

The definition of traditional sanctions: their scope and characteristics

Emmanuel Decaux

Emmanuel Decaux is Professor of Public Law at the University Panthéon-Assas Paris II.

Abstract

For more than 30 years the codification of state responsibility has been the main task of the International Law Commission, which has placed greater emphasis on financial reparations than on criminal sanctions. Since the 1990s, however, the responsibility of individuals for gross violations of humanitarian law has been one of the main topics in international law. This new approach implies discrepancies between domestic practice and international case law in terms of the nature and scale of sanctions, the role of victims and also the accountability of non-state entities, including private companies and international organizations.



By tradition, international public law gives short shrift to the concept of penal sanction. Indeed, the term figures last in the *Dictionnaire de droit public international*¹ entry for “sanction”, which is generally defined as designating “a broad range of reactions adopted unilaterally or collectively by the States against the perpetrator of an internationally unlawful act in order to ensure respect for and performance of a right or obligation”. The dictionary cites the doctrinal definition provided by an Italian author, L. Forlati Picchio: “A sanction would be any conduct that is contrary to the interests of the State at fault, that serves the purpose of reparation, punishment or perhaps prevention, and that is set out in or simply not prohibited by international law”². Sanctions may be centralized, in an institutional framework,³ or decentralized, with the risk of a return to “private justice”⁴. Much has been written on the relationship between calling into play the international responsibility of the state and having recourse to sanctions, and on

the relationship between the related concepts of “countermeasures” and “reprisals”, between primary and secondary law, and so on.⁵

Codifying state responsibility

Far from clarifying matters, the codification of responsibility in international law has only served to spark further debate. While the classic law of responsibility aimed to establish a link of causality between an “unlawful” act and the person to whom it was attributed, with a view to giving effect to the right to reparation, the deliberations of the International Law Commission (ILC) conducted under the influence of Special Rapporteur Roberto Ago underscored the distinction between crimes and offences, introducing a “qualitative” element into a purely quantitative relationship, the reparation being intended to expunge the unlawful act and enable a return to the *status quo ante*. Recognition of the unlawful act was deemed to be a form of moral redress, whereas material reparations, “of equivalent value” in the absence of *restitutio in integrum*, were an accounting operation.

The concept of “punitive” reparations, introduced by the arbitration of the *Rainbow Warrior* case between France and New Zealand, broke sharply with that tradition, whether by developing the concept or introducing an exception to it.⁶ The primary object of responsibility had been the cessation of the unlawful action and reparation, not the punishment of a “fault” and the stigmatization of the “guilty” state. The codification overseen by the most recent ILC Special Rapporteur, James Crawford, smoothed over the discrepancies, but the concept of “fault” has been introduced into the law on state responsibility, like a worm into an apple.⁷ Responsibility no longer concerns only the interplay of bilateral relations between two states, which are permeated by reciprocity – every state is both judge and defendant – it now calls into question multilateral obligations, *erga omnes*, based on mandatory law.⁸

1 Jean Salmon (ed.), *Dictionnaire de droit public international*, Bruylant/AUF, Brussels, 2001 (citation translated from the French).

2 Laura M. Forlati Picchio, *La sanzione nel diritto internazionale*, CEDAM, Padua, 1974 (translated from the French).

3 Jean Combacau, *Le pouvoir de sanction de l'ONU, étude théorique de la coercion non militaire*, Pedone, Paris, 1974. On the emerging issue of the “responsibility to protect”, see the forthcoming acts of the Nanterre colloquium organized by the Société française de droit international in June 2007.

4 See in particular the theses of Linos-Alexandre Siciliano, *Les réactions décentralisées à l'illicite, des contre-mesures à la légitime défense*, LGDJ, Paris, 1980; and Denis Allard, *Justice privée et ordre juridique international, étude théorique des contre-mesures en droit international public*, Pedone, Paris, 1994.

5 For a brief presentation see Emmanuel Decaux, *Droit international public*, 5th edn, Dalloz, Paris, 2006.

6 Sentence of 30 April 1990, *Report of International Arbitral Awards (UNRIAA)*, Vol. XX. Significantly, the French arbitrator was a specialist in private, not international, law. See Gilbert Guillaume, *Les crises internationales et le droit*, Le Seuil, Paris, 1994. For a discussion of developments in the law on responsibility, see the colloquium organized in Le Mans by the Société française pour le droit international, *La responsabilité dans le système international*, Pedone, Paris, 1991.

7 James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Texts and Commentaries*, Cambridge University Press, Cambridge, 2002.

8 Pierre-Marie Dupuy (ed.), *Obligations multilatérales, droit impératif et responsabilité internationale des Etats*, Pedone, Paris, 2003.

The International Court of Justice (ICJ), after much hesitation, itself expressly defined the concept of *jus cogens* in two recent decisions relating to the case of *Armed activities on the territory of the Congo*, that of 19 December 2005 (*Democratic Republic of the Congo v. Uganda*) and that of 3 February 2006 (*Democratic Republic of the Congo v. Rwanda*).⁹ As emphasized by the ad hoc judge Joe Verhoeven, however, its recognition of massive human rights violations was purely declaratory and spawned no debate on responsibility. The ICJ's capacity to provide redress in the case of large-scale crimes attributable to a state remained intact. In its decision of 26 February 2007 in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the ICJ was at pains not to qualify a state as such as guilty of genocide, with all the legal and political consequences such collective responsibility would have in historical terms. In fact, it is hard to see how, except in the event of *debellatio*, as in the case of Germany in 1945, a state could be held accountable for the crimes committed. It was by dissociating the German people from the Nazi regime responsible for Germany's defeat that the Allies enabled a democratic Germany to obtain rapid recognition. Is not convicting a state, by thus imposing on it either the abstract guilt of a "juridical person" that will one day disappear or change names, or the collective responsibility of a people instead of its leaders, tantamount to mortgaging the future not only of the people concerned but also of their neighbours?

Moreover, the action of a self-proclaimed entity like the Republika Srpska or of uncontrolled forces such as those in eastern Democratic Republic of the Congo tended to call into question the purely state concept of international responsibility. Here the concepts of complicity and of the obligation to prevent and repress were easier to grasp than the direct responsibility of a state. Thought should no doubt be given to the responsibility of non-state entities and liberation movements. Except for the rules of international humanitarian law, which govern their behaviour in certain circumstances, the Palestinian movements and their fratricidal clashes exist in a legal vacuum and this is a reality accepted by the entire international community, which is quick to denounce the abuses attributable to the state of Israel. The fact remains that behind every abstract entity there are men who commit crimes, as the International Criminal Tribunal for the former Yugoslavia recalled, referring to the Nuremberg judgement: "Crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."¹⁰

9 Emmanuel Decaux, "La CIJ et les droits de l'homme", *Studi di Diritto Internazionale in onore di Gaetano Arangio-Ruiz*, editoriale scientifica, Turin, 2004.

10 Nazi Conspiracy and Aggression, Judgement of the Nuremberg International Military Tribunal, 1 October 1946, *Trial*, Vol. I.

Developments in international law on penal responsibility

The changes in the international law on state responsibility are all the more marked in that they go hand in glove with recent developments in the law on penal responsibility. The *Dictionnaire de droit public international*¹¹ cites Part VII of the Treaty of Versailles,¹² which, under the title “Penalties”, juxtaposed the personal responsibility of Kaiser Wilhelm II, arraigned before a special tribunal (Art. 227), and the prosecution of persons accused of having committed acts in violation of the laws and customs of war (Arts. 228 ff.). These two series of provisions remained largely a dead letter. Part VIII, which dealt with “Reparations”, was hardly more successful and poisoned relations between the Allies in the 1920s. It is interesting to note, however, that the Treaty of Versailles made a clear distinction between penal sanctions against persons, on the one hand, and financial reparations for the damages inflicted, on the other. Already at that time it proved very difficult to calculate “losses” and “damages” in terms of human lives and devastated properties and territories.

The concept of penal sanctions was definitively incorporated into international law after the Second World War, when the Nuremberg and Tokyo Tribunals were established. The inception of the International Criminal Court in 1998 marked the logical culmination of the process. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide stipulates that the

Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties [in French, *sanctions pénales effectives*] for persons guilty of genocide or any of the other acts enumerated in article III. (Art. 5)

A similar article in the 1949 Geneva Conventions stipulates that the

High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions [in French, *sanctions pénales adéquates*] for persons committing, or ordering to be committed, any of the grave breaches of the present Convention ... (Art. 129 of the Third Geneva Convention relative to the Treatment of Prisoners of War)

The double play of state responsibility and individual criminal responsibility poses a number of problems, if only in respect of the immunity of the state and its representatives, except when provided otherwise in treaties or by decision of the UN Security Council. The French Cour de Cassation recalled this in its ruling of 13 March 2001 in the case implicating Colonel Muammar al-Gaddafi, the Libyan leader, in the 1989 attack on the

11 Above note 1.

12 The Versailles Treaty, 28 June 1919, available at <http://www.yale.edu/lawweb/avalon/imt/menu.htm> (last visited 14 April 2008).

UTA DC-10.¹³ The associations of relatives of the victims tried to bring the case before the European Court of Human Rights, but their dubious financial conduct (they accepted an out-of-court settlement) led to their application being struck out as moot on 4 October 2006 by the Grand Chamber, which did not even examine the admissibility of the government's argument that the applicants had lost their status of victims.¹⁴ Even if the obstacle of state immunity is removed, the dual nature of state and individual responsibility remains intact.¹⁵ In practical terms, it was no easy task to distinguish between the jurisdiction of the International Criminal Tribunal for the former Yugoslavia (ICTY) and that of the ICJ, there being a serious risk that they would end up with conflicting case laws, notwithstanding decisions by the other court. The ICJ based its decisions largely on the facts established by other independent bodies, but it did not seek to obtain the elements of "proof" of which only the ICTY had confidential knowledge; this led to a serious distortion, as pointed out by the ad hoc judge Ahmed Mahiou, in that the court found that there had been no genocidal intent without having really sought to prove that such an intent had existed. The result was the emergence of doctrinal criticism opposing the inadequacy of the court's "civil" procedure against the nature of the penal dispute.

The scale of sanctions

This dual development has served, I feel, to blur the classic concepts of sanctions and reparation. The international community has removed capital punishment from the scale of sanctions, another significant development since the Nuremberg and Tokyo trials. This step forward by the ad hoc tribunals established by the Security Council was enshrined in the Rome Statute, albeit not without difficulty as witness Article 80. The harshest sentence the International Criminal Court can hand down is a "term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person" (Art. 77). Since the jurisdiction of the national courts remains intact, a "double standard" may be applied. This was the case in Rwanda, where those sentenced by the local courts were publicly executed whereas the most senior officials brought before the International Criminal Tribunal for Rwanda were spared. The idea that the nature of the sanction must be in proportion to the scope of the crime must be overcome. Even a return to the law of retaliation would not be sufficient for mass crimes. It is precisely because the crime committed is "beyond compare" that it is morally

13 *Arrêt de la Cour de Cassation*, 13 March 2001, No.1414. For a discussion on the principle, see the colloquium organized by the Association SOS Attentats, *Terrorisme, victimes et responsabilité pénale internationale*, Calmann-Lévy, Paris, 2003. See also Salvatore Zappalà, "Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case before the French Cour de Cassation", *European Journal of International Law*, Vol.12 (3) (2001), pp. 595–612.

14 *Association SOS Attentats et de Boëry v. France*, 4 October 2006.

15 See Rafaëlle Maison, "La responsabilité individuelle pour crime d'Etat en droit international. De la sanction pénale des individus par les juridictions internationales", dissertation, Paris II, 2000.

right to break the cycle of vengeance, of settlement of accounts – such as the expedited “trial” of the Ceaușescus – and public lynchings – such as Saddam Hussein’s execution to taunts of hatred – but without resorting to a “symbolic trial”. The imperatives of truth, justice and reparation, recalled in the guidelines adopted by the Human Rights Commission pursuant to the work of Louis Joinet, would not be met.¹⁶

The situation is even more complex when it comes to the sentences handed down by the various chambers of the ad hoc tribunals, which are far from coherent. There are variations over time – between those initially charged, who were simply following orders, and the principal “leaders” – and above all differences in appreciation between the examining and the appeal chambers. These developments and contradictions reflect the absence of a clear ranking of crimes. The “light” sentences recently handed down by the ICTY against those responsible for the Vukovar massacre sparked official protests from the Croatian authorities.¹⁷ Above and beyond what the “public” thinks, which varies depending on the camp, the “penal policy” of the ad hoc tribunals – torn between the prosecutor and the court – obviously lacks coherence and thus serves no pedagogical purpose. The same no doubt applies to our national courts, which are too humane, but the need to render exemplary justice “for humanity’s sake” sets international justice apart. Having been unable to prevent large-scale crimes, the international community should aim to dissuade by effectively combating impunity. It will probably not be possible to prosecute all the perpetrators of a genocide, just as not all the families of the victims will obtain compensation, but it must not be forgotten that mass crimes, although decided at the highest level by a handful of political or military leaders, are the sum of thousands of individual crimes whose perpetrators also bear full responsibility. By waiving the head of state’s immunity and rejecting the excuse of due obedience, penal law broke a vicious circle. Everyone is now fully accountable, to themselves and in law, and must answer for their acts.¹⁸

The concept of “victims’ rights”, so dear to French diplomacy, is new to penal law, especially with regard to mass crimes. The victims who attend the trial are there as witnesses, not as “civil parties”. This was already the case in Nuremberg, when Mrs Vaillant-Couturier testified.¹⁹ The Rome Statute endeavours to make a place for the victims, but in reaction to the practice of the ad hoc tribunals, selecting victims as mere witnesses subject to cross-examination who are bereft of respect for their suffering and on occasion of protection against subsequent reprisals. Article 79 provides for the establishment of a “Trust Fund”

16 Revised final report prepared by Mr Joinet pursuant to Sub-Commission decision 1996/119, Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1.

17 See *Mrksić et al.* (IT-95-13/1), see also James M Yoch Jr, “ICTY prosecutors appeal “lenient” sentences in Vukovar massacre trial”, *Jurist*, 30 October 2007, available at <http://jurist.law.pitt.edu/paperchase/2007/10/icty-prosecutors-appeal-lenient.php> (last visited 14 April 2008).

18 Gen. Jean-René Bachelet, *Pour une éthique du métier des armes, vaincre la violence*, Vuibert, Paris, 2006.

19 For her testimony see *The Avalon Project at Yale Law School, Nuremberg Trial Proceedings Vol. 6, Forty-fourth day*, Monday, 28 January 1946, available at <http://www.yale.edu/lawweb/avalon/imt/proc/01-28-46.htm> (last visited 14 April 2008).

for the victims, but its scope is uncertain. If the Court collects no “fines or forfeiture” from convicted criminals who have organized their own insolvency – Charles Taylor, for example, received legal aid from the Special Tribunal for Sierra Leone²⁰ – international solidarity will have to provide the funds. It would also be unfair to all the anonymous victims who did not come forward for lack of proof or proper proceedings to draw too close a link between the fate of the accused and that of the victims. It would be particularly unhealthy if, depending on the whims of international politics or penal strategy, some victims were indemnified and others forgotten. Again, moving from the individual criminal trial – where the victim and the accused are brought face to face – to a collective trial for mass crimes poses problems of principle and practical difficulties of another kind entirely. In this field, the guidelines drawn up by Théo Van Boven and Chérif Bassiouni on the forms of collective reparations are useful.²¹ They propose not just symbolic measures, useful though these may be, but also rehabilitation, medical assistance and legal programmes.

It might be useful to come back to the notion of “effective penalties”. The first condition is that the penalty must exist. This implies combating impunity at all levels, from the head of state down to the foot soldier, and in all places, avoiding, as far as possible, double standards (the UN Secretary-General unfortunately spoke of a “rich man’s war” in the former Yugoslavia,²² yet all victims are entitled to the same vigilance, whether in Darfur or in Chechnya). But the International Criminal Court must not become a regional court either, mired in African crises. Even if justice has a cost, and choices have to be made in terms of what inquiries and prosecutions to undertake, beyond the limits inherent in the ICC’s jurisdiction any selectivity in international justice would spell long-term disaster for its legitimacy.

The effectiveness of the national framework

The best guarantee of universality remains the principle of complementarity, the idea being that national justice must be the first bulwark against violations of human rights and humanitarian law. Effective national prosecutions are also one of the positive obligations incumbent on all states. The states party to the Geneva Conventions must “respect and ensure respect” for humanitarian law. Under the

20 See David Charter, “Charles Taylor war crimes trial opens in The Hague amid funding crisis”, *The Times*, 7 January 2008, available at <http://business.timesonline.co.uk/tol/business/law/article3141681.ece> (last visited 14 April 2008).

21 Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law, prepared by Mr. Theo van Boven pursuant to Sub-Commission decision 1995/117, UN Doc. E/CN.4/Sub.2/1996/17; and regarding the Commission on Human Rights, The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report of the Special Rapporteur, Mr. M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33, UN Doc. E/CN.4/2000/62.

22 UN Secretary-General Boutros-Ghali famously said this in July 1992, when accusing the Western powers of fighting “the rich man’s war” in Yugoslavia while ignoring the collapse of Somalia.

human rights system, whose guaranteed rights were characterized for far too long by an approach of “non-interference”, the states parties to international instruments must also respect, protect and implement their commitments. In a number of recent decisions (the Turkish cases in particular), the European Court of Human Rights has referred to the importance of the positive obligations arising from Articles 2 and 3 of the European Convention on Human Rights, emphasizing the obligation to investigate, prosecute and punish any violations committed. Justice must undoubtedly be as close to the ground as possible, international justice serving in the last resort to guarantee the sound administration of justice.

For the principles of subsidiarity and complementarity to be fully functional, national justice must live up to its name and comprise competent, independent and impartial judges. What is true of the regular courts is even truer of courts of exception, starting with military tribunals.²³ How can one speak of exemplary rulings if, in the name of *esprit de corps*, the decisions of the military courts are neither motivated nor published, as is still the case in France? Effective sanctions are closely related to a form of court “pedagogy” that must be based on clear markers and predictable sanctions. This should be an imperative at all levels, from the immediate disciplinary action taken by a hierarchical authority to the penal sanctions that are handed down within a “reasonable period” and take account as required of the situation or the attenuating circumstances. In this regard, time plays a role that is often overlooked. The Milošević trial, which got under way far too late – the ICTY was established in 1993 and had jurisdiction as of 1991, yet it was not until 1997 and the Kosovo crisis that the first indictments were delivered – and was held up by what can only be called unwarranted procedural manoeuvring before being cut short by events known to all, was tragic proof that the ICTY had reached an impasse. Trials concluded over ten years after the fact, no matter how successfully, undermine court effectiveness. Justice may be catching up with all the perpetrators of crimes in cases where there is no statute of limitations – one instance is the long-delayed trial of some of the elderly surviving members of the Khmer Rouge clique of leaders – but only immediate “effective sanctions” can play a truly dissuasive if not preventive role.

The responsibilities of the United Nations

The United Nations also has an essential role to play. Where local justice is non-existent, the Peacebuilding Commission recently created as a subsidiary body by the Security Council and the General Assembly should make “reconstruction” of the legal system and the restoration of legal certainty a priority.²⁴ The ongoing examination, notably at the initiative of Switzerland, of the concepts of justice and

23 See all the principles listed in Issue of the administration of justice through military tribunals: report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Mr. Emmanuel Decaux, UN Doc. E/CN.4/2006/58.

24 See <http://www.un.org/peace/peacebuilding/> (last visited 14 April 2008).

the rule of law should be taken further, in particular in countries emerging from crisis. How can sanctions be effective when there are no judges or prisons and the former warring parties share the spoils of political power? Just like the struggle against corruption, the requirement of justice should not be used by one side against the other to pursue the war by other means, to impose a victor's justice and gloss over the crimes that were the price of victory.

But the United Nations should also apply the most stringent criteria of justice to itself. This it has not yet done. Peacekeeping operations are not within the purview of the European Court of Human Rights, as recalled in the recent decisions on *Behrami v. France* and *Saramati v. France and Norway*, handed down on 2 May 2007 by the Grand Chamber in respect of the UN Interim Administrative Mission in Kosovo (UNMIK) and the Kosovo Force (KFOR). The Court referred to the ILC's recent work to transpose the codification of state responsibility to the draft article on the responsibility of international organizations and quoted the UN legal counsel as stating that "the acts of such subsidiary organs were in principle attributable to the organization and, if committed in violation of an international obligation, entailed the international responsibility of the organisation and its liability in compensation" (para. 33). The ILC has to clarify not just the responsibility of the organization as such, but also that of its staff, which should not, as in the case of sexual abuse committed by peacekeepers, hinge on more or less lax national systems. A shared disciplinary system would seem the best means of maintaining the highest standard within multinational contingents, on the basis of the principle of subsidiarity and respect for *non bis in idem*.

There remains one constraint that is hard to get around: speaking of justice and sanctions implies calling into question the states and international organizations, but leaves open the question of armed groups, not to mention terrorist movements. The dissuasive nature of sanctions goes hand in hand with the hierarchy and forms of discipline inherent in established structures, even under the terms of Additional Protocol II to the Geneva Conventions. This being so, the argument of reciprocity cannot be invoked in situations that are by their very nature asymmetrical. It is to be hoped that the argument of exemplary sanction will be all the more effective. Sanctions are not only negative; they may also have a positive import.