The implementation of international humanitarian law and the principle of State sovereignty

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INTRODUCTION

Before stating the terms of the problem we intend to examine, it is necessary first of all to explain what is meant by "the imperative necessity of implementing international humanitarian law".

1. The imperative necessity of implementing international humanitarian law

As is well known, international humanitarian law is the set of legal rules which States are obliged to respect and which are designed to protect the victims of international or non-international armed conflicts.

It is essentially contained in the four Geneva Conventions of 12 August 1949 on the amelioration of the condition of the wounded and sick in armed forces in the field, the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea, the treatment of prisoners of war, and the protection of civilian persons in time of war, respectively.

These Conventions have been developed and supplemented by two Additional Protocols, adopted on 8 June 1977, the first of which relates to the protection of the victims of international armed conflicts and the second to the protection of the victims of non-international armed conflicts.

Implementation of international humanitarian law comprises respect for its provisions, i.e., its effective application, the supervision of that application and the repression of any violations.[1]

In this connection, it must be stressed that, given the purpose of international humanitarian law, its implementation is a matter of utmost importance. Of course, no legal order can have any meaning if its rules are not effectively applied when the necessity arises, but this observation is particularly relevant in the case of international humanitarian law, which is applied in the context of war, a context where the lives of human beings are constantly at risk. If it is not effectively applied in situations of conflict, the damage done is usually beyond repair. The mechanisms of punitive sanctions and reparations cannot change the tragic nature of the situation, but they can sometimes prevent it from continuing.

In any case, the imperative necessity of implementing international humanitarian law was clearly a major concern of the authors of the Geneva Conventions and Additional Protocols. This is evidenced in particular by some rules contained in these instruments which are not found in ordinary treaty law.

There is, first of all, the rule set out in Article 1 common to the Conventions and in Article 1, para. 1 of Protocol I, which specifies: *"The High Contracting Parties undertake to respect (...) the present Convention* [respectively Protocol] *in all circumstances"*. As many commentators[2] have pointed out, this provision may at first sight seem superfluous since it adds nothing to the general principle of the law of treaties, *pacta sunt servanda*, set out in Article 26 of the Vienna Convention on the Law of Treaties of 23 May 1969: *"Every treaty in force is binding upon the parties to it* and *must be performed by them in good faith"*.[3] In fact, it seems that the authors of these texts

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[1] Sassòli, Marco, "La mise en œuvre du droit international humanitaire et la répression de ses violations", International Seminar on the Law of Armed Conflicts and Humanitarian Action, Kinshasa, 6-8 January 1988, p. 1.

[2] See, *inter alia*, Sandoz, Yves, "Implementing international humanitarian law", *International Dimensions of Humanitarian Law*, Paris, UNESCO; Henry Dunant Institute, Geneva, Martinus Nijhoff Publishers, 1988, pp. 261-262; *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Editors: Yves Sandoz, Christophe Swinarski, Bruno Zimmermann, Martinus Nijhoff Publishers, ICRC, Geneva, 1987, pp. 31-35 (hereinafter *Commentary on the Additional Protocols*).

[3] Author's emphasis.

wished both to re-state the rule and to emphasize it, thereby demonstrating their insistence on the effective implementation of these instruments.[4]

Another rule, this time of a technical nature, provides that each of the Geneva Conventions and each of the Protocols *"shall come into force six months after not less than two instruments of ratification have been deposited."*[5] The fact that a treaty intended to be universal is satisfied with two instruments of ratification is in itself an unmistakable indication of the importance attached to applying it as soon as possible. As the *Commentary on the Additional Protocols* emphasizes: *"This meant that it* [Protocol I] *would quickly become applicable, at least between the Contracting States. Moreover, it could accelerate the rate of ratifications and accessions".*[6]

Furthermore, mention could be made of the provisions which stipulate that: *"The situations provided for in Articles 2 and 3 shall give immediate effect to ratifications deposited and accessions notified by the Parties to the conflict before or after the beginning of hostilities or occupation."*[7] The situations in question are those of international and non-international armed conflicts. Whereas normally the Conventions come into force six months after the instruments of ratification or accession have been deposited[8], when an armed conflict involves a Party for which that period has not yet elapsed, the texts will apply to that Party immediately, regardless of that rule.

All these specific rules show that the question of the implementation of international humanitarian law is in a class by itself.

2. The problem at issue

Has the imperative necessity of implementing international humanitarian law eroded to some extent the principle of State sovereignty? This is basically the question being asked in this article.

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[4] The Geneva Conventions and the Additional Protocols contain other provisions of similar purport: e.g. Article 45 of the First Convention, Article 46 of the Second Convention and Article 80 of Additional Protocol I.

[5] See Article 58-57-138-153 common to the Conventions, Article 95, para. 1 of Additional Protocol I and Article 23, para. 1 of Additional Protocol II.

[6] *Op. cit.*, p. 1080, para. 3730.

[7] See Article 62-61-141-157 common to the Conventions; *Commentary on the Additional Protocols*, p. 1081, paras 3737-3739.

[8] See note 5 above.

Let us say straight away, to avoid any misunderstanding, that the fact that States are sovereign does not in itself constitute a legitimate obstacle to the implementation of international law in general and international humanitarian law in particular. In other words, States could not invoke their sovereignty to avoid honouring their international legal commitments, such as treaty commitments. The principle of State sovereignty does not in fact mean that States are not subject to international law. A State which, in the exercise of its sovereignty, has contracted an international obligation cannot subsequently invoke its sovereignty to resist the implementation of that obligation.[9] A State which behaved in that way would definitely be in violation of international law and might well incur international responsibility.

Consequently, that problem— which has already been settled in the theory of international law— is not the one which we are considering here.

We should like to take up two points concerning the relationship between the implementation of international humanitarian law and the principle of State sovereignty.

First, there is the possible existence in international humanitarian law or in general international law of rules which reserve State sovereignty and thus erect potential obstacles to the implementation of international humanitarian law. When a State relies on such rules so as not to apply humanitarian conventions, it does not necessarily violate international humanitarian law.

Second, the question arises whether, through the use of other rules or principles specifically applicable in international humanitarian law, the sovereignty principle has not, in a way, made "concessions", thus facilitating the implementation of this law.

Hence we have the two following parts:

Part I : Rules which protect State sovereignty, and

Part II: "Concessions" by the principle of State sovereignty.

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[9] In its ruling on the *S.S. Wimbledon* case, the Permanent Court of Justice took a similar view: "The Court declines to see, in the conclusion of any treaty by which a State undertakes to perform or refrain from performing a particular act, an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it causes them to be exercised in a certain way. Nevertheless, the right of entering into international engagements is an attribute of State sovereignty." P.C.I.J., *Ser. A*, No. 1, 17 August 1923.

PART I:

RULES WHICH PROTECT STATE SOVEREIGNTY

These are rules incorporated into the legal norms of international humanitarian law which reserve, i.e. protect, State sovereignty.

The norms of humanitarian law which include such rules bear in themselves the virtual limits of their implementation. We shall examine some of these rules and try in each case to verify whether they constitute genuine obstacles to the effective application of international humanitarian law.

The question is worth asking whatever kind of rules they are; whether rules regarding the denunciation of humanitarian conventions or the formulation of reservations concerning them, rules which provide for the agreement or consent of the State, rules which reserve the security of the State and military necessities, rules which leave a wide margin of judgement to the State or rules which reserve certain powers to the State.

We shall then examine the problem in relation to the particular case of non-international armed conflicts.

1. The possibility of denouncing the Geneva Conventions and their Additional Protocols

"Denunciation (or withdrawal) is a procedural act carried out unilaterally by the competent authorities of States parties which wish to free themselves from their commitments".[10]

It is clear that a convention which provides for its denunciation by the States parties reserves their sovereignty.[11] By granting them the option of freeing themselves from their commitments, it allows them to regain their liberty.

In the case of the Geneva Conventions and their Additional Protocols, provision is made for the possibility of such a denunciation. Thus Article 63-62-142-158 common to the Conventions provides in its first paragraph: "Each of the High Contracting Parties shall be at liberty to

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[10] See Nguyen Quoc, Dinh, Daillier, Patrick and Pellet, Alain, *Droit international public*, 3e éd., Paris, LGDJ, 1987, p. 277. Denunciation is governed by Article 56 of the Vienna Convention on the Law of Treaties.

[11] Concerning denunciation, see Torrelli, Maurice, *Le droit international humanitaire*, Paris, PUF, 1985, p. 90. The author speaks of "the last rampart of sovereignty".

denounce the present Convention". The Protocols contain similar provisions.[12]

Nevertheless, this option is hedged about with important restrictions. The first is that *"a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with the release and repatriation of the persons protected by the present Convention have been terminated".*[13]

This is designed to prevent a State from unilaterally freeing itself from its commitments under humanitarian law just when these commitments have to be applied. This restriction is crucial for the implementation of humanitarian law since without it the law would become meaningless. What, indeed, would be its point if, at the outbreak or during the course of hostilities, the parties to the conflict could purely and simply repudiate it?

The second restriction is that the denunciation *"shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience".*[14]

This rule is based on the celebrated clause known as the Martens clause, from the name of the Russian diplomat who suggested it, which states that *"the principles of international law apply in all armed conflicts, whether or not a particular case is provided for by treaty law, and whether or not the relevant treaty law binds as such the Parties to the conflict".*[15] In other words, a State party which has made a legally valid denunciation of a humanitarian convention would nevertheless be bound by non-conventional humanitarian rules and principles. This means that, if it denounces such a convention, a State will not necessarily find itself in a humanitarian-law vacuum where it can do anything it likes.

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[12] See Article 99 of Additional Protocol I and Article 25 of Additional Protocol II.

[13] Paragraph 3 of Article 63-62-142-158 common to the Conventions. See also Article 99 of Additional Protocol I and Article 25 of Additional Protocol II.

[14] Paragraph 4 of Article 63-62-142-158 common to the Conventions. See also Article 1, para. 2 of Additional Protocol I and the fourth preambular paragraph of Additional Protocol II.

[15] *Commentary on the Additional Protocols*, p. 39, para. 56.

What is such a circumscribed right of denunciation really worth? It is hardly an exaggeration to say that it is no longer worth very much. Commenting on the provisions relating to denunciation in the Geneva Conventions, Professor Balanda notes: *"This is tantamount to recognizing in other terms that, as a result of these various types of requirements, none of the provisions of the Geneva Conventions of 12 August 1949, designed to protect the human person, can be denounced".*[16]

In practice, no State has ever denounced the Conventions and the relevant provisions are thus still theoretical.[17] This situation appears quite normal, since it is difficult to imagine that humanitarian obligations could be denounced.[18]

We must conclude, therefore, that the option of denouncing the Geneva Conventions and the Additional Protocols, as limited by the texts themselves, is not a real obstacle to the implementation of treaties of international humanitarian law.

2. Reservations

According to Article 2, paragraph (d) of the Vienna Convention on the Law of Treaties:

"'[R]eservation' means a unilateral statement, however phrased or named, made by a State or by an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization".

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[16] Balanda, Mikuin Leliel, "Le droit de Genève et son apport au droit international", International Seminar on the Law of Armed Conflicts and Humanitarian Action, Kinshasa, 6-8 January 1988, p. 21.

[17] *Commentary on the Additional Protocols*, p. 1108, para. 3835.

[18] This is the explanation given by the *Commentary on the Additional Protocols* of the fact that the question was nevertheless included: "The idea that a State could free itself from the obligations imposed upon it by humanitarian law by means of a denunciation might seem to be incompatible with the very nature of that law.

In view of the uncertainty of customary law and legal writings on the possibilities of denouncing a treaty when it does not have a specific clause for this purpose, it seemed preferable, already in the case of the Conventions to provide for the right to denounce them, at the same time making this right subject to certain restrictions and adding a reminder that some obligations continue to exist in all circumstances." (p. 1108, paras 3833-3834).

Neither the Geneva Conventions nor the Additional Protocols have any clauses concerning reservations.[19]

When a treaty is silent regarding the possibility of the States parties to enter reservations, the Vienna Convention on the Law of Treaties offers the following possibility (Article 19):

"A State or an international organization may, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless:

(...)

(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty".[20]

It is thus the criterion of compatibility with the object and purpose of the treaty which gives us the key to the problem.

The absence of any clauses concerning reservations did not prevent the States parties to the Geneva Conventions from making them.

From his study on the matter, Pilloud concludes that some 21 States made valid reservations, concerning a limited number of provisions.[21]

This is not the place to re-examine all the reservations entered to the Geneva Conventions. It will be sufficient to look at a few of them, by way of illustration, so as to get an idea of their compatibility with the object and purpose of the humanitarian Conventions and, more generally, with humanitarian protective rules.

We may begin by two examples of reservations made at the time of signature but withdrawn on ratification, undoubtedly because they were obviously contrary to the object and purpose of the Conventions.

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[19] As Torrelli (*op. cit.*, p. 89) reports: "The draft of ICRC Protocol I provided for a procedure giving details of the reservations that could be entered. This proposal was not adopted largely because of the fact, pointed out by Poland, that the reservation procedure had already been fixed by Articles 19 to 23 of the Vienna Convention on the Law of Treaties. However, Egypt, on the contrary, wanted all reservations prohibited to preserve the balance of the compromises reached, since the reservation machinery could enable each State to undo the progress achieved by setting aside the solutions which displeased it".

[20] The Convention adopted the position of the International Court of Justice in the case of *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, advisory opinion of 28 May 1951.

[21] Pilloud, Claude, "Reservations to the Geneva Conventions of 1949", offprint from the *International Review of the Red Cross*, Nos. 180-181, March and April 1976, p. 43. The provisions in question are Article 53 of the First Convention, Articles 85, 87, 99, 100 and 101 of the Third Convention and Articles 44 and 68 of the Fourth Convention.

Such was the case with Portugal's reservation to Article 3 common to the Conventions (conflicts not of an international character), which reads in part *"Portugal reserves the right not to apply the provisions of Article 3, in so far as they may be contrary to the provisions of Portuguese law in all territories subject to her sovereignty in any part of the world".*[22]

As Pilloud points out, such a reservation would "deprive of all meaning an article forming an important part of an international agreement".[23]

Another example of the same kind is the reservation that Spain made to Articles 82 ff. of the Convention relative to the Treatment of Prisoners of War. It was expressed in the following terms: *"In matters regarding procedural guarantees and penal and disciplinary sanctions, Spain will grant prisoners of war the same treatment as is provided by her legislation for members of her own national forces".*[24] As Pilloud comments once again, *"this reservation amounted to depriving the chapter on penal and disciplinary sanctions of all meaning".*[25]

These few cases of statements ultimately withdrawn by their authors give an idea of the kind of reservations that are incompatible with the object and purpose of humanitarian conventions, and thus inadmissible.

But what is the position now of the reservations which actually came into force?

Here again, we shall limit ourselves to commenting on two examples, the reservations made to Article 85 of the Third Geneva Convention and those made to Article 68 of the Fourth Geneva Convention.

Article 85 of the Third Convention provides as follows: *"Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention".*

A number of States, for the most part communist, entered similar reservations. The reservation made by the USSR was explained in the following way:

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[22] *Ibid.*, p. 12.
[23] *Ibid.*, p. 13.
[24] *Ibid.*, p. 26.
[25] *Ibid.*

"[T]he reservation (...) means that prisoners of war who have been convicted under Soviet law for war crimes or crimes against humanity must be subject to the conditions applied in the USSR to all other persons undergoing punishment after conviction by the courts. Consequently, this category of persons does not benefit from the protection of the Convention once the sentence has become legally enforceable.

With regard to persons sentenced to terms of imprisonment, the protection of the Convention will only apply again after the sentence has been served. From that moment onwards, these persons will have the right to repatriation in the conditions laid down by the Convention".[26]

Since this reservation does not affect the legal guarantees provided for prisoners of war by the Convention, prior to their conviction for war crimes or crimes against humanity, it does not seem justified to regard it as contrary to the object and purpose of the said Convention.[27]

On the other hand, the reservation entered in 1973 by the Provisional Revolutionary Government of the Republic of South Viet Nam concerning the same article drew objections from certain States[28] to the effect that it was directed against the object and purpose of the Convention.

The reservation reads as follows:

"The Provisional Revolutionary Government of the Republic of South Vietnam declares that prisoners of war prosecuted and sentenced for crimes of aggression, crimes of genocide or for war crimes, crimes against humanity pursuant to the principles laid down by the Nuremberg Court of Justice, shall not receive the benefit of the provisions of this Convention".[29]

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[26] Note from the Ministry of Foreign Affairs of the USSR of 26 May 1955, Pilloud, *op. cit.*, p. 29. The other States entering reservations on this point were: Albania, the German Democratic Republic, the Byelorussian SSR, Bulgaria, the People's Republic of China, the Democratic People's Republic of Korea, Hungary, Poland, Romania, Czechoslovakia, the Ukrainian SSR and the People's Republic of Viet Nam (*Ibid.*, p. 27).

[27] According to Pilloud (*op. cit.*, p. 33): "It should be pointed out that the Geneva Conventions, particularly the Third, do not raise any obstacle to the trial of prisoners of war for war crimes, nor to their sentence by the courts of the Detaining Power should they be found guilty. All the Third Convention lays down is that the enemy prisoner accused of war crimes shall be given the benefit of certain legal guarantees."

[28] For example, the United States and the United Kingdom (Pilloud, *op. cit.*, p. 37).

[29] Pilloud, *op. cit.*, p. 35.

Apart from the fact that this reservation adds to the list of the categories of crimes, it is not certain that its scope and significance differ from those of the reservation entered by the USSR.

As for Article 68 of the Fourth Convention, its second paragraph reads:

"The penal provisions promulgated by the Occupying Power in accordance with Articles 64 and 65 may impose the death penalty on a protected person only in cases where the person is guilty of espionage, of serious acts of sabotage against the military installations of the Occupying Power or of intentional offences which have caused the death of one or more persons, provided that such offences were punishable by death under the law of the occupied territory in force before the occupation began".

Several States have entered reservations to this paragraph, among them the United States of America, which declared that:

"The United States reserve the right to impose the death penalty in accordance with the provisions of Article 68, paragraph 2, without regard to whether the offences referred to therein are punishable by death under the law of the occupied territory at the time the occupation begins".[30]

Is such a reservation contrary to the object and purpose of the Convention? In so far as it seriously worsens the situation of the persons protected by the Convention, it can be regarded as incompatible with its object, at least in theory. In practice, however, as Pilloud comments: "There is no country, it appears, which in war-time does not have laws punishing with death the crimes listed in Article 68, especially when they are committed against military personnel or military property".[31]

Moreover, we should point out that, of the nine States which entered that reservation, four withdrew it, either on ratification (Argentina and Canada) or subsequently (United Kingdom and Australia).[32]

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[30] *Ibid.*, p. 41. In 1976, this reservation was still valid for four other States: the Republic of Korea, the Netherlands, New Zealand and Pakistan.

[31] *Ibid.*, p. 42.

[32] *Ibid.*, p. 41.

What shall we conclude about this point? Knowing that the reservations concerning Article 85 of the Third Convention and Article 68 of the Fourth Convention are probably the most important[33], it is clear that the reservations made to the Geneva Conventions have a limited scope.

For all that, we cannot help wondering whether, as a principle, the compatibility of the procedure of reservations, which safeguards State sovereignty[34], is compatible with the very object of the Geneva Conventions, namely, the protection of the victims of armed conflicts.

It would undoubtedly have been better if the texts of the Conventions had forbidden any reservations, but States are so touchy about their sovereignty that they prefer to retain the possibility of making reservations, even though they are aware that they will not take up the option.

In the future, an attempt should be made to persuade the reserving States to withdraw their reservations.[35] The attitude of the States party to the Additional Protocols with regard to reservations thereto could be an indication of their possible evolution on the question.[36]

In any case, the existing reservations to the Geneva Conventions do not constitute a major obstacle to the latter's implementation.

3. Rules providing for State agreement or consent

If the wording of a rule provides for the agreement or consent of the State committing itself, there is necessarily a reservation of the State's sovereignty, in the sense that the effective application of the rule depends on the will of the State.

We have not counted all the rules in the Geneva Conventions and Additional Protocols which include such a clause. Instead, we shall just give a few illustrations to show how the implementation of these rules can be hampered by the reservation of sovereignty implied by the need for the State's agreement.

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[33] *Ibid.*, p. 44.

[34] See Torrelli, *op. cit.*, p. 88: "The classic procedures for defending sovereignty in the law of treaties make it possible, first of all, for States to enter *reservations*".

[35] In this connection, see Pilloud, *op. cit.*, p. 44.

[36] For this purpose, it would be necessary to see the number and scope of the reservations made to the Additional Protocols. As of 31 December 1990, 99 States were party to Protocol I and 89 to Protocol II.

(a) Acceptance of the Protecting Powers, their substitutes and their representatives and delegates

The Protecting Power is a Power responsible for safeguarding the interests of the Parties to the conflict and of their nationals present in enemy territory.[37] Article 5, paragraph 2 of Additional Protocol I provides, incidentally, that the Protecting Power designated by a party to the conflict must be accepted by the other.

A substitute for the Protecting Power is either a neutral State or a humanitarian or other organization, which offers all guarantees of impartiality and efficacy, such as the International Committee of the Red Cross, which, in the absence of a Protecting Power, is appointed by the Parties to the conflict to undertake the functions entrusted to the latter.[38] It emerges from the relevant provisions that the substitutes for the Protecting Powers must be accepted by the Parties to the conflict.[39]

The same is true of the delegates of the Protecting Powers and of their substitutes who, in order to assume their functions, must first be approved by the Power with which they are to carry out their duties.[40]

In all these examples, the important point to bring out is that the implementation of such rules is subject to the will of the States parties and that the dependence is itself consistent with the Conventions. This is a reservation of the sovereignty of the States which can paralyse the application of the machinery for implementing international humanitarian law.

(b) The agreement concerning the settlement of disputes

The procedures for the settlement of disputes provided for by the Geneva Conventions and Protocol I also contain some elements requiring the consent of the States concerned for their application.

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[37] Verri, Pietro, *Dictionnaire du droit international des conflits armés*, International Committee of the Red Cross, Geneva, 1988, p. 102.

[38] See Article 10-10-10-11 common to the Conventions; Article 5, para. 4 of Additional Protocol I.

[39] Article 5, para. 4 of Additional Protocol I clearly states: "The functioning of such a substitute is subject to the consent of the Parties to the conflict" The only exception seems to be the obligation imposed on the Parties to the conflict to accept the offer made by the ICRC or by a similar organization to take on the humanitarian duties of the Conventions, in the absence of the Protecting Power or other substitute (Article 10-10-10-11, para. 3 of the Conventions and Article 5, para. 4 of Protocol I) but, even on this assumption, the reservation of consent to the exercise of the duties remains.

[40] See, for example, Article 8-8-8-9, para. 1 and Article 9-9-9-10 common to the Conventions.

Thus paragraphs 1 and 2 of Article 52-53-132-149 common to the Conventions stipulate:

"At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.

If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed".

Whether it is a question of the enquiry or of the possible arbitration, the success of the procedure will thus depend on the agreement of the parties concerned. In other words, if one of the parties obstructs it, for one reason or another, the mechanism for the settlement of disputes cannot be immediately set in motion.[41]

Additional Protocol I, which breaks new ground by providing for the establishment of an International Fact-Finding Commission, nevertheless still reserves the sovereignty of the States in the operation of the Commission in question. It is apparent from Article 90 of the Protocol that:

— The Commission will be competent only with respect to the States parties which have made a declaration to that effect (para. 2 (a));

— It will not be established until at least 20 High Contracting Parties have agreed to accept its competence (para. 1 (b));

— In certain situations, the Commission will institute an enquiry only with the consent of the other Party or Parties concerned;[42] *and*

— The members of the Commission instructed to examine a situation must be accepted by the Parties.

— All these clauses are clearly such that they can delay the establishment of the Commission and hinder its operation.

It must be said that, in the matter of the settlement of disputes, the Geneva Conventions and the Additional Protocols have simply kept to the classical machinery dominated by the principle of consensus whereby States cannot be subjected to a method of settlement without their prior or *ad hoc* consent.

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[41] Sandoz (*op. cit.*, p. 278) observes in this connection: "This procedure does however require agreement at least on the umpire, which is probably one reason why it has never been successful."

[42] Nevertheless, in the case of a grave breach as defined in the Geneva Conventions and Protocol I or of other serious violation of these instruments, it appears that the Commission will be able to institute an enquiry, even without the agreement of the Party complained of (para. 2 (c)). On this point see Sandoz, *op. cit.*, p. 278.

4. Rules which reserve State security and military necessity

A number of rules in the Geneva Conventions contain a clause reserving State security or military necessity.

Such clauses — of which a few examples will be given below — exempt the States parties from applying the substantive rules they contain on the grounds of State security or military necessity.

Needless to say, these clauses are intended to protect the State and, in particular, one of its constituent elements: sovereignty.

This is an almost "natural" reservation but one which can nevertheless damage respect for international humanitarian law since the State benefiting from the derogation unilaterally assesses the danger to its security or the military requirements in question.

We can cite, among other examples, para. 3 of Article 8-8-8-9 common to the Conventions, which states:

"They (the representatives or delegates of the Protecting Powers) *shall, in particular, take account of the imperative necessities of security of the State wherein they carry out their duties. Their activities shall only be restricted, as an exceptional and temporary measure, when this is rendered necessary by imperative military necessities".*[43]

Or again, Article 30, para. 2 of the Fourth Convention which reads:

"These several organizations (Protecting Powers, ICRC, National Red Cross and Red Crescent Societies) *shall be granted all facilities for that purpose by the authorities, within the bounds set by military or security considerations".*[44]

5. Rules which leave a wide margin of judgement to the State

We may adopt a similar line of reasoning with respect to certain rules of the Geneva Conventions and Protocols which are so worded

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[43] The last sentence of this paragraph, however, does not appear in the text of the Third and Fourth Conventions.

[44] In this connection, see also Article 126, para. 2 of the Third Convention; Articles 5, 35 para. 3, and 74 para. 1, of the Fourth Convention and Articles 64, para. 1, and 71, para. 4, of Protocol I.

as to leave a wide margin of judgement to the State concerning the extent of its obligation.

For example, para. 2 of Article 8-8-8-9 common to the Conventions states that: *"The Parties to the conflict shall facilitate, to the greatest extent possible, the task of the representatives or delegates of the Protecting Powers".*[45]

Similarly, Article 74 of the Third Convention provides, in its last paragraph: *"The High Contracting Parties shall endeavour to reduce, as far as possible, the rates charged for telegrams sent by prisoners of war, or addressed to them".*[46]

Let us also quote Article 5, para. 4, of Protocol I which uses another formula: *"every effort shall be made by the Parties to the conflict to facilitate the operations of the substitute in the performance of its tasks under the Conventions and this Protocol".*[47]

Article 88, para. 2, of Protocol I states in a very similar way that: *"when circumstances permit, the High Contracting Parties shall co-operate in the matter of extradition".*[48]

The expressions "to the greatest extent possible", "as far as possible", "every effort shall be made", "when circumstances permit", and others of the same kind are so vague that it may be wondered to what extent they really bind any State. What is certain is that States can shelter behind this indefinite formulation so as not to apply the Conventions and Protocols as they should do.

Once again these are expressions which protect the sovereignty of States and can affect the implementation of humanitarian law.

6. Rules which reserve certain powers to the State

The question which arises here is that of determining whether the Geneva Conventions and their Additional Protocols have reserved certain powers to the States in the matter of the protection of the victims of armed conflicts. In other words, whether there is a reserved area in humanitarian international law.

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[45] Author's emphasis. See also, for instance, Article 81, para. 3, of Protocol I.

[46] Author's emphasis. See also, for instance, Article 30, para. 3, of the Fourth Convention and Article 81, para. 4, of Protocol I.

[47] Author's emphasis.

[48] Author's emphasis.

We may recall that, in the theory of general international law, the reserved area is that of *"State activities where the power of the State is not bound by international law"*.[49] According to Nguyen Quoc *et al.*: *"The concept of the reserved area is only a 'historical residue' of the absolute sovereignty of the monarchical era. It is still intimately connected with the concept of sovereignty"*.[50]

When this question comes up in humanitarian international law, it is usually in connection with the problem of repressing breaches of the law, which is generally said to be a national matter, in the absence of an appropriate international criminal court.

We shall limit ourselves to this example and see what the situation is exactly, distinguishing between what are the termed grave breaches and other breaches.

(a) **Repression of grave breaches**

The list of grave breaches is set out in Article 50-51-130-147 common to the Conventions, supplemented by Article 11, para. 4, and 85, paras. 3 and 4, of Protocol I.

As for their repression, Article 49-50-129-146 common to the Conventions, provides in its first and second paragraphs:

"The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention (...).

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches (...). It may also, if it prefers (...), hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie *case".*

It follows from this text that the principle of repression itself is not part of the reserved area of States. Their competence in the matter is restricted since, by the terms of the Conventions, they are required to punish persons committing breaches. Failing this, and in application of the principle *aut dedere aut judicare*, they are obliged

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[49] This is a definition by the Institute of International Law (*Annuaire de l'IDI*, 1954, Vol. 45-II, p. 292), quoted by Nguyen Quoc *et al.*, *op. cit.*, p. 397.

[50] *Ibid.*, p. 396. The theory of the reserved area has been positively recognized in Article 2, para. 7, of the United Nations Charter.

to extradite them to a State party which wishes to try them. Furthermore, it should not be forgotten that the determination of the breaches is international, not national. In addition, the obligation to punish persons committing grave breaches is absolute, and the parties could not relieve themselves of their responsibilities in that respect.[51]

On the other hand, it appears that fixing the penalties for these breaches falls within the States' exclusive competence. And this is not necessarily without significance, for certain States might provide for penalties that are less severe than those imposed by others. Now, in domestic law and international law alike, the severity of the penalty may play a major dissuasive role which would be lacking in the case of an insignificant penalty thus reducing the chances of ensuring respect for the "hard core" of international humanitarian law.

It must, however, be said that it would be very difficult to draw up an international schedule of penalties. Moreover, even on the assumption that the penalties for grave breaches are determined nationally, it appears that the principle of the execution in good faith of international treaties (aforementioned Article 26 of the Vienna Convention on the Law of Treaties) would forbid the States parties to apply excessively light penalties for incidents regarded by everyone as grave. This, when all is said and done, puts into perspective the fact that this subject comes under the reserved area of States and reduces the consequences that could stem from it for the implementation of the relevant rules.

(b) **The repression of other breaches**

The above-mentioned Article 49-50-129-146 common to the Geneva Conventions provides in its third paragraph as follows:

"Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches".

But what is the meaning of the word "suppression"? According to the *Commentary on the Additional Protocols*:

"The term suppress ... should be understood in a broad sense: literally of course this means putting an end to such conduct; depending on its gravity and the circumstances, such conduct can

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[51] See Article 51-52-131-148 common to the Geneva Conventions.

and should lead to administrative, disciplinary or even penal sanctions — in accordance with the general principle that every punishment should be proportional to the severity of the breach".[52]

Even if we interpret the word in the widest sense, it is difficult to find in it a definite basis for an obligation to repress, in the penal sense of the word. States might be able to maintain that this provision, unlike the preceding ones, does not oblige them to repress breaches of the Conventions other than grave breaches. If this were so, it would be necessary to conclude that the matter belongs to the area reserved to States, with the consequence that, in some States, "ordinary" breaches would not be punished as criminal acts,[53] and this could affect the law of Geneva and its implementation.

This is likewise true, and with greater reason, of the fixing of the penalties applicable to these breaches, in the States that punish them. The obligation to repress by disciplinary means may, on the other hand, stem from the general provisions concerning the implementation of international humanitarian law, particularly Article 1 common to the Geneva Conventions.

7. The principle of State sovereignty and the special situation of the implementation of international humanitarian law in non-international armed conflicts

Non-international armed conflicts are governed by Article 3 common to the Geneva Conventions and by Additional Protocol II, which applies to armed conflicts *"not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".* The conflicts to which Protocol II

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[52] *Commentary on the Additional Protocols*, p. 975, para. 3402.

[53] Sandoz (*op. cit.*, p. 276) notes incidentally:
"It [Article 86, para. 2 of Protocol I] cannot however *impose* sanctions where only the Contracting Parties are competent to do so, that is, in cases of breaches, other than grave breaches, of the Conventions or Protocol I."

is applicable are generally more intense than those governed solely by Article 3 common to the Geneva Conventions.[54]

The peculiarity of legal provisions governing these conflicts as compared with those applicable to international armed conflicts lies, *inter alia*, in the fact that there are no breaches described as grave, no system of Protecting Powers and no enquiry procedure.[55]

Since the conflict involves only one Contracting Party, the principle of State sovereignty "regains all its rights", or almost, if we may use the expression.

It is therefore not surprising that Protocol II should contain an article which, in a way, protects State sovereignty against international humanitarian law. Article 3, entitled "Non-intervention", provides as follows:

"1. Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.

2. Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs".

As one author points out, *"the reaffirmation of sovereignty is thus a striking one".*[56]

The sole restriction on State sovereignty expressed in this rule seems to be the reference to "legitimate means" which are the only ones that may be used.[57] But since it is the State itself which assesses the legitimacy of the means, this restriction is very relative.

It remains true, nevertheless, that a State which has acceded to Protocol II is bound to respect the rules it contains, in keeping with

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[54] See *Commentary on the Additional Protocols*, p. 1350, para. 4457.

[55] Sandoz, *op. cit.*, p. 280. The ICRC may, nevertheless, offer its services to the parties to the conflict (Article 3 common to the Conventions) but the latter need not accept them. In practice, however, ICRC activities are just as extensive as in international conflicts (*Ibid.*).

[56] Torrelli, *op. cit.*, p. 94.

[57] From this the *Commentary on the Additional Protocols* (p. 1387, para. 4501) deduces that "the imperative needs of State security may not be invoked to justify breaches of the rules of the Protocol". Here again, it is necessary to agree on what is meant by "imperative needs of State security".

general international law. As the *Commentary on the Additional Protocols* observes:

"In ratifying or acceding to the Protocol, a State accepts its terms by the unfettered exercise of its sovereign powers. Consequently, the obligation to respect the rules contained in it cannot later be considered as an infringement of its sovereignty, as the government's freedom of action is limited by the obligations it has itself freely agreed to". [58]

To conclude, what accentuates the peculiarity of the legal régime of non-international conflicts is less the reaffirmation of State sovereignty, which no one had forgotten, than the resultant absence of outside mechanisms to monitor the State's compliance with humanitarian law. It is in this respect that it seems to us that the sovereignty principle constitutes a hindrance to the effective application of this law.

Whatever obstacles the principle of State sovereignty puts in the way of the implementation of international humanitarian law, and we have by no means exhausted them[59], we must now consider whether this same principle has not made some "concessions" to humanitarian international law and retreated somewhat, at least in comparison with classical international law.

PART II

"CONCESSIONS" MADE BY THE PRINCIPLE OF STATE SOVEREIGNTY

The question here is whether, in view of its specific character and the imperative necessity of implementing it, international humanitarian law does not contain some special rules or principles which, when compared with the classical principle of State sovereignty, reveal some direct or indirect derogations therefrom.

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[58] *Ibid.*

[59] We might also have mentioned rules of general international law, such as those on the States' unilateral interpretation and assessment, which are not always calculated to facilitate the implementation of international law, including humanitarian law.
On this subject, see, for instance, Torrelli, *op. cit.*, pp. 89-90.

We are thinking, in particular, of the acceptance by the State of outside supervision of the application of the Geneva Conventions and their Additional Protocols, of the ban on reprisals against protected persons and property and of the fact that one State cannot exonerate another from its responsibility for grave breaches of the Conventions and Protocols.

1. Acceptance by the State of outside supervision

We must understand, first of all, that it is one thing for a State to enter into an international legal commitment and quite another for it to accept outside supervision of the way in which it respects and applies that commitment. The two do not necessarily go hand in hand and many international conventions do not provide for such acceptance.

States can thus content themselves with contracting international obligations without setting up any supervisory mechanism, and relying, when it comes to violations of these obligations, on the traditional mechanisms of international responsibility, whose function is essentially reparative.

Within the framework of international humanitarian law and in view of the context in which it has to be applied, it was difficult to stop there[60]; it is undoubtedly because of the specific nature of this law that the States which drew up the Geneva Conventions and their Additional Protocols accepted outside supervision.

Whether such supervision has or has not been put into effect or whether it is itself sometimes hedged about by sovereignty reservation clauses which limit its scope is another question.

The pertinent fact is that these States, which could have limited themselves to a "material" commitment, have also accepted the possibility of supervision by a third party. In doing so, they have clearly "conceded" something to humanitarian law.

In this connection, we shall refer to the commitment the States have entered into to ensure respect for the Conventions and Protocols and to the system of Protecting Powers and substitutes they have set up.

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[60] Another branch in which it has generally proved necessary to provide for specific guarantee mechanisms, is that of human rights. This is hardly surprising, in view of the close relationship between the two disciplines.

(a) The commitment by States to "ensure respect" for the Geneva Conventions and Additional Protocol I

Article 1 common to the Conventions and Article 1, para. 1, of Protocol I contain the following rule: *"The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances".*

This is an unusual provision in international law which has given rise to different interpretations. As Sandoz notes:

"Some people feel that this obligation should be seen merely as clarification of the obligation to respect international humanitarian law and is consequently for domestic application. However, prevailing opinion favours a more comprehensive interpretation to the effect that the High Contracting Parties have an obligation to ensure that other States respect the Convention. The Commentary published under the general editorship of Jean Pictet states that this expression must be interpreted both as strengthening the obligation within the body of national law and as implying an obligation towards other States".[61]

The *Commentary on the Additional Protocols* confirms this interpretation.[62]

This clause must thus be understood as including a commitment by States to ensure respect by other States for the rules of international humanitarian law. But what is the content of this obligation and what does it amount to?

It is generally accepted that, with regard to the obligation to ensure respect for humanitarian law, the most that can be done by States is *"to take diplomatic measures or publicly denounce violations. It would be improper, and probably dangerous, to impose non-military sanctions (and still more obviously, to impose military sanctions or any form of intervention)".*[63]

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[61] *Op. cit.*, p. 266. The author adds that the 1968 International Conference on Human Rights held at Tehran had confirmed that interpretation. For an in-depth study of this obligation, reference may be made to Condorelli, Luigi and Boisson de Chazournes, Laurence, "A few comments on the obligation of States to 'respect and to ensure respect for' international humanitarian law 'in all circumstances'", *Etudes et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge, en l'honneur de Jean Pictet*, Geneva, The Hague, ICRC, Martinus Nijhoff Publishers, 1984, pp. 17-35.

[62] *Commentary on the Additional Protocols*, pp. 35-37, paras. 41-46.

[63] Sandoz, *op. cit.*, p. 266. See also *Commentary on the Additional Protocols*, pp. 36-37, paras. 43-46.

In practice, though this is not widely known because of the discretion that surrounds its work, it seems that the ICRC has based itself on this obligation when requesting States not party to a conflict to use their influence or offer their co-operation to ensure respect for humanitarian law.[64] Whatever the effectiveness of the system may be, the fact is that, by accepting that States not party to a conflict can have a responsibility with regard to the application of international humanitarian law, States have admitted a derogation to the principle of their sovereignty. States do not readily accept that other States are entitled to ensure respect, even to a limited extent, for their own obligations in their own territory.

(b) The system of supervision by Protecting Powers, their substitutes or the ICRC

The States party to the Geneva Conventions and their Additional Protocols have agreed also to submit themselves to supervision by the Protecting Powers, their substitutes or the ICRC.

As we have seen, the Protecting Power is a *"State instructed by another State (known as the Power of origin) to safeguard its interests and those of its nationals in relation to a third State (known as State of residence)".*[65] In other words, this Power will be responsible for checking whether the State of residence is actually complying with the rules of humanitarian law in relation to the Power of origin and its nationals.

Scholars who have studied the institution in depth point out that, in practice, the system of Protecting Powers has not worked well and has rarely been applied, the main reasons for this situation being as follows:

"— the fear that the designation of a Protecting Power will be seen as recognition of the other Party (where it is not recognized);

— unwillingness to admit that an armed conflict exists or that there are differences of opinion as to the character of a conflict;

— the maintenance of diplomatic relations between belligerents;

— the pace of events in some wars;

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[64] *Commentary on the Additional Protocols*, p. 36, para. 43.

[65] *Commentary* on the First Convention, quoted by Sandoz, *op. cit.*, p. 266. See Article 8-8-8-9 common to the Conventions and Article 5 of Protocol I.

— the difficulty of finding neutral States acceptable to both parties and able and willing to act in this capacity".[66]

As for the substitutes for the Protecting Powers, Article 10-10-10-11 common to the Conventions presents a series of substitution solutions, the main idea being that, in every case, there must be an institution to supervise the application of humanitarian law.[67] The system of successive substitutes for the Protecting Powers has not been used in practice any more than that of the Protecting Powers.[68]

The ICRC can, as we have just seen, play the part of a substitute for a Protecting Power but also act outside this system as an impartial humanitarian organization under Article 9-9-9-10 and Article 3 common to the Conventions.

In practice the ICRC plays a considerable role, without having to establish on exactly what grounds it offers its services.[69]

Whether it is a question of a Protecting Power, a substitute for that Power or the ICRC when it is not acting as a substitute, it is important to emphasize that the body supervising the application of humanitarian law is external to the State which is subjected to the latter.

As noted above[70], the rule of State consent could obstruct the operation of the system. This does not mean, however, that the acceptance of supervision cannot also be interpreted as a "concession" by the traditional principle of State sovereignty.

2. The ban on reprisals against protected persons and property

Reprisals may be defined as measures in themselves unlawful which are adopted by a State following unlawful acts committed to its detriment by another State with the aim of compelling the latter to respect the law.[71]

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[66] *Ibid.*, p. 271. According to Torrelli, *op. cit.*, p. 102: "The fault in this system lies in the need to obtain the consent of all the Parties to the conflict".

[67] See also Article 5, para. 1 of Additional Protocol I.

[68] Sandoz, *op. cit.*, p. 274.

[69] *Ibid.*

[70] See above, pp. 116-118.

[71] See the definition of the International Law Institute, Nguyen Quoc *et al.*, *op. cit.*, p. 827.

In positive general international law, only non-armed reprisals which form part of what the International Law Commission calls countermeasures are accepted, on certain conditions.[72]

By derogation from general international law, international humanitarian law prohibits even non-armed reprisals against protected persons and property.

Thus the Geneva Conventions contain a general prohibition of reprisals[73], while Additional Protocol I contains a series of sectoral prohibitions.[74] In all cases, the texts make it clear that these prohibitions are absolute.[75]

The prohibition of reprisals in international humanitarian law found subsequent confirmation in the Vienna Convention on the Law of Treaties which exempts from the application of the *exceptio non adimpleti contractus*: *"provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties"* (Article 60, para. 5).

A priori, it is not very evident what relationship there may be between the question of reprisals and the principle of State sovereignty. It is true that this relationship is indirect. In fact, this subject is more closely related to the principle of reciprocity in international law which is itself a corollary of the principle of the sovereign equality of States.

The fact that a State has the possibility of taking reprisals against another State (in other words, of giving it tit for tat) is thus, in the last analysis, a manifestation of its sovereign equality with that State, and of its own sovereignty as such.

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[72] To be lawful, countermeasures must respond to an internationally unlawful act, be directed against the State that committed the act, be adopted only in case of necessity after a summons which has remained fruitless, and not be contrary to the *jus cogens* (Nguyen Quoc *et al.*, *op. cit.*, p. 830).

[73] See Article 46, Article 47 and Article 33, para. 3, of the First, Second and Fourth Convention respectively.

[74] Articles 20; 51, para. 6; 52, para. 1; 53, para. (c); 54, para. 4; 55, para. 2 and 56, para. 4.

[75] *Commentary on the Additional Protocols*, p. 242, para. 812. Torrelli (*op. cit.*, pp. 91-92) refers, however, to the positions of certain States during the Diplomatic Conference on the Reaffirmation of Humanitarian Law, which leave a doubt regarding effective respect for this prohibition. Cameroon, for example, commented: "A State cannot reasonably be asked to fold its arms when faced with grave and repeated breaches of the Conventions and Protocols by its adversary".

Consequently, the fact that the States party to the Geneva Conventions have renounced even non-armed reprisals is thus certainly an unusual derogation from the principle of State sovereignty.

3. Impossibility of absolving another State from its liability

This rule appears in Article 51-52-131-148 common to the Geneva Conventions, as supplemented by Article 91 of Additional Protocol I.

For example, Article 51 of the First Convention reads as follows:

"No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article".

The breaches in question are the grave breaches of the Conventions and Protocol I, already discussed above.[76]

The rule that interests us here is not that of the impossibility for a State to absolve itself from liability, but rather that of the impossibility of its absolving other States from any liability they have incurred.

The *Commentary on the Additional Protocols* explains this rule as follows:

"The purpose of this provision is specifically to prevent the vanquished from being compelled in an armistice agreement or peace treaty to renounce all compensation due for breaches committed by persons in the service of the victor.

(...)

On the conclusion of a peace treaty, the Parties can in principle deal with the problems relating to war damage in general and those relating to the responsibility for starting the war, as they see fit. On the other hand, they are not free to forego the prosecution of war criminals, nor to deny compensation to which the victims of violations of the rules of the Conventions and the Protocol are entitled".[77]

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[76] See Article 50-51-130-147 common to the Geneva Conventions and Articles 11, para. 4 and 85, paras 3 and 4 of Protocol I.

[77] *Commentary on the Additional Protocols*, pp. 1054-1055, paras 3649 and 3651.

The result is that no State party which has incurred liability for grave breaches can escape answering for it. This rule may be regarded as utterly prohibiting a State to renounce its rights, whereas general international law normally sets no limits upon the right to renounce the subjective rights of States.

If we bear in mind that the right to renounce its rights is a sovereign attribute of the State, we realize that any erosion of this right, even when agreed to by the State in question, is another concession by the principle of State sovereignty to humanitarian law.

As regards the implementation of international humanitarian law, we should emphasize the dissuasive effect, at least in theory, of the rule barring one State from absolving another of its liability. Knowing that, whatever happens, it will be held responsible for all grave breaches imputable to it, every State should normally be more inclined to respect the material rules of humanitarian law.

CONCLUSION

In general, it would seem that the imperative necessity of implementing international humanitarian law should normally push back the principle of State sovereignty.

In actual fact, this principle has made a few "concessions" which take the form of rules derogating from general international law, such as the obligation to ensure respect for the Conventions and Protocols, the acceptance of outside machinery to supervise respect for these instruments, the absolute prohibition of reprisals, even non-armed ones, against protected persons and property, or the equally absolute impossibility for a State to absolve another from the liability it has incurred for grave breaches.

Nevertheless, if we look closely, international humanitarian law itself conceals a number of mechanisms defending State sovereignty, which more or less hamper its implementation. In the first place, we have the possibility granted to States to denounce the Conventions and the Protocols and the option of making reservations concerning them. Then there are rules which provide for the agreement or consent of the State, which reserve State security and military necessities, which leave the State a wide margin of judgement or which reserve to the State certain exclusive powers. It is evident, too, that the principle of sovereignty regains still more ground in the special situation of implementing international humanitarian law in non-international armed conflicts.

Lastly, it appears that despite the few "concessions" it has made to international humanitarian law, the principle of State sovereignty still places many obstacles in the way of its implementation. We have endeavoured to identify some of these obstacles, and the arduous task remains of convincing States that certain of them should be removed. But that is another question.

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