When state practice does not exist: criteria of humanization and dictates of the public conscience in international criminal case law

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The positivistic vision has been dominant in the modern system of international law. This trend, which started with the work of Erich Vattel and was consolidated by several authors of the early twentieth century - e.g., Dionisio Anzillotti and Hans Kelsen-, considers the State and its consent to be the center of the argumentation to understand who the subjects of international law are, what the legal sources should be used, what the nature of international jurisdiction is (voluntary or obligatory), etc. It is a trend that overhauled the foundations of the understanding of international law based on natural law, as stated the so-called founding fathers of international law, Francisco de Vitoria, Hugo Grocio and Francisco Suárez.[1]

However, from the beginning of the XXth century, this positivistic vision has began to be disputed by several authors. Many of them, underlining the need to recognize the status of the individual in international law, took the first steps towards a process of humanization of the international law that later, after 1945, found fertile ground for development. These authors are, among others, Alejandro Álvarez, George Scelle, Nicola Politis, André Mandelstam, Charles De Visscher, Jean Spiropoulos, and French jurist León Duguit.[2]

Importantly, one of the most visible early manifestations of the trend towards the humanization of international law emerged from the framework of international humanitarian law. The Hague International Conference, in 1907, which approved the Convention (IV) respecting the Laws and Customs of War on Land[3], was a notable example in this regard. It was a conference that, according to the former

[1] Cançado Trindade. Antônio A., *International Law for Humankind Towards a New Jus Gentium*, Leiden/Boston, Martinus Nijhoff Publishers, 2013, pp. 9-30.
[2] Politis, Nicola, "L'influence de la doctrine de L. Duguit sur le développement du droit international", *Archives de Philosophie du droit et de Sociologie juridique*, No.1- 2, 1932, pp.69-81
[3] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

Cuban judge of the Permanent Court of Justice, Antonio Sánchez de Bustamante y Sirvén, "had not had the purpose of codifying public international law and submitting differences between States to arbitration, but rather was a result of the desire, purely political, of reducing armaments in Europe, as a means to obtain general peace."[4] However, one of the elements of this Convention that can be considered as a manifestation of the humanization of the international law was the introduction of the well-known "Martens Clause" in its preamble. This clause, proposed by the Russian jurist F. F. de Marten, appealed to a residual formula of application of "the laws of humanity, and the dictates of the public conscience".[5]

As Theodor Meron has argued, this clause "has ancient antecedents rooted in natural law and chivalry", and "It is articulated in strong language, both rhetorically and ethically, which goes a long way toward explaining its resonance and influence on the formation and interpretation of the law of war and international humanitarian law."[6] Although it was initially designed to provide "residual humanitarian rules for the protection of the population of occupied territories, especially armed resisters in those territories", it did not prevented that "a broad understanding has emerged to the effect that the Martens clause reaches all parts of international humanitarian law." [7]

Undoubtedly, the ethical and moral concepts contained in the clause, such as "principles of humanity" and "dictates of public conscience", have played a determining role in the application of various international judicial bodies and has been reiterated in various treaties on international humanitarian law.[8] In this sense they would have a key role in the application of international humanitarian law by

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[4] Sánchez de Bustamante y Sirvén, Antonio, *La Segunda Conferencia de la Paz, Reunida en el Haya en 1907*, Tomo Primero, Madrid, Librería General de Victoriano Suárez, 1908, p.V

[5] This clause stated that: "Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."

[6] Meron, Theodor, "The Martens Clause, Principles of Humanity, and Dictates of Public Conscience", *American Journal of International Law*, vol. 94, nº. 1, 2000, p.79

[7] Ibidem, p.79

[8] Ibidem, p.79-80.

international criminal tribunals such as the International Military Tribunal in Nuremberg, the International Criminal Tribunal for Yugoslavia and the International Criminal Tribunal for Rwanda.

Many cases submitted to these Tribunals had customary law as a main source of law and the basis of legal responsibility as the principle of criminal legality required the existence of defined rules. However, in many cases it was very difficult to determine and formulate existing customary norms. Reality shows that the determination of customary law becomes a complex task in many occasions.[9] As Mendelson put it, it sometimes becomes very difficult to discover what states really do, and the importance that should be given to their actions.[10] Indeed, there is "a high degree of freedom" prevails between doctrine and practice.[11] This difficulty was highlighted on more than one occasion by Antonio Cassese, who was very well aware of the enormous difficulty to define international norms that are unclear, and subject to different interpretations. It is even more difficult when we speak about norms of customary origin. And precisely these norms are the main legal source for such a novel branch law as the International Criminal Law, a body of unclear and underdeveloped norms of customary law.[12]

The absence of state practice meant that in many cases the international tribunals resorted to the ethical content of the "principle of humanity" and of "dictates of public conscience" to support their decisions. These principles would be applied on a residual basis, in many cases in the absence of state practice or *opinio iuris* to identify customary law. As Cançado Trindade says, in general, "the Martens clause

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[9] See generally about these reflections in: Díaz Galán, Elena Carolina; Bertot Triana, "La protección de los derechos humanos en la justicia penal internacional: el caso particular del Tribunal Penal Internacional para la ex-Yugoslavia en relación con el derecho consuetudinario y el principio de legalidad", *Universitas, Revista de Filosofía, Derecho y Política*, No. 29, 2019, pp.70-100

[10] Mendelson, Maurice H., "The International Court of Justice and the sources of international law", en Fifty years of the International Court of Justice, Essays in honour of Sir Robert Jennings, Edited by Vaughan Lowe University of Cambridge and Malgosia Fitzmaurice, Queen Mary and Westfield College University of London, Cambridge University Press, 1996, p.67.

[11] Kammerhofer, Jörg, "Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems", *European Journal of International Law*, 2004, vol. 15 No. 3, p. 551.

[12] Cassese, Antonio, "The ICTY: A Living and Vital Reality", *Journal of International Criminal Justice*, 2 2004, p. 591.

impedes, thus, the *non liquet*, and exerts an important role in the hermeneutics and the application of humanitarian norms."[13]

Because of space constraints three examples will be brought here that support the above argument. First, in the *Decision of the Defense Motion for Interlocutory Appeal on Jurisdiction in the Tadić case*, the Court of Appeals had difficulty in finding sufficient state practice, when deciding whether it was possible to establish the criminal responsibility of individuals for these violations in the context of an internal armed conflict, pursuant to the provisions of the common article 3 of the Geneva Conventions. The Court appealed to the case law of the Nuremberg Tribunal to conclude that the absence of treaty law on the punishment of serious international crimes did not prevent from establishing individual criminal responsibility. Thus, the Chamber held that "(p)rinciples and rules of humanitarian law reflect «elementary considerations of humanity» widely recognized as the mandatory minimum for conduct in armed conflicts of any kind", so that "(n)o one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition".[14]

Similarly, in the *Kupreškić case*, the Chamber's concluded that there is no sufficient State practice (*usus*) to support the idea of a customary rule prohibiting retaliation against civilians while in the hands of the adversary. For this reason the Chamber reasoned in the terms of the "Martens Clause" that "(i)n the light of the way States and courts have implemented it, this Clause clearly shows that principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent."[15]

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[13] Cançado Trindade. Antônio A., *International Law for Humankind Towards a New Jus Gentium*, Leiden/Boston, Martinus Nijhoff Publishers, 2013, p. 151.

[14] *Prosecutor v. Tadić,* IT-94-1, 2 October 1995, para. 129. Some author considered that it seemed premature that in 1995, based on practice, it could be maintained that the principle of individual criminal responsibility for war crimes committed in non-international armed conflicts was habitual. Henckaerts, Jean-Marie, "Civil War, Custom and Cassese", *Journal of International Criminal Justice*, 10, 2012, p. 1101.

[15] In general terms, the Court held "This is however an area where opinion iuris sive necessitatis may play a much greater role than usus, as a result of the aforementioned Martens Clause. In the light of the way States and courts have implemented it, this Clause clearly shows that principles of

In the *Furundžija case*, on the other hand, the humanization criterion incorporated in the "Martens Clause" was used to indicate that the prohibition of torture "has evolved in customary international law" among other examples. The Court described the evolutionary nature of prohibition of torture and for that purpose cited the *Lieber Code*, Articles 4 and 46 of the Regulations annexed to Convention IV of 1907, Law No. 10 of the Allied Control Council in its article II (1) (c) as well as the 1949 Geneva Conventions and their Additional Protocols of 1977[16].

The cited case law of the international criminal tribunals is of vital importance for the consolidation of customary norms in international humanitarian law. The principles of humanity and the dictates of legal conscience are coming to the aid in the absence of state practice, and inform the decisions of the tribunals. These decisions, in their turn, were later taken as legal tools for the determination of the developed Customary International Humanitarian Law.

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international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. The other element, in the form of opinion necessitatis, crystallising as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law"[15]. *Prosecutor v. Kupreškić et al*., Judgment, Trial Chamber, Case. IT-95-16-T, T.Ch., 14 January 2000, párr. 527. An ICRC study concluded that: "Because of existing contrary practice, albeit very limited, it is difficult to conclude that there has yet crystallised a customary rule specifically prohibiting reprisals against civilians during the conduct of hostilities. Nevertheless, it is also difficult to assert that a right to resort to such reprisals continues to exist on the strength of the practice of only a limited number of States, some of which is also ambiguous. Hence, there appears, at a minimum, to exist a trend in favour of prohibiting such reprisals". Henckaerts, Jean-Marie, Doswald-Beck, Louise (eds), *Customary International Humanitarian Law*, Vol. I: Rules; Vol. II: Practice (ICRC and Cambridge University Press, 2005), p.523.

[16] *Prosecutor v. Anto* Furundžija*, Judgement*, Trial Chamber, Case No.: IT-95-17/1-T, Date: 10 December 1998, párr. 137.