confirms the indictment, he/she may also issue orders and warrants for the arrest, detention, surrender or transfer of the accused (Art. 19) [16].

b.3) The International Criminal Tribunal for Rwanda

The genocide which took place in Rwanda in 1994 was investigated by a Commission of Experts established by the U.N. Security Council the same year. In the wake of the Commission's report, the Council determined that the genocide in Rwanda constituted a threat to international peace and security. As a result, acting under Chapter VII of the Charter, the Council established the ICTR and adopted its Statute by way of Resolution (1994). The Trial Chamber upheld the legality of the establishment of the ICTR byway of a reasoning similar to the one used by the Appeals Chamber in relation to the legality of the ICTY. According to the Chamber, the existence of a threat to international peace and security justified the creation of the ICTR by the Security Council on the basis of Chapter VII of the UN Charter [17].

The ICTR has jurisdiction over persons charged with serious violations of IHL committed in the territory of Rwanda and Rwandan nationals charged with such violations committed in the territory of neighbouring States between January 1 and December 31, 1994 (Statute, Art. 1). The serious violations over which the Tribunal has jurisdiction correspond to acts of genocide (Art, 2), 1302 crimes against humanity "committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds" (Art. 3), and violations of Article 3 common to the Geneva Conventions of 1949 and of Additional Protocol II (Art. 4). Therefore, the ICTR has jurisdiction over violations of IHL committed during a non-international armed conflict, which means that its Statute extends the concept of individual criminal responsibility for violations of IHL to such armed conflicts [18].

b.4) The International Criminal Court (ICC)

The ICC was established by way of a multilateral treaty (The Rome Statute of the International Criminal Court) concluded in 1998. As indicated earlier, the establishment of the ICC is the end result of efforts which started within the U.N. system as early as 1948, were suspended in the 1950's, only to be revived in the l980's. The drafting of the Statute of the ICC took place in the wake of the creation of both the ICTY and the ICTR. Naturally, the draft Statute of the ICC was to a large extent influenced by the Statutes of the two *ad hoc* tribunals. However, unlike the ICTY and the ICTR, the ICC is a permanent criminal court of universal jurisdiction. As such, it represents a major development in the evolution of international criminal law. Indeed, the history of international criminal tribunals shows that, until 1998, the international community was willing to establish such tribunals on an ad hoc basis, but as reluctant to create a permanent international criminal court. In accordance with its Article 126, the Statute of the ICC came into force after being ratified by sixty States, i.e. in July 2002. In turn, the Court came into existence in February 2003 [19].

i) Jurisdiction

Ratione materiae, the Court has jurisdiction over genocide, crimes against humanity, war crimes and aggression (Art. 5). Other crimes like terrorism, drug trafficking or use of nuclear weapons were set aside to facilitate the adoption of the treaty. Moreover, the exercise by the Court of its jurisdiction over aggression will have to wait until it is defined by way of an amendment (Art. 5(21)). On the other hand, genocide, crimes against humanity and war crimes are defined in the Statute (Arts. 6-8). Their definition is supplemented by "elements of crimes" provided by Article 9 of the Statute and developed by the Preparatory Commission in 2000. However, under Article 124 of the Statute, a State may, upon becoming a party thereto, set aside the jurisdiction of the Court over war crimes for a period of seven years, when h crimes have been committed by its nationals or on its territory [20].

ii) Applicable Law

The Court applies first its Statute, Elements of Crimes and its Rules f Procedure and Evidence. The Rules were developed by the Preparatory Commission in 2000, and adopted in accordance with Article 51 of the Statute. Then, the Court applies "applicable treaties and the principles and rules of international law, including the established principles of the law of armed conflicts'. Third, the Court applies general principles stemming from national laws, provide that they are consistent with the Statute and with international law. The Court may take into consideration its own precedents to apply principles and rules of law. The application and interpretation of rules of law by the Court must he consistent with human rights law (Art. 21) [21].

iii) Organization of the Court

The Court sits in The Hague. It consists of the Presidency, an (Appeals Division, a Pre-Trial Division, a Trial Division, the Office of the Prosecutor and the Registry (Art. 34). The President and the First and Second Vice-Presidents are elected by an absolute majority of the judges for a maximum term of three years. They may be re-elected once. They are responsible for the administration of the Court, except with respect to the Office of the Prosecutor. They cooperate with him over matters of mutual concern (Art. 38) [22].

iv) Operation of the Court

Under the Statute, a case may be brought before the Court in three different ways: a State party may refer to the Prosecutor a situation in which one or more crimes falling under the jurisdiction of the Court seem to have been committed, and request the Prosecutor to investigate with a view to determining whether some individuals should be charged with such crimes (Arts. 13(a), 14); the Security Council acting under Chapter VII of the Charter may refer to the Prosecutor a situation in which some crimes over which the Court has jurisdiction seem to have been committed. In that case, the

Court may exercise its jurisdiction over crimes which were not committed on the territory or by a national of a contracting party (Darfur) (Act. 13(6)); on the basis of credible information, and with the authorization of the Pre-Trial Chamber, the Prosecutor may initiate an investigation *proprio motu* with respect to crimes falling under the jurisdiction of the Court (Arts. 13(c), and 15) [23].

Upon receipt of a request for arrest, a State party shall immediately take steps to arrest the person concerned in accordance with its laws and Part 9 of the Statute. The person arrested is then brought before competent judicial authorities in the custodial State. They shall verify that the warrant applies to the arrested person and that the arrest was consistent with proper procedures and the rights of the person. That person is then surrendered to the Court at its request Art. 59) [24].

The sentence must be pronounced in public and, if possible, in the presence of the accused (Art. 76(4)). It may consist of a jail sentence not exceeding thirty years, or of a life sentence if justified by "the extreme gravity of the crime and the individual circumstances of the convicted person". A joint sentence specifying the total period of imprisonment is pronounced when the accused is convicted of more than one crime (Art. 78). Moreover, the Court may order the convicted person to pay a fine and/or suffer a forfeiture of proceeds, property and assets derived from the crime (Art. 77). The Court may also order the convicted person to pay reparation to victims, including restitution, compensation and rehabilitation (Art. 75(2)). A Trust Fund is established for the benefit of victims of crimes falling under the jurisdiction of the Court (Art. 79) [25].

b.5) The Special Court for Sierra Leone

The Special Court for Sierra Leone was established by way of an agreement concluded in 2002 between the United Nations and the government of Sierra Leone. It is intended to prosecute the main perpetrators of serious violations of IHL and of Sierra Leonean law committed in Sierra Leone since 1996 (Statute of the Special Court, Art, 1(1)). In many respects, the provisions of the Statute of the Court mirror corresponding provisions in the Statutes of the ICTY and the ICTR [26].

i) Jurisdiction

The special Court has jurisdiction over crimes against humanity (Art. 2); violations of common Article 3 and of Additional Protocol II (Art. 3); other serious violations of IHL, including attacks against civilians, attacks against peacekeepers and the enrolment of children under fifteen into armed forces (Art. 4), as well as over crimes under Sierra Leonean law, such as offences relating to the abuse of young girls and offences relating to the wanton destruction of property (Art. 5). The Special Court has concurrent jurisdiction with Sierra Leonean courts but primacy over them. As a result, it may formally request a domestic court to defer its jurisdiction to it (Art. 8). However, the Court does not have jurisdiction over an accused who was under fifteen when the alleged crime was committed. If the accused was between fifteen and eighteen at that time, he/she shall be granted preferential treatment in accordance with the rules of international law governing the rights of the child (Art. 7(1)) [27].

b.6) The Extraordinary Chambers in the Courts of Cambodia (ECCC)

In 2001, a law was enacted in Cambodia, with a view to prosecuting senior leaders of the Khmer Rouge and those most responsible for crimes under Cambodian law, IHL and conventions ratified by Cambodia, which were committed between 17 April 1975 and 6 January 1979 (Art. 1). The Law provided for the establishment of the ECCO (Art. 2). Subsequently, in 2003, an agreements was made between Cambodia and the United Nations to determine the conditions under which the international community could help Cambodia to achieve its goal. The ECCC are a mixed tribunal. This feature is reflected in their structure, as well as in their operation. Indeed, Cambodia insisted that the trial take place in Cambodia and be led by Cambodian judges and staff. However, because of the weakness of the Cambodian judicial system, its inability to meet international standards of justice, as well as the international nature of the crimes, foreign assistance was needed. It was requested from the United Nations in 1997 [28].

III. Conclusion

The Geneva Conventions and their Additional Protocols, as well as many other instruments relating to lilt, create an obligation for State parties to adopt national measures of implementation. Such measures must, for instance, be intended to prevent and suppress the misuse of the distinctive emblems of the Geneva Conventions, to repress grave breaches of the Conventions and to disseminate their provisions. They involve the enactment of national statutes, supplemented by administrative regulations, and a lied by domestic courts. Several bodies participate in the effort [29].

IV. References

1. See The Canadian Forces Code of Conduct, Dispatches 15. See also, Nathan Gtreenfiled, "The Bowmanville Riot-Canandian troups fired on German Pows in 1941" Maclean's, 7 October 2002, at p. 49. For a different example relating to Second World War, see Dr. Marcel JUNOD, Warrior without Weapons, Geneva, ICRC, 1982, 1996; 6(2):156
2. Supra, note 63.
3. Supra, nos. 76 et seq. According to the ICRC Study on customary law, the prohibition of reprisal attacks against civilians is not part of customary law: see J.-M. HENCKAERTS, loc. cit., note 200, at p. 481.
4. Ibid., at. 264.
5. Ibid., at. 406.
6. For instance in relation to events in the former Yugoslavia (see S/Res 780, 6 Oct. 1992) and in relation to events in Rwanda see S/Res 935, 1 July 1994.
7. See Prosecutor v. Kordic, Cerkez. IT-95-14/2, Judgment, 29 February 2001, ICTY (T.Ch.), at paras. 311 et seq.
8. Supra, nos. 34 et seq.
9. See Y. SANDOZ, loc. Cit., note 684, at p. 280.
10. See S/Res/1012, 28 August 1995; S/Res/814, 26 March 1993; S/Res/446, 22 March 1979.
11. Sex Kriangsak KITTICHAISAREE, International Criminal Law, Oxford, Oxford University press, 2001, at p. 14, See also L.C. GREEN, op. cit., noter 319, at p. 288.

12. (Art. VI). See A. ROBERTS and R. GUELFF, op. cit., note 2, at pp. 179 et seq.; K. KITTICHAISAREE, op. cit., note 2, at p. 667.
13. On the ICTY, the ICTR and the Special Court for Sierra Leone, see William A. SCHABAS, The UN International Criminal Tribunals, Cambridge, Cambridge University Press, 2006.
14. See Prosecutor v. Tadic, 2 October 1995, supra, note 4. See also infra, no. 721.
15. See also ICTY Rules, Rule 13.
16. The same facts may lead to cumulative charges and cumulative convictions, ibid., at paras. 400 et seq.; Prosecutor v. Galic, 5 December 2003, supra, note 282, at para. 163; Prosecutor v. Strugar, 22 November 2002, supra, note 282, at paras. 447 et seq.
17. See Prosecutor v. Kanyabashi, ICTR-96-15-T, Decision on the Defence Motion on Jurisdiction, 18 June 1997, ICTR (T.Ch.), at paras. 19 et seq.
18. See Prosecutor v. Jean-Paul Akayesu, 2 September 1998, supra, note 272, at paras. 494 et seq. See also Prosecutor v. Protais Zigiranyirazo, ICTR-01-73-T, Judgment, 18 December 2008, ICTR (T.Ch.), at paras. 396 et seq.; Prosecutor v. Simeon Nchamihigo, ICTR-01-63-T, Judgment and Sentence, 12 November 2008, ICTR (T.Ch.), at paras. 329 et seq. On incitement to commit genocide, see Prosecutor v. Barayagwiza, ICTR-99-52-T, Judgment, 3 December 2003, ICTR (T.Ch.), at paras. 978 et seq.
19. See D. SCHINDLER and J. TOMAN, op. cit., note 9, at pp. 1309 et seq. As of 23 January 2009, it is binding on 108 States, including Cananda.
20. The Commission was established by the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court, to prepare the coming into operation of the ICC. As such, it was entrusted, among other things, with the task of preparing the draft texts of the Rules of Procedure and Evidence and of the Element of Crimes: see D. SCHINDLER and J. TOMAN, op. cit., note 9, at pp. 1379-1380.
21. See Report of the Preparatory Commission for the International Criminal Court: Finalized draft text of the Rules of Procedure and Evidence, 12 July 2000, UN Doc. PCNICC/2000/INF/3/Add. 1.
22. Conversely, see Prosecutor v. Erdemovie, IT-96-22-T, Judgment, 7 October 1997, ICTY (A.Ch.), at para. 19
23. On the other hand, the Security Council, acting under Chapter VII of the UN Charter, may prevent an investigation or prosecution for taking place or stop its proceeding for a period of twelve months, renewable (Art. 16). In this respect, see S/Res/1487, 12 June 2008.
24. On Articles 58 and 60 of the ICC Statute, see Prosecutor v. Thomas Lubanda Dyilo, ICC-01/04-01/06 OA12, Judgment, 21 October 2008, ICC (A.Ch.), at paras. 34 et seq.
25. See Prosecutor v. Thomas Lubanga Dyilo, supra, note 1323.
26. On its status as an international criminal tribunal, see Prosecutor v. Charles Taylor, Decision on Immunity from Jurisdiction, SCSL-2002-01I, 31 May 2004, SCSL (A.Ch.), at paras. 37 et seq.
27. On the jurisdiction of the Court and the law applicable to crimes railing under its jurisdiction, see Prosecutor v. Moinina Fofana and Allieu Kondewa, SCSL-04-14-T, Judgment, 2 August 2007, SCSL (T.Ch.), at pares. 87 et seq. Set also Prosecutor v. Moinina Fofana and Allieu Kondewa, SCSL-04-14A, Judgment, 28 May 2008, SCSL (A.Chi.); Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, SCSL-2004-16-A, Judgment, 22 February 2008, SCSL (A.Ch.); Prosecutor v. Norman, Decision on Preliminary Motion Based on Lack of Jurisdiction, SCSL-04-14-AR72(E). 31 May 2004. SCSL (A.Ch.).
28. Under Article 43, the ECCC are located in Phnom Penh.
29. Supra, nos. 660 et seq. See also Article 25 of the Hague Convention on cultural property.