Volume 90 Number 870 June 2008

INTERNATIONAL REVIEW of the Red Cross

Sanctions as a means of obtaining greater respect for humanitarian law: a review of their effectiveness

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Abstract

There are several aspects to reviewing the role of punishment in ensuring greater respect for international humanitarian law. First, there is the question of improving compliance with the law, second, the focus on the punishment itself and, third, the characteristics of the perpetrators. The situation of armed groups is dealt with separately. The article also examines transitional justice as an accompanying measure and the problem of how to take care of the victims. Finally, suggestions are presented which could help the parties concerned in the establishment of a system of sanctions capable of having a lasting influence on the conduct of weapon bearers so as to obtain greater respect for international humanitarian law.

* The author is in charge of the sanctions project being conducted by the ICRC's Advisory Service. Since 2006 the project has benefited from the ongoing support and advice of the Director of the Centre for International Law at the Université d'Aix Marseille III, Professor Xavier Philippe, and a group of experts from various backgrounds, namely Emmanuel Castano, New School for Social Research, New York; Amedeo Cottino, Università di Torino; Emmanuel Decaux, Université de Paris II; Pierre Hazan, journalist, adviser on transitional justice; Christian Nils-Robert, Faculty of Law, University of Geneva; Eric Sottas, OMCT, Geneva; Eric Steinmyller, Ministry of Defence, France; and Yves Sandoz, member of the International Committee of the Red Cross. The article largely reflects the results of this process of consultation undertaken since 2006, including an Interregional Meeting on the Role of Sanctions in Ensuring Greater Respect for International Humanitarian Law, held in Geneva from 15 to 17 November 2007.

https://doi.org/10.1017/S1816383108000453 Published online by Cambridge University Press

In 2004 the ICRC published a study on the origins of wartime conduct, the aim of which was to identify the factors which were crucial in conditioning the behaviour of bearers of weapons in armed conflicts (referred to hereafter as the Influence Study).[1] One of the main conclusions of the Influence Study is that the rigorous training of combatants, strict orders concerning proper conduct and effective sanctions in the event of failure to obey those orders are prerequisites for obtaining greater respect for humanitarian law from weapon bearers.

It has been the ICRC's wish since 2006 to examine those conclusions in greater depth by concentrating, in particular, on the role played by sanctions as a means of obtaining greater respect for humanitarian law. The choice of focus is also justified by the fact that where serious violations of international humanitarian law are concerned, sanctions are inevitable. In general, the international texts stipulate in very similar terms that, when violations affecting fundamental values have been committed, the parties must take the legislative measures necessary to assure the application of those sanctions and, in particular, to provide for penal sanctions which are appropriate, effective and strictly applied or sanctions which are sufficiently dissuasive.

In the ICRC's efforts to follow up states and parties to conflicts which have primary responsibility for the implementation and application of international humanitarian law, it becomes vital to try to find means which make it easier to implement sanctions. In other words, the focus needs to be on the conditions which would make it possible to increase the deterrent effect of a sanction and to make its message easier to read when it is applied to violations of international humanitarian law.

A more thorough analysis of the role played by sanctions in obtaining greater respect for humanitarian law also makes it possible to reaffirm the importance of the rule of law and the fundamental universal values which it upholds. This review should help to strengthen the rule itself and, at the same time, to prevent its being called into question. It should also help to determine what is negotiable and what is not.

To bring the exercise to a successful conclusion and to find the correct mix of theoretical principles and pragmatism, a number of challenges need to be overcome. First, the decision not to start by defining the concept of sanctions may come as a surprise.[2] While penal sanctions and their effectiveness remain at the heart of the discussion, we consider that the value of the different sanctions needs to be analysed as part of a legal process which covers a lengthy period of time and a broad geographical area and takes a number of complementary forms. Taken in isolation, a sanction is very often insufficient or ineffective. It may, however,

1 Daniel Muñoz-Rojas and Jean-Jacques Frésard, *The Roots of Behaviour in War: Understanding and Preventing IHL Violations*, ICRC, Geneva, October 2004.

2 On the definition of sanctions in international law, reference should be made to the article by Emmanuel Decaux, ''The definition of traditional sanctions: their scope and characteristics'', *International Review of the Red Cross*', in this issue.

https://doi.org/10.1017/S1816383108000453 Published online by Cambridge University Press

become fully relevant if it is part of that holistic process. Moreover, that makes it possible to fulfil sometimes contradictory requirements such as those of carefully considered judicial decisions and of expeditiousness. A more detailed study of the role played by sanctions in obtaining greater respect for humanitarian law therefore makes it necessary to consider the nature and the characteristics of sanctions themselves as well as matters such as the forms of justice the persons to which they apply or the environment in which they are utilized.

Second, for a review of the role of sanctions to be credible and sufficiently detailed, the discussion needs to be broadened and questions need to be submitted to the crossfire of different specialist fields in the hope of achieving cross-fertilization and with the risk of remaining within the realm of generalities. Finally, one also needs to be aware of the fact that there will always be a mismatch between the number of sanctions and the number of crimes which have been committed during armed conflicts, given that the crimes are often mass crimes or systematic in nature. It would seem difficult to obtain strict respect for the principle of equality under those circumstances.

Having said that, it is nonetheless appropriate to go into more detail on some points. The review is restricted to bearers of weapons, including non-state armed groups, even if, in the case of the latter, the information is often incomplete and fragmentary. The backdrop is therefore behaviour in wartime and the focus is on the violations of the law applicable during armed conflicts. Within that framework, account needs to be taken of the social reality of a situation of war in which crimes – including serious crimes – are frequently committed as a result of circumstances and by people who would not normally have become involved in criminal activities. The review is restricted to measures which target individuals and not states following an internationally wrongful act, even if it is sometimes impossible to keep individuals and the state totally apart, particularly when it comes to judging leaders and when the violations of humanitarian law are the outcome of a policy that they themselves had drawn up. Due consideration should be given to the important role which may be played by the international judiciary bodies in officially recognizing violations of international humanitarian law affecting victims and in granting them reparations when states have not fulfilled their international obligations. Moreover, case law may have a real influence on the behaviour of the states concerned, which must be taken into account.[3]

3 In that respect, interesting developments have been observed in the case law of the European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights. Reference should be made, in particular, to the various ECHR cases on the subject of missing persons in Chechnya. In these cases the ECHR considers that, in order to prevent inhuman treatment of the families of disappeared, states have to put into place effective mechanisms providing families with information and answers. See also Xavier Philippe's article which deals in particular with the distribution of competences among judiciary bodies: Xavier Philippe, "Sanctions for violations of international humanitarian law: the problem of the division of competences between national authorities and between national and international authorities", in this issue.

https://doi.org/10.1017/S1816383108000453 Published online by Cambridge University Press

The review of the role of sanctions in obtaining greater respect for international humanitarian law covers seven aspects which have been identified in the studies undertaken by the ICRC since 2006:

- the first raises the question of adherence to the norm and explores the extent to which the parties concerned are familiar with international humanitarian law;
- the second relates to the sanction itself;
- the third aspect concerns the characteristics of the perpetrator;
- the situation of armed groups is dealt with separately as the fourth aspect;
- the fifth looks specifically at group-related problems;
- transitional justice as an accompanying measure is dealt with as the sixth aspect; and,
- problems relating to the victims are dealt with in greater depth as the seventh and final aspect.

For each of those aspects, elements and modalities which might be used to develop an operational instrument will be proposed. It should help the parties concerned to set up a system of sanctions capable of having a lasting influence on the behaviour of bearers of weapons so as to obtain greater respect for international humanitarian law. The elements and modalities are summarized in the conclusions. The different sections also pinpoint the issues which were identified during the research and for which the need for a more detailed analysis and further research has become apparent.

Observing the rules

To apply sanctions is also to acknowledge that there is an inadequate degree of compliance with the rule for which a lack of respect needs to be signalled. However, for individuals to comply with a particular rule, they first need to know it and it needs to be part of their framework of reference. It is not enough for a state simply to be party to an international treaty; appropriate measures need to be taken by the relevant authorities to translate the rules of that treaty into national law.

Although international humanitarian law stipulates the obligation to repress all serious violations of its provisions, it must regrettably be noted that legislation in a fair number of countries falls short of that requirement. Some acts which need to be repressed – and hence the sanctions applicable to them – have quite simply not been included in any form whatever in the reference legislation of a number of states. That situation can be explained by different factors such as the age of the texts in question, the lack of priority or interest on the part of the authorities with regard to issues of humanitarian law or, ultimately, a lack of political will.

Where measures have been taken, it must also be noted that they are very often incomplete and lead to problems both of substance and of form. For example, the list of crimes included in national legislation is often incomplete. In

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some cases, there are also no provisions relative to the general principles of international criminal law. Consequently, the generally applicable provisions in national criminal laws remain applicable to international crimes and make it possible to place, without due cause, certain obstacles, such as the issue of statutes of limitation or the defence of superior orders, in the way of penal action. Moreover, the necessary amendments and adjustments are not always made to all relevant texts, in particular those which apply to bearers of weapons, and make differentiated treatment possible for the same deeds both as crimes under criminal legislation and as military offences. Those crimes are generally judged by separate courts and lead to sentences which are sometimes very different. Finally, the systems frequently suffer from a lack of clarity, the provisions relative to the repression of the most serious violations of international humanitarian law being scattered throughout several legal application texts (criminal code, code of criminal procedure, code of military justice, military criminal code, code of military discipline, special law, etc.). Those provisions are rarely grouped together in a single text. The crimes are sometimes included in general criminal law texts or in texts which are military in nature, or both. In some cases ordinary criminal courts have sole competence to judge those crimes, whereas in others military tribunals are used. Other systems retain concurrent competence. Those discrepancies are the cause of misunderstandings about the rules and their application and lead to a double inconsistency – first, with regard to the range of courts responsible for judging the same matters and, second, with regard to the risks of the cases being treated differently – in terms of procedure and substance – by the different orders or types of courts. Rationalization is needed if sanctions are to be made more effective. While it would seem desirable to unify the system by placing it under the competence of a single court, it appears unrealistic given the attachment of states to their own judicial systems. By contrast, the notion of similar guarantees, or even procedures, in the courts whose responsibility it is to deal with serious violations of international humanitarian law should be better received by the states.

It must also be admitted that certain rules of international humanitarian law ought to be clarified to ensure greater coherence of the various penal systems. Indeed, given the limited number of cases with which they have to deal, national judges are often faced not merely with a lack of rules but with their lack of practical application. That situation may well produce a degree of hesitancy with regard to international crimes when they have to deal with them and lead either to a refusal to recognize their own competence with regard to the reprehensible deeds or to an erroneous or incomplete understanding of the existing rule. The clarification of those rules might allow that risk to be kept to a minimum.

Characteristics of sanctions

A review of the effectiveness of sanctions with regard to violations of international humanitarian law must make extensive reference to numerous studies carried out

https://doi.org/10.1017/S1816383108000453 Published online by Cambridge University Press

at the national level in this subject area, especially in the fields of criminology and penology. However, the review must take account of specific features. First, it must not be forgotten that the violations in question are committed in an unusual situation of extreme violence. It must also be acknowledged that it is difficult to conceive of all crimes being repressed and, last, the profiles of most of the persons having committed atrocities and to whom those sanctions should be applied are not those of common-law criminals. Those considerations must therefore be borne in mind when identifying the characteristics of sanctions.

The effectiveness of sanctions

Effective sanctions are those which produce the anticipated effect. Viewed from that perspective and taking account of the range of different crimes and perpetrators or victims, it may be difficult to assess the effectiveness of a sanction when humanitarian law has been violated. Sanctions may actually have a number of different aims, which become superimposed on each other, vary across time and from one geographical location to another, and depend on the individuals concerned. For example, the measures which ought to target the leaders who plan, organize or order the execution of crimes cannot be placed on a par with those aimed at people who commit the crimes, some of whom are sometimes, unfortunately, children. Nor can sanctions and the impact that they have on victims be excluded from the evaluation.

The definition of offences and sanctions generally suffers from a lack of foreseeability or readability for persons who are likely to be involved in armed conflicts as bearers of weapons. Adopting an exclusively penal approach to unlawful behaviour and sanctions also makes it fairly illusory to expect sanctions to have a dissuasive impact. The dynamics of the exercise consist of determining the possible factors and conditions which are conducive to preventing the crime from taking place or being repeated. The idea which must therefore be constantly borne in mind is a system of constraints (regardless of whether those take the form of punishment for violations or not) at each stage of the process prior to the commission of the crime. That ability to respond exists on paper, but insufficient use has been made of it in practice.

Having said that, certain characteristics remain constant, regardless of the circumstances, the individuals targeted or the court which imposes the sanction. First and foremost, it seems that sanctions may only play their role fully to the extent that, in every case, they make it possible to underline the reprehensible nature either during the action or just after the offence has been committed. The distinguishing features of sanctions must hence be the certainty that they will be imposed and their immediacy, that is, that there will be an immediate response. It obviously has to be recognized that certain sanctions, particularly those that are criminal, do not always permit that speed, which is why it is worth exploring the possibility of combining measures which would be the most apt to produce the desired effects among perpetrators, victims or any other persons concerned. Sanctions must also be applied to all perpetrators of violations without

discrimination, irrespective of the groups to which they belong, in order to uphold the principle of equality and to avoid the creation of a feeling of ''victor's justice''.

Second, the publicity surrounding sanctions is also important. The dissemination obligation is essential to the effectiveness of sanctions, because it is the means of informing and educating people about what a serious violation is and the consequences which it entails. That publicity raises complex issues, in particular with regard to how to provide it in both peacetime and wartime. In every case it must cover the rationale behind the sanction, that is, the reasons why it has been chosen. It must also deal with the entire procedure leading up to the imposition of the sanction (with account being taken of the need to protect personal data), which, in all circumstances, immediately rules out clandestine courts and secret places.

Third, sanctions should be characterized by their proximity in terms of both form and substance. As far as possible, they should be implemented close to the places where the violations were committed and to the people on whom they are to have an impact. To the extent possible, an abstract, disembodied procedure without a specific territorial context should be avoided. Delocalization should not be envisaged unless *in situ* justice proves to be impossible for reasons connected, in particular, with the inability or unwillingness of the parties which are responsible for carrying out that justice, and should be accompanied systematically by a complementary local sensitization procedure. In every case, account must be taken of the local (national) context and that factor must be given a weighting based on the universal criteria referred to above. ''Context'' is taken to mean all the mediate or immediate elements which enable the sanction to have a greater impact on the framework and the individual to which or to whom they apply, with account being taken, in particular, of the cultural factor. The field of sanctions seems to lend itself to an examination of the procedures which go beyond the accusatory system and are based on systems of logic which might achieve a better impact in certain circumstances, such as procedures based on public stigmatization (''shaming'') or rehabilitation.[4] In other words, states should explore further the various ways of applying the law ''in their way'', without ruling out recourse to adapted forms of more traditional justice, in order to make the law more effective.

Fourth, there is nothing to justify departing from the well-established principles of individualization and proportionality of the sentence. However, it must be recognized that the principle of proportionality seems difficult to implement in the case of mass or systematic violations of international humanitarian law.[5] However, when examined more closely, the principle of proportionality is one of the false clear concepts of legal science to which everyone

4 In that respect see, in particular, the article by Amedeo Cottino, which explores the treatment of crimes by the Navajo and indigenous Hawaiian communities: Amadeo Cottino, ''Crime prevention and control: Western beliefs vs. traditional legal practices'', in this issue.

5 Decaux, above note 2, observes in that respect that it is precisely because the crime committed is without comparison that the moral dimension consists of circumventing the logic of vengeance and settlement of accounts, without nonetheless being content with a ''symbolic trial''.

https://doi.org/10.1017/S1816383108000453 Published online by Cambridge University Press

refers without ever really defining its limits. Proportionality is a nomadic concept pertaining to different sciences and constitutes an unavoidable principle because of the logical function which it has in implementing the rule of law. Its great value – but also its complexity – is based on the evaluation of a connection between several dimensions or variables which oblige first the perpetrator and then the judge to take account of the ''relations of proportion'' as an artist would do when painting a landscape. Quite obviously, apart from the initial relation of the seriousness of the crime to the sanction, there are several ''relations of proportion'', which explains that people talk more – or they ought to talk more – about the ''principle of a lack of disproportion'' than of the principle of proportionality. Under criminal law the principle of proportionality obliges the judge to pursue a synthetic approach, that is, for the purpose of deciding on the sentence, to take into consideration not only the deeds of which the perpetrator is accused but also the entire environment which led to their being committed. That way of interpreting the principle of proportionality makes it possible to move away from the strict ''an eye for an eye'' logic responsible for producing cycles of vengeance which certainly hinder greater respect for international humanitarian law.[6]

A typology of sanctions

Seen from that perspective, sanctions may be of various kinds; they may be criminal, disciplinary, jurisdictional or not and may be imposed by an authority governed by ordinary law or military law, which may be international or national. International humanitarian law should apparently not immediately rule out resorting to solutions other than criminal sanctions. Those solutions might be able to give greater consideration to contextual features and be better suited to take account of the mass or systematic nature of the violations. However, there should be no compromise on the obligation to maintain criminal sanctions for serious violations of international humanitarian law or on the fact that imprisonment remains essential in such cases. Imprisonment is the only sanction which may conceivably be imposed to punish major criminals long after they have committed their offences (sometimes several decades later), this course of action being credible provided that those crimes are not subject to any statute of limitation and given that efforts to combat impunity have revived in recent years. But imprisonment should also be seen as a means of pressuring the perpetrator to accept his responsibility – including responsibility towards the victims – rather than a way only of removing him from society and rendering him harmless. A programme that aims at his rehabilitation should also take into account this purpose. Nor does the context undermine the rules that are internationally recognized in the field of juvenile justice, which also apply to children who have

6 See the article by Damien Scalia for more details on applying the principles of legality, necessity, proportionality and non-retroactivity to the sentence: Damien Scalia, ''A few thoughts on guarantees inherent to the rule of law as applied to sanctions and the prosecution and punishment of war crimes'', in this issue.

been involved in the perpetration of violations of international humanitarian law; such rules are based first and foremost on the primary interest of the child and are aimed at rehabilitation and reintegration.[7]

That integrated approach to sanctions, driven by the desire to obtain the maximum from them, leads to different types of sanctions being combined. For bearers of weapons, for example, priority should be given to using disciplinary sanctions which are applied without delay and linked to penal procedures when serious violations are involved.[8] Disciplinary sanctions which constitute the immediate response of the hierarchy are capable of having an immediate impact on group dynamics and of immediately underlining the prohibition, thus avoiding any subsequent systematic deviation. Criminal sanctions, which naturally take effect later, act as a reminder of the standards and rules of humanitarian law for the perpetrator of the offence and society.

Accepting that the effectiveness of sanctions depends on combining their various forms also implies that different judicial systems can be used. No matter what systems of justice are involved, too much emphasis cannot be placed on the importance of clear national and international rules which establish the criteria to be respected in terms of impartiality, independence, publicity and compliance with the rules that guarantee fair legal proceedings, including the pronouncement of the sentence. Moreover, the individuals called to take the decisions should be properly qualified before assuming their tasks, which includes having an understanding of the cultural context in which they are called to operate. Once that essential basis has been put in place, the next step is to determine the system which is best suited to the circumstances. A clear preference has become apparent for, whenever possible, a national rather than an international system and ordinary criminal courts rather than military courts, but naturally with a certain number of nuances. There are, of course, situations in which the international complement is indispensable – or even inevitable – and areas in which military justice can complement ordinary justice harmoniously, particularly when it allows rapid deployment in the geographical area.[9] In every case, these tribunals must provide all the judicial guarantees of human rights and international humanitarian law.

7 See, in particular, the Convention on the Rights of the Child (2 September 1990), Articles 37, 39 and 40; International Covenant on Civilian and Political Rights (23 March 1976), Article 14(4) and the international texts which deal specifically with the issue, United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), UN Doc. AGNU/RES/40/33 (29 November 1983); United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines), UN Doc. CES/RES/1989/66 (24 May 1989); United Nations Rules for the Protection of Juveniles Deprived of their Liberty, UN Doc. AGNU/RES/45/113 (14 December 1990); and United Nations Guidelines for Action on Children in the Criminal Justice System, UN Doc. CES/RES/1997/30 (21 July 1997).

8 On the issue of disciplinary sanctions applicable in the context of the armed forces, see the article by Céline Renaut, "The impact of military disciplinary sanctions on compliance with international humanitarian law", in this issue.

9 In the context of armed conflicts it should be pointed out that the reference texts stipulate that prisoners of war must generally be tried by military tribunals, thus equating prisoners of war with the armed forces of the detaining power. By contrast, civilians in enemy hands have to be tried by the courts which normally preside in their territory (see, in particular, the Third Geneva Convention, Articles 82–88 and 102; the Fourth Geneva Convention, Articles 3, 64–66 and 71).

The complementary role which traditional justice may also play in the process deserves to be analysed carefully, the major challenge being to reconcile the concern for effectiveness with the preservation of essential principles, particularly those that are linked to guarantees relative to fair legal proceedings, in situations in which mass violations have been committed.[10] While recognizing the importance of the specific cultural context, which makes it possible to avoid adopting an ethnocentric view, that cannot be used as a pretext to sell such principles short, and the risk of instrumentalizing traditional justice must not be underestimated.

In the case of parties which are not able to respond to the violations themselves and where the international complement is needed, a field of investigation opens up which should be fed by very recent experience of a wide range of different systems. The consensus is, however, that the international contribution should be temporary and aim at reinstating the national systems in the long term, especially by reinforcing their capacities. It is time to evaluate the merits of those ad hoc systems, such as that of Bosnia and Herzegovina, in which international judges have been integrated into the national system, that of Sierra Leone, where a mixed court has been established, or that of the international tribunals which are independent of national systems, such as those for the former Yugoslavia and Rwanda, while naturally bearing in mind the existence of the International Criminal Court. All those systems have obvious limitations, particularly with regard to their capacity of absorption, which may be a source of frustration. The aim is therefore to endeavour to draw up elements to identify, in particular, the best conditions for providing the national structures with international expertise, for evoking an appropriate national response and for encouraging an enriching dialogue between the different legal systems concerned. Given the concurrent existence of different systems, care must be taken to avoid imbalances which may be created by the systems themselves and by their implementation in determining and applying the sanctions.

Universal jurisdiction and complementarity of sanctions

Finally, this study of the complementarity of the roles of the sanction systems cannot ignore the principle of universal jurisdiction, as it authorizes the tribunals of all states to take cognizance of certain international crimes, regardless of where the offence has been committed and regardless of the nationality of the perpetrator or the victim. The objective of that jurisdiction is to ensure consistent repression of certain particularly serious offences. It demonstrates solidarity between the states in endeavours to combat international crime and should, at least in theory, make it possible to find a competent criminal authority in every case. Recent examples have also shown that universal jurisdiction, that is, beginning legal proceedings in another country, may have an influence on the courts in the state

10 See Cottino, above note 4.

on whose territory the crimes were committed or the state of which the perpetrator is a national by triggering their action.

Universal jurisdiction also affects the way in which sanctions are perceived within the national setting. The general tendency of the judicial authorities with regard to serious violations of international humanitarian law consists of thinking that the relatively limited risk of having to deal with such matters makes it pointless to deepen their knowledge of those areas. However, if the mechanisms of universal jurisdiction develop, even the most peaceful places on the planet may find themselves faced with the duty to try war criminals. The situation is anything but a scholarly hypothesis: the International Criminal Tribunal for the former Yugoslavia (ICTY), for example, has passed some of the files on accused persons on to the states for them to be handled within the framework of their national judicial systems, and the International Criminal Tribunal for Rwanda (ICTR) is preparing to do likewise.[11] It is thus necessary for judges to be familiar with the rules relating to international crimes, and the natural extension of universal jurisdiction is reaffirmed. The need for judges to know those rules is all the more essential because the effectiveness of sanctions is a matter of common concern.

Universal jurisdiction appears essential because it is linked to the effectiveness of sanctions and to the notion that no war criminal may escape repression. In practice, however, it is often difficult to implement and comes up against obstacles which may be technical (conditions vary from one country to another) or political (selectivity of cases), which result in its being used today in a sporadic and anarchical manner. It would hence seem appropriate to identify elements on exercising universal jurisdiction which could take advantage of the framework of complementarity advocated by the Statute of the International Criminal Court. Those elements, which will take account of the relevant studies already carried out,[12] could establish the minimum links required to exist between the perpetrator of the offence and the place of the trial, by requiring him, for example, to be present in the territory concerned. They could also insist on the co-operation modalities between the states concerned and stress the importance for the states in which the offences were committed to fulfil their repression obligation or, if not, to allow other states or the competent international bodies to do so.

Characteristics of perpetrators

All the studies point to the need to set up mechanisms necessary to punish both the perpetrator of the violation and the relevant line of command responsible for

11 According to the procedure determined in Rule 11 *bis* of the Rules of Procedure and Evidence of both ad hoc international criminal tribunals.

12 See for instance the study on universal jurisdiction carried out by Princeton University in 2001, which identified certain principles, available at www1.umn.edu/humanrts/instree/princeton.html (last visited 14 July 2008). See also the resolution on universal jurisdiction in the field of criminal law with respect to the crime of genocide, crimes against humanity and war crimes, available of the Institute of International Law, adopted at the session in Krakow in 2005, available at www.idi-iil.org/idiF/resolutionsF/2005_kra_03_fr.pdf (last visited 14 July 2008).

it. As for the actual perpetrator of the violation, there are still some questions about the extent of his responsibility when crimes are committed following an order which is (manifestly) illegal. It needs to be recalled in that respect that military discipline requires unquestioning compliance with orders on penalty of sanctions which may be very severe, particularly when disobedience occurs within the framework of field operations. Non-compliance with an order may occur in at least two sets of circumstances which it is appropriate to single out. The first refers to cases in which the order given is a priori legal but to carry it out is not, because it was not clear enough to enable subordinates to understand what it meant or to comprehend the measures which it authorized. In that case, the full significance of training becomes clear. The scope for interpretation which subordinates are allowed willingly or not should be measured against the yardstick of the applicable rules of humanitarian law which they have taken on board and, if the procedure has been correctly applied, what they do should remain within the bounds of legality.

The second set of circumstances relates to a manifestly illegal order. In that case, the law is clear: obeying such an order is subject to sanctions and may in no way be an exonerating factor, although under certain strict conditions it may at most be taken into consideration as attenuating circumstances. The subordinate must therefore refuse to carry out the order. An order which is manifestly illegal is a command whose illegality is obvious. Viewed from that perspective, it is difficult to contest the illegal nature of serious violation, included in the Geneva Conventions and Additional Protocol I, of genocide or of crimes against humanity. That is, moreover, the approach taken by the Rome Statute, at least for these last crimes.[13] In those cases concrete expression is given to the principle of humanity, as those crimes can affect the most fundamental areas of human life and they are indisputably reprehensible. The situation of the subordinate who has to assess the manifestly illegal nature of an order is a difficult one in the case of certain war crimes which take account of a degree of proportionality[14] or which require a distinction to be made between those taking part in the hostilities and others. In cases in which subordinates are required to act responsibly, sanctions should most certainly take account of the difficult situation in which those subordinates find themselves (including the pressure exerted on them, or the threats to which they are subjected). When the order is one that the soldier considers to be clearly illegal, the operational framework should provide for a mechanism to clarify the order to which the subordinate may refer.

The commanding officers, in turn, may find their responsibility involved in different respects, in particular for having participated in the violation in one way or another; for having ordered a violation to be committed; for having failed

13 Rome Statute, Article 33(2).

14 Reference is made here to the principle of proportionality in international humanitarian law which prohibits an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated (as stated in Additional Protocol I, Article 51(5)(b)).

to prevent a violation from being carried out and, hence, failed in their duty to be vigilant; for having failed to punish those who have committed violations, or, worse, for having covered up for them. With this also comes the obligation to train their subordinates.

The importance of the responsibility of civilian and military superiors even if they have not participated directly in the offence is generally recognized, and recent developments in jurisprudence in that field at both the national and international levels, particularly with regard to the conditions which must exist for the responsibility of civilian or military superiors to be involved, are to be commended.[15] However, it is agreed that there are a number of areas which are worth clarifying to enable that type of responsibility to be fully integrated into the scenes of operation with regard to both violations of humanitarian law which are serious and those that are not.

First, the concept of a superior needs to be clarified. On that issue, the commentary on Protocol I refers to a "superior who has a personal responsibility with regard to the perpetrator of the acts concerned because the latter, being his subordinate, is under his control".[16] It is, however, not very forthcoming on the matter of problems linked to the line of command or to the degree of responsibility depending on the different scenarios, which range from the order to commit an offence to training deficiencies and include complicity, instigation, encouragement and tolerance. That issue could doubtless be dealt with in greater depth and usefully linked to that of the manifestly illegal order referred to above.

Second, the measures which need to be taken by superior officers should be more clearly defined in terms of their hierarchy and positions in the line of command to allow them the better to determine what is reasonably expected of them. Finally, it would be wrong to ignore the links which exist between military control and the power of the concerned civilian authority. The spectre of sanctions must be capable of influencing all those whose responsibility may be involved, especially leaders.

Third, it needs to be recognized that this approach based on the distinction between superiors and subordinates conceals the importance of intermediate officers both in the implementation of criminal acts and in the reconstruction of a society which is emerging from a conflict. An examination of the sentences pronounced by the ICTY shows that the most severe sentences were reserved for the leaders who were tried and for the subordinates who had committed particularly contemptible acts. In the light of initial analyses, it seems that those of the accused who had occupied intermediate positions in the hierarchy were generally punished less severely, which might also reflect their detachment from the criminal policies being pursued or their willingness

15 For more information on this issue, see the article by Jamie Allan Williamson, "Some considerations on command responsibility and criminal liability", in this issue.

16 ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, especially para. 3544.

to alleviate the damage or sufferings which resulted from those policies. It needs to be borne in mind that it was the specific context of the armed conflict that caused several of them to become involved in criminal activities. It is those same individuals who will be relied upon for the social reconstruction efforts in the period following the conflict. In that context the full weight of the educational and instructive nature of the sanctions becomes clear. They must correctly establish the connection between the crime of which the person is accused and the person concerned, so that the latter has no choice other than to admit his involvement. Sanctions which do not sufficiently explain why the specific individual's participation is blameworthy or which might suggest that his responsibility is only involved because of a remote connection with the crime[17] unfortunately risk leading to the rejection of the entire process and are likely to stir up feelings of resentment which are inevitably passed on to future generations, thus engendering exactly what the sanctions set out to prevent.[18]

That binary approach based on the superior–subordinate relationship also fails to take sufficient account of the role of the instigators in preparing the environment which is conducive to violation of international humanitarian law. In that respect, it is encouraging to note that the Statute of the ICTR incorporated the provisions already included in the 1948 Genocide Convention, which make direct public incitement to commit genocide a punishable offence, and that the tribunal did not hesitate to apply them. There is, moreover, no reason why that form of criminal participation should not be extended to other international crimes, given the place occupied by the instigators, who, by pounding out their message, contribute to the demonization of the enemy and to justifying crimes committed against that enemy, as discussed below.

Finally, it is also important for a good system of justice to cover all those who may commit violations of humanitarian law. The particular case of the forces of the United Nations or of regional organizations must continue to be investigated even if a large number of studies are carried out on that subject. The recent resolution of the UN General Assembly on the accountability of UN officials and experts on mission, which recommends including in national legislation special criminal provisions for contingents from the countries which contribute to constituting the UN forces is worth being emphasized and taken into account by all those who participate in and assist the process of implementing international obligations at the national level.[19] Besides, the United Nations and the competent regional organizations should also apply the strictest criteria in this area to themselves and, in particular, consider setting up a common disciplinary

17 Particular attention has to be given to cases related to the "joint criminal enterprise" theory.

18 It must also be noted that, for it hopefully to produce the effects discussed, the procedure to which the accused is subjected must also cover the mechanisms which enable the sentence to be adapted to the individual and the situation which that person will have to face once he has completed his sentence.

19 See in particular the Ad Hoc Committee on the criminal accountability of UN officials and experts on mission, UN Doc. AGNU A/RES/62/63 (8 January 2008), especially paras. 2 and 3 of the resolution's operative part.

system which would be able to respond to the need for speed and immediacy required by sanctions.[20] Those organizations should also take care to ensure that their officers are given appropriate training and that the knowledge is passed on to all levels. The question of accountability for private security companies and their staff also merits attention.

Armed groups[21]

Given that sanctions should have the same effects on persons placed in similar circumstances, to what extent can they affect the armed groups? Sanctions which could be imposed by the authorities on the members of armed factions simply because they participated in the hostilities even though this participation did not imply violations of humanitarian law are not covered here.[22] Attention is rather drawn to the extent to which the message of sanctions can be built into the thinking of armed groups and help to ensure greater respect for humanitarian law.

The dissemination of the rules with regard to armed groups is a key element not only of their sensitization to sanctions but also of their compliance with the process. The greater difficulty in accessing those groups as well as their often unclear structures may render the implementation of international humanitarian law uncertain. The message about sanctions must be clearly spread: the members of armed groups – like those of other groups participating in the conflict and members of government forces or groups attached to them – will have to answer for atrocities committed. That is, moreover, the approach pursued by the International Criminal Court, which deals with crimes involving any individuals, including non-state actors. Moreover, that message should have a double connotation. On the one hand, it should make it possible to warn the perpetrators of potential atrocities that they run the risk of measures being taken against them and that the conflict will not be an excuse. On the other hand, it also makes it possible to emphasize that everyone will be treated in the same way, thus reaffirming the principle of equality. With regard to armed groups, the experts furthermore observed that the ICRC can play a particular role in this area. To the extent that it has access to those groups, it is responsible for ensuring that it

20 On this matter Decaux, above note 2, justifiably adds that a system of this kind must be based on the principles of subsidiarity and *non bis in idem*.

21 The ICRC is particularly interested in the question of respect for international humanitarian law by armed groups and has identified a series of tools which are useful in that respect: see in particular Annex 3 of the report entitled "International humanitarian law and the challenges of contemporary armed conflicts" presented at the 30th International Conference of the Red Cross and Red Crescent (301C/07/8.4). The document is available at www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5XRDCC/$File/IHLcontemp_armedconflicts_FINAL_ANG.pdf (last visited 14 July 2008). See also the article by Anne-Marie La Rosa and Carolin Wuerzner, "Armed groups, sanctions and the implementation of international humanitarian law", in this issue.

22 See Additional Protocol II, Article 6(5), which states that "at the end of hostilities, the authorities in power endeavour to grant the broadest possible amnesty to persons who have participated in the conflict …".

https://doi.org/10.1017/S1816383108000453 Published online by Cambridge University Press

conveys a clear message about sanctions and the importance of punishing all serious violations of international humanitarian law. Disseminating the rule is not enough; the message also has to deal with the modalities of respect as well as the mechanisms which are to be implemented in case of violation and which must in every case uphold the principles of fair justice.

Different factors have an influence on the role played by sanctions with regard to the behaviour of armed groups. The size of the group, the intensity and the length of time during which control is exercised over a territory are factors which are crucial to the establishment of institutions similar to those that the states are obliged to set up. The existence of a clear line of command also remains essential as a vehicle for the rules which are in line with humanitarian law, to train the troops in this area and in order to put a stop to behaviour which is not in keeping with humanitarian law and to sanction it. Finally, the objectives pursued by an armed group may also have a bearing on the place reserved for sanctions within the rationale of the group. For example, the importance of the armed group's being recognized by the international community may have a decisive positive influence as it might prompt the group to show its respect for the law and its ability to emphasize and repress what is prohibited, which, by the same token, could help to improve their image. By contrast, it is easy to imagine that sanctions will have a negligible impact on an armed group whose primary objective is to destabilize and hence disrupt any aspect of normalization. If the group is fighting a racist or oppressive regime, it will adopt certain values more easily than if its primary objective is to call those values into question and to reject the system on which they are based. The importance attached by a group in the first category to its image within the international community may have a positive impact on its willingness to demonstrate its concern to uphold those values and its ability to repress contraventions of them.

It is nonetheless evident that, in that area, more far-reaching investigations still need to be carried out on how justice could be carried out by armed groups and on the possible need to adapt the principles of fair justice in those situations, which are by nature unstable and intended to be transitory. International humanitarian law does not appear to rule out, a priori, the initiation of criminal proceedings by armed groups. Rather, it stresses the importance of the regular constitution of those courts, their independence and lack of bias, and the fact that they must give all recognized judicial guarantees.[23] In that respect, it seems important and necessary to carry out work to shed more light on the procedural guarantees which are indispensable to fair criminal justice and to assure their concretization and respect in this context. If no measure is taken by the parties concerned against the members of armed groups who have committed violations of humanitarian law, that asymmetry in the application of sanctions will merely evoke a sense of injustice and impunity which will unfortunately cancel out any positive impact that the sanction might otherwise have. It is therefore

23 See, in particular, Article 3 common to the Geneva Conventions and Article 6(2) of Additional Protocol II.

important to seek the necessary mechanisms which will ensure, on a common basis, the repression of anyone who violates humanitarian law, regardless of their allegiances.

Groups and sanctions

The impact of the group on the behaviour of combatants has been dealt with amply in the Influence Study. For example, that study points out that a number of research studies carried out in the course of recent decades have shown that combatants are frequently influenced not by ideology, hatred or fear, but rather by group pressure and the fear of being rejected – or even punished – by the group. The Influence Study hence stresses the importance of understanding the dynamics of the groups to which reference is made.[24] In military terms, reference is made, in particular, to the spirit of comradeship within the military unit to which the people belong and which gives rise to vertical and horizontal solidarity. In that context, it becomes vital to obey the authority. At the interregional meeting held by the ICRC on the issue of the role of sanctions, an UNPROFOR commander, who was present at the siege of Sarajevo in 1995, observed that exercising authority is not the same as imposing fierce discipline. Rather, a subtle alchemy is created in the absolute trust which exists between the commander and his subordinates and which is based on the powers conferred on the commander and, of course, his authority, but also on the caring concern that he shows for each of his men, with a very strong emotional component.[25] The obvious ambivalence of his remarks should be noted, as well as the possibility that those dynamics are for better or for worse, hence the importance of reconciling the principles and rules which the authority promotes by virtue of international humanitarian law in such a way that the pressure exerted by the group and by the authority has a positive effect on the individual. Everything possible must be done to ensure that group pressure does not lead to serious violations being perpetrated. In a hypothesis of that kind, the danger is that a spiral of violence may be triggered, irreversibly increasing the initial divide between the reprehensible behaviour of the group members and respect for the rule.[26]

For troops to show respect for the rules and principles of humanitarian law in situations of extreme violence such as armed conflicts, those rules and principles must be part of relevant training courses. The troops must undergo training which allows them to absorb fully the rules and principles of humanitarian law as well as other obligations connected with the service, so that

24 The Influence Study draws particular attention to the mechanisms of moral disengagement and dehumanization: see in particular ch. 11 of *Behaviour in War: A Survey of the Literature*, which deals at length with those issues. See also Muñoz-Rojas and Frésard, above note 1.

25 See, in this regard, the Address by Jean-René Bachelet in this issue.

26 See Cottino, above note 6, who deals in particular with the question of the responsibility of the collective unit. This report has not examined that issue in greater depth but its importance must not be underestimated.

they become a natural reaction. Bearers of weapons must not have to weigh up the pros and cons in the heat of the action and their instinctive reactions must be in keeping with the law.[27]

Sanctions must also be part of that process and must, first and foremost, be consistent with the rules which already exist within the society or group in question, since if it allows for a legitimization of crimes, those sanctions will be pointless. The idea of the necessary respect for the law and consequently for sanctions must also be part of the training, so that if bearers of weapons do not comply with the rule, they know that they will be punished. In that respect, it seems appropriate for the armed forces to develop codes of conduct that include simple rules which integrate in a practical manner the behaviour which is promoted by respect for the principles of humanitarian law, including matters relating to the consequences of non-compliance, with those principles. Enough disapproval cannot be voiced for military (or other) cultures which make hatred of the enemy one of the basic aspects of military training.[28] Such attitudes are essentially contrary to the entire philosophy of international humanitarian law and attack its very foundations. Regression with regard to respect for the principles of humanity is often the result of demonizing or dehumanizing the enemy or policies which aim at ostracizing the ''other''.

On the last point, the force of the group must not be underestimated in the attitude to the enemy. Before the start of a conflict, the group may be called upon to play a decisive role in the awareness that it conveys to its members of belonging to a whole while stigmatizing the non-adherence – to varying degrees – of others, who are thus perceived as ''abnormal''. In that structure, ''normativity'' is equated with ''normality'', which is translated by the construction of new social rules that set apart those who are ''abnormal'' – that is, those who belong to another group set up for the set of circumstances in question. When an armed conflict begins, it then becomes very easy to target groups of ''others'' on the basis of their particular status (of a created minority) and their lack of normality in the new meaning given to that term. That outlawing has the advantage of providing justification for the discriminatory treatment meted out to the groups created and, in particular, allows the members of the dominant group to justify their action by treating it as normal and in line with the new rules that have been established. A policy justifying the breaches of the law is thus created and allows violations to be accepted without even raising the question of whether or not they are in line with the rules of international humanitarian law.

A kind of transfer of the framework and reference values is thus observed; it causes the perpetrators of violations not only to accept acts which they would have condemned unreservedly some years previously but also to consider those acts ''normal''. That transfer of normality explains why the threat of sanctions is

27 See the article by Emanuele Castano, Bernhard Leidner and Patrycja Slawuta: ''Social identification processes, group dynamics and the behaviour of combatants'', in this issue.

28 On this matter see in particular Michel Yakovleff, ''The foundations of morale and ethics in the armed forces: some revealing variations among close allies'', *Inflexions*, No. 6 (2007).

not only improbable within the group thinking but, moreover, why they feel protected by the new rules which its members have taken on board.

It will also be seen that this type of attitude may vary in accordance with the spheres of influence. That means that normality is not necessarily the same within a society and among the bearers of weapons, who may accept certain violations of international humanitarian law more readily as they consider that the perception of their environment is not necessarily the same as that of an ordinary citizen and that the defence of their cause justifies violations of that kind. That defence may even vary within the same armed group in accordance with the activities and responsibilities of the different members of the group. The perception of normality may vary from one sphere of influence and decision to another.[29]

It is therefore necessary to break these group dynamics which lead to violations being stripped of their seriousness by stressing the fact that sanctions are not negotiable and by recalling that they are not a possibility but a certainty and that accountability is required.

Transitional justice

To place the sanctions provided for with regard to humanitarian law back in the context of a review of transitional justice is to acknowledge that, taken in isolation, they are frequently insufficient and even ineffective. It is also to accept simultaneously that humanitarian law does not rule out having recourse to complementary solutions which are better able to take account of the mass or systematic nature of the violations that have been committed in the context of armed conflicts or of special contextual aspects and the expectations of the population or individuals concerned.

To position humanitarian law in that manner stimulates respect for it and its implementation by placing those issues back in the flow of justice which, when mass violations have been committed, covers several decades, takes varying forms ranging from the quest for truth via memory to reparations and requires mechanisms which are suited to those purposes. That pragmatically based integrated approach means that advantage can be taken of every opening in the hope of triggering a sort of set of healthy dynamics at the level of society and the individuals concerned; when the social fibre has been deeply damaged, the worse thing is for nothing to happen. Transitional justice is then accepted as complementing criminal justice and it is also acknowledged that it may help to reconstruct a society and individuals who form it as well as to write a coherent, authentic and honest history. However, there can be no compromise over the fact that criminal sanctions must be imposed in the case of serious violations to show

29 For a discussion of the existence of different dynamics which may exist in parallel, with emphasis on the local setting, see the article by Samuel Tanner: "The mass crimes in the former Yugoslavia: participation, punishment and prevention?", in this issue.

https://doi.org/10.1017/S1816383108000453 Published online by Cambridge University Press

that the prohibitions are absolute and that no departure from them will be allowed, even if, in the actual context, that approach may clash with approaches which are aimed at promoting peace and are based on the mechanisms of forgetting and granting an amnesty.[30] One also needs to be aware of the risk of the measures of transitional justice being manipulated when they are used in the context of policies of disguised impunity.[31]

Transitional justice shifts attention from the crime and places the victim at the heart of the process. Its mechanisms are also complementary and may be defined in the light of the objectives pursued: ''quest for truth'', ''reparations'', ''repression'' and finally ''sanctions'' within the framework of the overriding general objective of reconciliation. Institutional reform is a prerequisite that is frequently necessary to ensure the actual effective implementation of the mechanisms of transitional justice. It integrates initiatives pertaining to restorative justice, according to which the crime is seen as having caused a wound which needs to be treated. Viewed from that perspective, the question of reparations must be given an appropriate place as, if sanctions are to have a preventive impact, necessary consideration must be given to reparations for the victims. Indeed, there can be no justice without social justice and there can be no social justice or a return to a peaceful coexistence when a large part of the population is left to suffer. That also allows a shift from the individual scale – face to face in the context of criminal proceedings – to a more collective scale, which allows better account to be taken of the principle of equal treatment. Those reparations integrate classic aspects of accountability, but go beyond them by including reparations which are outside traditional legal obligations and are based on individual responsibility. It thus seems that it is a serious error to link reparations closely with a criminal sentence, all the more so in a situation in which only a small minority of those who are guilty are ultimately sentenced.

Reparations may take various forms, may be financial or otherwise, or be imposed on a collective or individual basis. Reparations may also integrate public policies in favour of the victims or those eligible to access public services and equal opportunities. They also cover rehabilitation and reintegration measures as well as more symbolic measures – such as official apologies, guarantees of non-repetition, the construction of memorials or the holding of commemorative ceremonies – to which the victims are particularly attached.[32]

30 The danger of adapting an act of justice to political imperatives has been underlined by Eric Sottas, ''Transitional justice and sanctions'', in this issue.

31 Ibid. See also the article by Pierre Hazan, which analyses an example of truth and reconciliation in which the component of accountability and repression was ignored. Pierre Hazan, ''The nature of sanctions: the case of Marocco's Equity and Reconciliation Commission'', in this issue.

32 For a more detailed discussion on transitional justice and its components, see in particular Anne-Marie La Rosa and Xavier Philippe, ''La justice transitionnelle'', in Vincent Chetail (ed.), *Peacebuilding and Post-conflict Reconstruction: A Practical and Bilingual Lexicon*, Cambridge University Press, Cambridge, 2008 (forthcoming).

Victims

No one would deny the importance of the role of the victim in the process of sanctions. The reviews deal mainly with the definition of victim and the way in which victims may participate in this process.[33]

In fact, a large number of people may be affected directly or indirectly and in various ways by violations of humanitarian law. Time must therefore be taken to consider the types of violations to which they have been subjected. The role and place of the victims in the process of sanctions may be defined in different ways. They depend on the nature of the measure to which the victims give priority by virtue of the circumstances, being aware that measures may be neither criminal nor disciplinary but may be considered effective by the persons concerned. For example, ''the right to know'', which is recognized by humanitarian law and which is not defined merely in terms of repression, grants victims who are members of a dead person's family the right to obtain information about the fate of their relatives and hence goes on to give official recognition to the violations to which they were subjected.

The wide range of measures which may be envisaged does not detract from the importance of the criminal trial for the victims; through the pronouncement of the sentence, it highlights what is forbidden and grants them a kind of symbolic reparation. No one contests the fact that victims must be given access to the criminal trial – as witnesses who generally appear for the prosecution, or as *parties civiles* in the countries which have that institution. The question today is rather to determine at what stages (investigations, trial, sentence) and in what forms the criminal proceedings are open to them.[34] In every case, care must be taken to avoid creating unrealistic expectations by involving the victims. The quest for legal truth which is defined by virtue of the objectives of the trial does not always match the willingness of the victims to tell their stories, which would contribute to shaping a more comprehensive picture of the reality. Care must be taken to ensure that the entirely legitimate claim for a form of justice which serves the victims does not corrupt the way in which justice is carried out and is not harmful to the serenity of its proceedings, its integrity and impartiality. On the other hand, the prerogatives linked to the need to pronounce a judgment within a reasonable time frame must not be allowed to distort the legal investigation by giving priority to bargaining procedures regarding the charges, the guilt or the sentence (plea bargaining) which may obscure the truth. For consensual justice to have the desired effect, it must be carried out within a precise framework and the judges must be allowed to use their full discretion to reject agreements between the prosecution and the defence if they are not absolutely convinced that the facts as

33 See in this regard the article by Christian-Nils Robert, Mina Rauschenbach and Damien Scalia in this issue.

34 For a critical presentation of the mechanisms of participation by the victims at the International Criminal Court, see the article by Elisabeth Baumgartner, ''Aspects of victim participation in the procedure of the ICC'', in this issue.

they are presented represent the true picture of events. Moreover, those procedures must inevitably be accompanied by minimum guarantees which ensure their truthfulness and the expression of sincere remorse and which offer an opportunity to apologize to the victims.

It is also imperative that greater account be taken in the criminal process of the problem of the victim who has to testify and the suffering and risk that that may represent for the victim by emphasizing the consistency which must be inherent in judicial proceedings with regard to different cases as well as between the different international and national courts. One can never emphasize enough how important it is for judges and lawyers, including national judges and lawyers, to be appropriately trained in conducting questioning and in particular cross-examination in such a way as to preserve the integrity of the persons questioned, many of whom have been the victims of the crimes for which the accused is on trial. In that connection, particular attention must be paid to victims of sexual violence.

Finally, there seems to be virtual unanimity about the fact that participation by victims in the criminal trial does not include the stage in which the sentence is decided, which should be left to the competent judiciary body.

Conclusion – Proposed elements of sanctions

The wide range of different factors influencing the definition and the implementation of sanctions explains just how difficult it is for sanctions imposed in isolation to change people's behaviour.

In pondering the specific reasons why sanctions may be ineffective and the factors explaining why they are called into question, the review has endeavoured to understand why sanctions are not used to their best value by those involved in conflicts and by external observers. The review has considered reinforcing the existing framework but has also examined supplementary reinforcement solutions aimed at placing sanctions in a position that they should have. The task was to attempt to identify the elements and modalities which could today bring about a concrete improvement in the effectiveness of sanctions in the efforts by all parties to ensure greater respect for international humanitarian law. They are summarized below and include elements governing the effectiveness of sanctions, including those that are inherent in sanctions imposed for violations of humanitarian law or those pertaining to the perpetrators.

Elements which determine the effectiveness of sanctions

1. Any message about the imposition of sanctions for violations of international humanitarian law must be accompanied by measures intended to improve adherence to the rules and respect for them.

https://doi.org/10.1017/S1816383108000453 Published online by Cambridge University Press

- The necessary measures must be taken by all parties concerned to ensure that the applicable rules and sanctions are integrated into their system of reference, that they are known and properly applied.
- At the national level, the judges must be trained in international humanitarian law and they must take part in the process of interpretation and clarification of that field of law, in particular by taking into account studies carried out in that area at the international level.
- A rationalization effort must be undertaken to ensure that sanctions are more effective. It must deal with both the legal texts and the competent courts.
- The states should be encouraged to ensure the similarity of guarantees and procedures used by courts responsible for dealing with violations of international humanitarian law.

2. To ensure that sanctions play an effective preventive role, the potential perpetrators of violations of international humanitarian law are to be given detailed information about the different types of sanctions and the modalities of their application

- At this level, education must enable individuals to identify clearly what is permissible and what is not.
- This education must also be provided for all who are instrumental in the application of international humanitarian law, regardless of the group to which they belong, and including those acting under the mandate of the United Nations and competent regional organizations.
- The principles and rules promoted by the authority must be in line with the requirements of international humanitarian law.
- Any aspect which is based on hatred of the enemy must be excluded from training programmes.

3. Training and education in international humanitarian law need to be integrated as unavoidable mechanisms which imply genuine reflex reactions, particularly among bearers of weapons.

- Information about sanctions must convey the fundamentally wrongful nature of the behaviour which is being sanctioned.
- The efficiency of sanctions and their dissuasive character depend on the degree to which the rule subject to the sanctions has been internalized by bearers of weapons.
- The aim of this internalization must be to prompt genuine reflex reactions among the bearers of weapons, leading to respect for the rule.

Elements relative to violations of humanitarian law

4. The concept of sanctions must incorporate prevention of a repetition of the crime and be based on a pragmatic and realistic approach.

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- The definition, procedure and implementation of sanctions must be designed in such a way that they make it possible to prevent the repetition of such crimes.
- A pragmatic and realistic approach consists of searching for ways to prevent the crime from being committed or repeated, bearing in mind the resources available. It must respond to the dual challenge of conforming to the rules and principles of general international humanitarian law while adhering closely to the contingent requirements of the national framework.
- Sanctions cannot be defined *in abstracto* but must rather be defined in relation to the concept of justice; in that context, the complementary nature of transitional justice must be recognized.
- The above-mentioned pragmatic and realistic approach should also be able to provide guidelines for exercising universal jurisdiction. They should draw on the studies already carried out and be based, in particular, on the possible link which should exist between the perpetrator of the offence and the place of trial as well as on the modalities of co-operation between the states concerned.

5. Criminal sanctions remain the essential and unavoidable axis for the treatment of all serious violations of humanitarian law

- Sanctions must help to reinforce the rules of humanitarian law and the fundamental universal values which underpin them.
- Imprisonment must remain the central element in sanctioning serious violations of international humanitarian law.
- Criminal sanctions may not be viewed solely from the perspective of the prison sentence. In terms of effectiveness, they must be perceived with regard to the context, that is, all elements enabling sanctions to have a greater impact on the individual to which they apply and on the society to which he belongs, with account being taken, in particular, of the cultural factor.

6. Sanctions for violations of humanitarian law share some essential common characteristics irrespective of the circumstances.

- For the perpetrator of violations, sanctions must be certain in nature, that is, they must be automatic regardless of the perpetrator. The idea is that every perpetrator of violations knows that there is a price to pay.
- To be effective, sanctions must be imposed as quickly as possible after the act has been committed (need for justice to be rendered without delay). An initial reaction must take place without delay, regardless of whether or not that is by combining disciplinary and judicial measures.
- Sanctions should be implemented with respect for all aspects of the principle of equality. They must lead to all perpetrators being treated equally, irrespective of the group to which they belong.
- Sanctions should be pronounced as close as possible to the places where the crime has been committed and people on which they are intended to have an effect. In that context, international justice must aim to reinforce national capacities and, whatever the case, only constitute a transitory or complementary process.

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- Delocalization should only be envisaged as a very last resort and should inevitably be accompanied by a local sensitization mechanism.

7. Apart from the seriousness of the crime, other aspects need to be taken into account when selecting the sanction, in particular those linked to the context and the personal characteristics of the perpetrator (individualization).

- It is essential for the sanctions to be proportionate to the seriousness of the crime in order to avoid generating lack of comprehension and resentment among both the victims and the perpetrators. This proportionality is a guarantee for all parties.
- The judge must adopt a synthetic approach which causes him to take account of the whole of the environment which led to the reprehensible act being committed.
- The principle of proportionality thus implies an understanding of complex relations between several variables which judges have to take into account in order to avoid any disproportion.
- Sanctions must take account of the personality of every perpetrator, which implies an individualized treatment of every violation.

8. In order for sanctions to play an effective preventive role in the society in question, they must be made public and be subject to appropriate dissemination measures.

- The effectiveness of a sanction is linked to its speed and the publicity given to it with regard to both the perpetrator and the group.
- The dissemination obligation is fundamental because it is the means of informing and educating people about what a serious violation is and the consequences which it entails.
- The clarity of the rule and of the message which accompanies it is indispensable for them to be effective. The message must cover the rationale which has led to the sanction and justifies the choice of that particular sanction. It must also cover the entire process leading to the imposition of the sanction.

9. The aim of the various mechanisms for imposing sanctions (criminal or otherwise) must be to reinforce each other in order to ensure that the overall process is as effective as possible.

- These mechanisms should be based on clear rules which define the criteria to be respected in terms of impartiality, independence, publicity and compliance with the standards guaranteeing fair procedures, including the passing of the sentence.
- The large number of different sources of sanctions (jurisdictional, non-jurisdictional, disciplinary, traditional or other) must give rise to a clear distribution of powers among the bodies.
- That is all the more important in systems which combine disciplinary and jurisdictional measures. The complementarity should give priority to effectiveness and the mechanisms should not be redundant.

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- In that sense, the mechanisms of traditional justice should also be explored, while ensuring respect for the criteria referred to above.

Elements relative to perpetrators

10. Sanctions must lead the perpetrators to recognize their responsibility in the violation of humanitarian law and thus to help to enable the society as a whole to be aware of the impact of certain events which have affected it.

- The process set up must at least ensure that the perpetrator has no choice other than to accept his responsibility and that the sanction is in accordance with the extent of his responsibility for the violations committed.
- As far as it is possible and beyond what has been referred to above, that process must allow the perpetrator of the violations to show evidence of regret and give him the opportunity to ask for forgiveness.

11. Subordinates must be given the opportunity to understand the consequences of their acts and to assume responsibility for them.

- Codes of conduct need to be developed which include simple rules incorporating in a practical manner the types of behaviour which are bound to generate respect for the principles and rules of humanitarian law, including the consequences associated with lack of respect for those principles.
- Individuals must also be informed of their rights and obligations with regard to an order which is a priori or manifestly illegal and the ensuing consequences.
- Operational mechanisms need to be developed which allow subordinates to obtain clarification about orders that they are given, where they believed that the orders were not precise or manifestly illegal.
- Subordinates may not shelter behind the argument of superior order to avoid their responsibility.

12. Sanctions must first and foremost target the commanders responsible for mass crimes.

- Sanctions must not be linked solely to the direct nature of involvement in the conduct of a violation of the law but must also take account of the degree of responsibility in relation to the order given.
- The responsibility of military and civilian commanders and superior officers is not limited to the orders given but also covers lax control and deficiency in training.
- From an operational point of view, it is essential for the chain of command and the measures which may reasonably be expected at each level in that chain to be clearly established.

13. The role of the instigators must be evaluated precisely and give rise to an involvement which is in keeping with their responsibility.

- The responsibility of the instigators in preparing the environment which is conducive to violation of international humanitarian law by contributing, in

particular, to the demonization of the enemy and the justification of the crimes which are committed against that enemy, has to be clearly recognized.

14. In order to achieve its aim, the overall process of sanctions must ensure that the victims adhere to it and to that end take account of considerations in the field of social justice.

- Sanctions may be imposed on the perpetrator only after a previous quest for truth (no sentencing based on insufficient evidence or reasoned out by analogy) and after the victims have been given responses in terms of reparations.
- The participation of victims and society in general in the process of justice will allow it to be given credibility and will enable the system to be adapted to each context.
- Transitional justice with the victim as its focus makes it possible to expand the classic framework of sanctions by integrating other aspects which must, however, not be confused with its original hard core.
- Recognition must be given to the role of victims in criminal justice, but that role may not go so far as to allow their participation in determining the quantum of the sentence.

https://doi.org/10.1017/S1816383108000453 Published online by Cambridge University Press