

Reception date: 2021-06-17; acceptance date: 2021-09-02

ARE DICTATES OF PUBLIC CONSCIENCE A NORM OF
JUS COGENS IN INTERNATIONAL HUMANITARIAN LAW?
¿Son los Dictados de la Conciencia Pública norma
jus cogens en el Derecho Internacional Humanitario?

JESÚS FRANCISCO RAMÍREZ BAÑUELOS*

Instituto Tecnológico y de Estudios Superiores de Occidente

Abstract

This essay deal with one of the components of the general principles of law that has a normative character in international humanitarian law: the dictates of public conscience. Through a critical approach to international law, this essay intends to contribute to the academic discussion in the sense that the dictates of public conscience have acquired the status of *jus cogens* in international law. To this end, Part I of this essay reviews the evolution of dictates of public conscience. Part II of this essay shows that the complexity of the dictates of public conscience is given by the difficulty of establishing a specific content as a normative device. In this regard, the intended contribution is to point out that the dictates of public conscience are an open norm that nevertheless has an identifiable purpose. Part III reinforces the previous statement by pointing out that the content of the dictates of public conscience is dynamic and therefore situational, which allows for a progressive interpretation. It concludes with the assertion that the dictates of public conscience have attained the character of *jus cogens*.

Keywords

Dictates of public conscience; *jus cogens*, international humanitarian law.

Resumen

Este ensayo trata de uno de los componentes de los principios generales del derecho que tiene carácter normativo en el Derecho Internacional Humanitario: los dictados de la conciencia pública. Mediante un enfoque crítico del derecho internacional, este ensayo pretende aportar a la discusión académica en el sentido de que los dictados de la conciencia pública han adquirido el rango de *jus cogens* en el derecho internacional. Para ello, la parte I de este ensayo realiza un repaso de la evolución de los dictados de la conciencia pública. La parte II de este ensayo muestra que la complejidad de los dictados de la conciencia pública está dada por la dificultad de establecer un contenido específico en tanto dispositivo normativo. A este respecto, la aportación que se pretende hacer es señalar que los dictados de la conciencia pública son una norma abierta que, no obstante, tiene una finalidad identificable. En la parte III se refuerza la afirmación anterior al señalar que el contenido de los dictados de la conciencia pública es dinámico y por ello situacional, lo que le permite una interpretación progresiva. Se concluye con la afirmación de que los dictados de la conciencia pública han alcanzado el carácter de *jus cogens*.

Palabras clave

Dictados de la conciencia pública; *jus cogens*, derecho internacional humanitario.

* Abogado y maestro en Gestión de Servicios Públicos en Ambientes Virtuales por la Universidad de Guadalajara. Máster en Derecho Penal Internacional por la Universidad de Granada. M2 en Historia del pensamiento jurídico contemporáneo por la Universidad Paris 1 Panthéon-Sorbonne. Profesor de asignatura. Iteso (Tlaquepaque, México). Correo electrónico: jramirezbañueლოს@iteso.mx; ramirezbañueლოს@gmail.com. ORCID: <https://orcid.org/0000-0002-7458-9853>.

1. Introducción

War has been a concomitant theme in the civilizing development of humanity. The law has attempted to establish reasonable rules to regulate armed conflict; however, it has constantly been noted that codification is not all-encompassing. Moreover, international humanitarian law (hereinafter IHL) has noted that the law lags technological advances and innovative methods of waging war.

However, the IHL has complementary tools to codification that allow it to cover a broader spectrum than that presented by legislation on the conditions of armed conflict. In other words, the IHL is a legal system in which international treaties are one of the legal alternatives for regulating war, but not the only one. This is so because the IHL recognizes the legal validity of international custom and general principles of law, as well as the specific principles of the IHL.

It exceeds the purposes of this essay to make a general study of the *jus cogens* character of the Martens Clause as a whole. This essay will deal primarily with one of the components of the general principles of law that are normative in the IHL, namely the dictates of public conscience (hereinafter PCDs). The PCDs are one of the pillars of the Martens Clause (hereinafter MC) included in 1899 as part of the IHL¹. The MC has been the subject of various interpretations in academic, military, and jurisprudential circles regarding its content and scope. The range of appreciation of the MC goes from those who consider it as a clause in disuse² to those who consider it with a civilizing character³. In any case, there is unanimity that the MC has been one of the most enduring elements in the evolution of the IHL. Although some consider that this validity has been mythological⁴ and inapplicable in the battlefield⁵, there are also those who consider that the reason for the existence of the MC is extra-legal, as a philosophical foundation of the IHL⁶. This essay is positioned in the last group of thought.

Through a critical approach to international law⁷, this essay aims to contribute to the academic discussion that PCDs have acquired the status of *jus cogens* in international law. In this respect, part I of this essay reviews the evolution of PCDs. Part II shows that the complexity of PCDs is due to the difficulty of establishing a specific content as a normative device. In this regard, the contribution that this essay intends to make is to point out that the PCDs are an open norm⁸ that nevertheless, has an identifiable purpose. Part III reinforces the previous statement by pointing out that the content of PCDs is dynamic and therefore situational, allowing for progressive interpretation. It concludes with the assertion that PCDs have achieved the character of *jus cogens*.

2. The evolution of PCDs

Despite their different legal drafting and scope since their inclusion in 1899 until today the PCDs have maintained coherence as the foundations of the IHL of an extra-legal nature and unavailable with respect to the will of the actors in the armed conflicts. Furthermore, they have had the constant purpose of conserving international stability and the self-preservation of the human species⁹ around the axes of good faith and the prohibition of abuse of the law¹⁰.

¹ UNITED NATIONS (1899), preamble.

² CASSESE (2000), pp. 215-216; AMBASSADOR OF THE RUSSIAN FEDERATION (1995), p. 13.

³ MÜLLERSON (2014), pp. 831-833; VEUTHEY (2003), pp. 608-610.

⁴ GILADI (2014), pp. 862-863; CASSESE (2000), pp. 215-216.

⁵ MERON (2006) pp. 28-29; MERON (2000), p. 88.

⁶ VEUTHEY (2003) pp. 631-633; MINISTER AT THE EMBASSY OF JAPAN (1995), p. 3.

⁷ CORTEN (2009), pp. 59-62.

⁸ ZAGREBELSKY (2011), pp. 109-130.

⁹ INTERNATIONAL COURT OF JUSTICE (1996), para 98.

¹⁰ CRIDDLE AND FOX-DECENT (2019), pp. 4-5; SMITH (2019), pp. 188-192; INTERNATIONAL COURT OF JUSTICE (1996), para 99.

2.1. A diplomatic strategy of consensus

The origin of the legal value of PCDs is linked to the emergence of MC. It is unanimous opinion that the inclusion of MC was a diplomatic strategy of the Russian delegate F.F. Martens to achieve a consensus between powerful and weak countries regarding the adoption of a binding international instrument to regulate war¹¹. Many point out that F.F. Martens did not consent to or attempt to give it the scope that MC currently has¹². In any case, what is interesting to highlight in this section is that from their inclusion in the MC, the PCDs acquired a normative value as evident and unalterable realities by the will of the parties.

In this respect, when we analyze the legal construction of the MC, we appreciate that in its enunciation it is noted that the general principles of international law derived, among other elements of the PCDs, are a given fact that precedes international regulation¹³. In this sense, the choice of the verb *constater* in the original French text to make it clear that the delegates did not create this normative provision, but only recognized it in the codification as an evident and transcendent reality to the legislative work, is enlightening. According to the legal definition of the time *constater* means to establish the reality of a fact by means of convincing evidence¹⁴. In this way, not only was the adoption of the Convention on the Laws and Customs of War on Land possible, but the PCDs were given normative value as a minimum requirement for achieving international stability and the preservation of the human species. In other words, the diplomatic strategy of consensus transcended its purpose and triggered the configuration of a larger legal framework.

Indeed, a systematic interpretation of the MC in the preamble of the Convention on the Laws and Customs of War on Land leads to the conclusion that the MC, and with it the PCDs, is intended to protect the interests of humanity and the progressive requirements of civilization. It is also clear that the delegates at the Convention on the Laws and Customs of War on Land warned against legislating in all possible cases of armed conflict, making it clear that it was not their intention to give rise to arbitrariness in unforeseen cases. For this reason, along with the legal provisions established in the Regulations annexed to the Convention on the Laws and Customs of War on Land, they gave normative value to the general principles of international law derived from custom, the principles of humanity, and the PCDs¹⁵. The inclusion of the MC in the Convention on the Laws and Customs of War on Land established the *erga omnes* value of the PCDs by situating them as components of the general principles of international law that are necessary even in the absence of the will of the parties.

There is no doubt that the inclusion of the MC in the Convention on the Laws and Customs of War on Land gave way to the introduction of the international normative concept of public awareness and its variants. Thus, the Geneva Protocol included the conscience of nations¹⁶. The Universal Declaration of Human Rights refers to the conscience of humanity¹⁷. For its part, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity mentions issues of serious concern to world public opinion¹⁸. The Ottawa Treaty on the prohibition of anti-personnel mines included the phrase public conscience¹⁹, and the Rome Statute of the International Criminal Court uses the concept of conscience of humanity²⁰.

It should be noted that the IHL took up literally the original expression of PCDs in the Convention on the Laws and Customs of War on Land in the denunciation provisions of the four

¹¹ STAPLETON-COORY (2019), pp. 480-482; SMITH (2019), pp. 187-188; CRAWFORD (2006), pp. 1-3; MERON (2000), p. 79; CASSESE (2000), pp. 187-188; GILADI (2014), pp. 849-852.

¹² STAPLETON-COORY (2019), p. 479; GILADI (2014), p. 859; CASSESE (2000), pp. 188-192.

¹³ VEUTHEY (2003), p. 609; SHAHABUDDEN (1996), pp. 184-186.

¹⁴ ACADEMIE FRANÇAISE (1762), n. *constater*.

¹⁵ UNITED NATIONS (1899), preamble.

¹⁶ UNITED NATIONS (1925), preamble.

¹⁷ UNITED NATIONS (1948), preamble.

¹⁸ UNITED NATIONS (1968), preamble.

¹⁹ UNITED NATIONS (1997), preamble.

²⁰ UNITED NATIONS (1998), preamble.

Geneva Conventions of 1949²¹; the United Nations Convention on Certain Conventional Weapons²²; as well as in Additional Protocol I²³; and Additional Protocol II to the 1949 Geneva Conventions²⁴.

2.2. A redundant element or a supplementary provision?

In the opinion of some, the MC is a redundant clause and therefore useless²⁵. Under this consideration the PCDs have no reason to exist in the codification of the IHL, since the principles of proportionality, necessity, and the prohibition of causing unnecessary suffering to comprise its scope. For these authors, the MC has been used *ad abundantiam* in most of the jurisdictional cases in which it has been referred to²⁶. These include the Advisory Opinion of the International Court of Justice on the Use and Threat of Use of Nuclear Weapons²⁷.

In the opinion of these authors the MC is a relic of the Convention on the Laws and Customs of War on Land that has been surpassed with the 1949 Geneva Conventions²⁸. In this respect, they cite the wording of the MC in the Convention on the Laws and Customs of War on Land to the effect that the normative value of the MC was provisional until a more complete codification was drawn up, which in their opinion has already been complied with²⁹. Cassese even goes so far as to point out that the MC is a meaningless ritual that should disappear from the future codifications of the IHL³⁰.

The repeated and widespread use of PCDs by the international community in codifications, military manuals and court rulings can be opposed to these objections³¹. Furthermore, complete codification has not been achieved in the IHL. In addition, it was precisely in the 1949 Geneva Conventions that PCDs reached their peak in international codification as peremptory norms. In addition, the fact that the purpose of the PCDs coincides in some cases with certain treaty provisions, international custom, or the principles of the IHL does not imply that the PCDs are useless, but rather reaffirms the systematic nature of the IHL. In addition, PCDs are a preventive component that allows for the resolution of unregulated and even unforeseen situations³². This is evident in the theoretical discussions regarding the eventual use of autonomous weapons systems.

A more moderate doctrinal position considers that MC, and with it PCDs, has a supplementary function. This view derives from the literalness of the clause in the sense that it provides that in the absence of a conventional or customary rule, the general principles of law formed as derived, among others, from the PCDs are applicable. It is true that this was the original intention of the delegates at the Convention on the Laws and Customs of War on Land³³, since the preamble of that instrument states literally that the MC would be a rule of interpretation for Articles 1 and 2 of the Regulations attached to the Convention on the Laws and Customs of War on Land³⁴ to avoid arbitrariness on the part of the leaders of the armies³⁵. However, given the evolution of the MC, it can be stated that currently the PCDs have a founding value of the IHL. That is, the PCDs do not act as simple criteria of substitution, but rather they

²¹ UNITED NATIONS (1949a), art 63; UNITED NATIONS (1949b), art 62; UNITED NATIONS (1949c), art 142; UNITED NATIONS (1949d), art 158.

²² UNITED NATIONS (1980), preamble.

²³ UNITED NATIONS (1977a), art. 1 (2).

²⁴ UNITED NATIONS (1977), preamble.

²⁵ EVANS (2013), p. 716; CASSESE (2000), pp. 192-193.

²⁶ CASSESE (2000), pp. 202-208.

²⁷ CASSESE (2000), pp. 205-207.

²⁸ UNITED NATIONS (1899), arts. 1-2.

²⁹ GILADI (2014), pp. 859-863.

³⁰ CASSESE (2000), pp. 215-216.

³¹ KAHN (2016), pp. 27-28; MERON (2006), pp. 16-17; INTERNATIONAL COURT OF JUSTICE (1996), para 186.

³² VEUTHEY (2003), p. 610.

³³ UNITED NATIONS (1899), arts. 1-2.

³⁴ UNITED NATIONS (1899), arts. 1-2.

³⁵ SHAHABUDDEN (1996), p. 186.

inform the content of the entire system of the IHL. This is so, since when we analyze the purpose of the PCDs we notice that they are a substantial component of the IHL³⁶.

In fact, neither conventional codification nor customary rules derived from the international community, nor general principles of law or those specific to the IHL, can abrogate the purpose of PCDs, since questioning the transcendence of international stability and the self-preservation of the human species would be a contradiction not only in law but in civilization. In essence, the PCDs are self-referential elements that protect the existence of humanity and are manifested in the various sources of the IHL³⁷.

2.3. PCDs as a peremptory element of international humanitarian law

The value of PCDs as peremptory elements of the IHL system is embodied in the four Geneva Conventions of 1949. These take up the original concept of PCDs as drafted in the MC in the Convention on the Laws and Customs of War on Land but give them peremptory status with substantial value in the IHL³⁸. This is noticeable in the wording of the possibility of states to denounce the four Geneva Conventions of 1949, without this implying any dissociation from the PCDs. For greater clarity, the text of the treaties provision is transcribed below.

The denunciation shall have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience³⁹.

From the preceding transcript we can see that the denunciation to which the 1949 Geneva Conventions give possibility has effect *si omnes*, while the PCDs have effect *erga omnes*. This is so, since not even the willingness of states to disengage themselves from their treaty obligations implies the cessation of the effects of PCDs. In other words, the peremptory status of PCDs is given by their very nature which precedes and transcends codification. In other words, the PCDs have effects prior to, concomitant with and after the validity of the IHL codification.

Thus, in the four Geneva Conventions the nature of PCDs was modernized and their value as norms of *jus cogens* was reached⁴⁰.

It is important to emphasize here that, although it did not pronounce itself in favor of the affirmative —because it explicitly considered that it was not the subject of the consultation— the International Court of Justice showed that the MC, and with it the PCDs, deserve a study of their value as a norm of *jus cogens*⁴¹.

3. The complexity of PCDs configuration

The acceptance of PCDs as *jus cogens* standards is not sufficient if their content is not clarified. Indeed, the debate has been about finding the substance of PCDs. The majority position points out that the PCDs have a vague reference that does not allow their application by the various operators of the IHL. Although this may appear to be the case in the first instance, we believe that a deeper and more interdisciplinary conception of the concept of PCDs can shed light on their scope.

The purpose of the PCDs is the maintenance of international stability and the self-preservation of the human species. These ideas are congruent with the sense of the idea of public awareness understood as the self-reflection of the reality of the environment. In other words, public awareness implies the identification of the actor with the environment in which

³⁶ MERON (2006), pp. 87-88.

³⁷ INTERNATIONAL COURT OF JUSTICE (1996), para 186.

³⁸ UNITED NATIONS (1899), arts. 1-2.

³⁹ UNITED NATIONS (1949a), art 63; UNITED NATIONS (1949b), art 62; UNITED NATIONS (1949c), art 142; UNITED NATIONS (1949d), art 158.

⁴⁰ INTERNATIONAL COURT OF JUSTICE (1996), para 78.

⁴¹ INTERNATIONAL COURT OF JUSTICE (1996), para 83.

he lives. Therefore, self-knowledge based on morality or subjective ethics is not enough, but it is essential that knowledge of reality be generalized in the community even if it is not unanimous⁴². This allows that the active or omissive conduct that is carried out has a criterion of sufficient generality to be judged.

Furthermore, when we analyze the PCDs we must emphasize that for the IHL not all the elements that make up the public conscience are legally binding, but only the dictates of that public conscience, that is, the precepts that inspire the conscience that makes man feel present in the world.

This precision allows us to have an objective criterion to conceptualize PCDs. In fact, the norm of *jus cogens* in the IHL refers only to those elements consubstantial to the international stability and self-preservation of the human species. Other moral, religious, and even legally valid values at a sub-national, national, regional, or international level that do not reach this status of being indispensable to maintain the purpose of the IHL cannot be considered as peremptory.

It is true that the PCDs do not provide, as a legal rule, for a specific legal assumption that binds the parties. But this derives from its very nature. In the case of the latter, it is important that the parties to the agreement have a clear understanding of the nature of the agreement and that it is not a matter of a mere agreement. In other words, PCDs are the necessary components for civilization to progress even when it is recognized that war will continue to exist as a social phenomenon. PCDs are the guarantors of the balance between the expression of power in conflicts and the preservation of civilization.

In this sense, the inclusion of the axes of good faith and the prohibition of the abuse of the right in the conception of PCDs becomes important. This means that actors in armed conflicts are obliged by reason of public conscience to act in good faith and not to take any action or omit to act in contravention of it. This concept of good faith is fundamental to international stability and to all human relations in general. Its observance gives a character of justice to human situations, including those resulting from armed conflict.

For its part, the prohibition of the abuse of the right implies that the actors in armed conflicts have the imperative to abstain from exceeding the exercise of their right. This concept is based on ethical principles, but it transcends the public consciousness in that the rights are not absolute, since they must be weighed against the other rights of the members of the international community. For the IHL, therefore, it is necessary to limit the rights of those involved in the struggle, to provide for the excess of power to the detriment of civilization.

As can be seen, the conceptual breadth of PCDs does not derive from normative inconsistency, but from their philosophical significance. The PCDs are elements of the duty to be that condition the being. This is what explains their character of *jus cogens*.

4. The dynamic character of PCDs

To achieve their objective, PCDs are conditioned to the prevailing circumstances of reality. Therefore, it is said that the content of PCDs is situational.

Indeed, it is possible that what is considered a positive element for the public conscience today may not be so in future generations; or, as history shows, that what was considered adequate for the public conscience in past generations may not be so in ours⁴³. This circumstance of the PCDs only reinforces their character as a peremptory norm, since their essence, i.e., international stability and self-preservation of the human species, is coordinated by the interests and demands of civilization, as established in the preamble of the Convention on the Laws and Customs of War on Land⁴⁴.

⁴² WEERAMANTRY (1996), p. 267.

⁴³ CRAWFORD (2006) pp. 11-12.

⁴⁴ UNITED NATIONS (1899), arts. 1-2.

These interests and civilizing demands are understood as the requirements of humanity to advance to a better stage and never to retreat. It is in this sense that the affirmation of the progressive value of PCDs, as it has been established since the end of the Second World War in international human rights law, is understood. We find here that the IHL in its evolution experienced a change of focus with the incursion of the human person in the international scene, that is, from a conception notoriously centered on the state and its sovereignty the IHL has been moving towards a more humanized vision in which a specific value is given to the human person⁴⁵. This is clearly identifiable in the protection afforded to the civilian population in armed conflict.

In addition, the dynamic nature of PCDs has meant that the IHL system pays special attention to the elements that make up the environment of civilization. Therefore, we see a tendency to consider PCDs as constitutive elements of environmental protection in armed conflict⁴⁶.

On the other hand, it is noted that PCDs will continue to develop mandatory norms for actors in armed conflict as an expansion of civilization into areas not yet covered by man is undertaken. A good example of this is outer space, where PCDs have undoubtedly already influenced the consideration that celestial bodies cannot be the object of sovereign appropriation⁴⁷.

As can be seen, the content of PCDs cannot be encapsulated in a concrete legal assumption, since their progressiveness is immanent to the development of civilization.

5. Conclusion

The development of civilization has included the humanization of armed conflict. The IHL has carried out incessant work to create a more advanced codification to regulate the phenomenon of war in a rational and contemporary way. However, the difficulties inherent in conventional codification, such as the will of states and the dynamism of technological advances, always leave areas unregulated.

In this sense, PCDs have been established as indispensable elements for achieving the objectives of the IHL. This is because PCDs have a purpose that is transcendental to legislative activity, since they include a guarantee for the maintenance of international stability and the preservation of the human species.

The complexities of determining the content of PCDs can be overcome when it is understood that only those elements that are essential for the achievement of their objectives—their dictates—are those that have the character of peremptory. It is the elements that derive from the dictates that are discovered as civilization progresses and shape the rest of the sources of the IHL.

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⁴⁵ MERON (2006), pp. 27-29.

⁴⁶ SMITH (2019), pp. 186-187.

⁴⁷ UNITED NATIONS (1966), article II.

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