



### ELEMENTS TO RENDER SANCTIONS MORE EFFECTIVE

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 behaviors. However, there are some 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.

#### **A. 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.**

- 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.

#### **B. 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.**

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

**C. 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.