
The Martens Clause: Half a Loaf or Simply Pie in the Sky?

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Abstract

*The Martens Clause is indisputably one of the contemporary legal myths of the international community. Being particularly ambiguous, it has been variously interpreted. The author dismisses the more radical interpretation whereby the clause upgrades to the rank of sources of international law the 'laws of humanity' and the 'dictates of public conscience'. The other, less extreme interpretation, whereby the clause merely serves to reject a possible a contrario argument, is equally without merit. He suggests that the clause was essentially conceived of, at the 1899 Hague Peace Conference, as a diplomatic gimmick intended to break a deadlock in the negotiations between the smaller and Great Powers. The clause could nevertheless be given a twofold legal significance. First, it could operate at the interpretative level: in case of doubt, rules of international humanitarian law should be construed in a manner consonant with standards of humanity and the demands of public conscience. Secondly, the clause, while operating within the existing system of international sources, could serve to loosen — in relation solely to the specific field of humanitarian law — the requirements prescribed for *usus* whilst at the same time raising *opinio* to a rank higher than that normally admitted.*

1 Introduction

The so-called 'Martens' Clause was first inserted, at the suggestion of the Russian publicist Fyodor Fyodorovich Martens (1845–1909), in the preamble of the 1899 Hague Convention II containing the Regulations on the Laws and Customs of War on Land, and then restated in the 1907 Hague Convention IV on the same matter. It is by now well known to any student of international relations and is couched as follows:

En attendant qu'un code plus complet des lois de la guerre puisse être édicté, les Hautes Parties Contractantes jugent opportun de constater que, dans les cas non compris dans les dispositions réglementaires adoptées par Elles, les populations et les belligérants restent sous la sauvegarde et sous l'empire des principes du droit des gens, tels qu'ils résultent des usages établis entre nations civilisées, des lois de l'humanité et des exigences de la conscience publique. Elles déclarent que c'est dans ce sens que doivent s'entendre notamment les articles 1 [on the

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requirements for lawful belligerents] et 2 [on the so-called *levée en masse*] du Règlement adopté.¹

Since 1907, the clause — at least in its mutilated form (i.e. without its last proviso) has been hailed as a significant turning point in the history of international humanitarian law. It has been argued, in this respect, that it represents the first time in which the notion that there exist international legal rules embodying humanitarian considerations and that these rules are no less binding than those motivated by other (e.g. military or political) concerns was set forth. Two features of the clause are striking. First, it is very loosely worded and has consequently given rise to a multiplicity of often conflicting interpretations. Secondly, perhaps precisely because of its evasive yet appealing contents, the clause has been very frequently relied upon in international dealings, restated by states in treaties, cited by international and national courts, invoked by organizations and individuals. The combination of these two features warrants the conclusion that by now the clause has become one of the *legal myths* of the international community.

Be that as it may, undoubtedly the name of Martens is inextricably bound up with the clause, whilst all his other diplomatic achievements or scholarly works have fallen into obscurity. Whatever its inherent legal value, there is no gainsaying that the Martens Clause acquired a vast resonance and has had a significant impact on international law, in particular international humanitarian law. The principal — and general — merit of the clause — of which Martens may arguably have been unaware — is that it approached the question of the laws of humanity for the first time not as a *moral* issue but from a *positivist* (or, to put it more accurately, from an *apparently positivist*) perspective. Previously, international treaties and Declarations had simply proclaimed the importance of such laws or humanitarian considerations. As a consequence, states had not been enjoined to abide by any strict legal standard upholding the laws of humanity; they had merely been called upon to not disregard the principles of humanity, *qua moral principles*, while acting in the course of a war. Absent international courts with compulsory jurisdiction or even mandatory fact-finding bodies or commissions of enquiry, it was left to each belligerent to decide for itself whether or not it had behaved humanely while attacking the enemy or bombing its cities and villages. In short, these clauses had scant legal value. By contrast, the Martens Clause proclaimed for the first time that there may exist principles or rules of customary *international law* resulting not only from state practice,

¹ According to the translation reported in J.B. Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907* (1915) 101–102, the English equivalent of this clause is as follows: ‘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. They declare that it is in this sense especially that Articles 1 and 2 of the Regulations must be understood’. It should be emphasized that both commentators and states as well as courts tend to neglect the last proviso of this clause, which nevertheless proves to be of great help in understanding the historical origin of the clause, as will be shown *infra*.

but also from the laws of humanity and the dictates of public conscience. Martens deserves credit for crafting such an ingenious blend of natural law and positivism. It was probably the combination of his diplomatic skill, his humanitarian leanings and his lack of legal rigour which brought about such a felicitous result.²

However, the clause is *ambiguous* and *evasive* — we do not know whether this was so intentionally or unwittingly. Indeed, as stated above, it lends itself to many and conflicting interpretations.

2 The Various Interpretations of the Clause Propounded in the Legal Literature

What is the proper legal significance to be attributed to the Martens Clause? A careful perusal of the legal literature shows that opinions are divided. Arguably, three different trends may be discerned.

A first trend includes authors who contend that the clause operates only at the level of *interpretation* of international principles and rules. Some of these commentators maintain that the clause serves to exclude the *a contrario* argument whereby the fact that certain matters are not regulated by the Hague Convention would render belligerents free to behave as they please and to disregard any possible limitations flowing from other international rules (whether they be customary or treaty rules). The clause would serve solely to avert this dangerous inference.³ Other publicists

² On Martens, see in particular: Holland, 'F. De Martens', 10 *Journal of the Society of Comparative Legislation* (1909) 10–12; Kamarowsky, 'Frédéric de Martens', 23 *Annuaire de l'Institut de Droit International* (1910) 538–543; Wehberg, 'Friedrich v. Martens und die Haager Friedenskonferenzen', 20 *Zeitschrift für Internationales Recht* (1910) 343–357; V.E. Grabar, *The History of International Law in Russia, 1647–1917*, transl. W.E. Butler (1990) 381–388; Nussbaum, 'Frederic de Martens, Representative Tsarist Writer on International Law', 22 *Nordisk Tidsskrift for International Ret* (Acta Scandinavica juris gentium) (1952) 51–66; Miyazaki, 'The Martens Clause and International Humanitarian Law', in *Studies and Essays in Honour of J. Pictet*, (1984) 433–444; Pustogarov, Ф.Ф. МАРТЕНС: ЮРИСТ, ДИПЛОМАТ, ПУБЛИЦИСТ (F.F. Martens: Jurist, Diplomat, Publicist), Советский журнал международного права (3–4 *Soviet Journal of International Law*) (1991), 76–94; V.V. Pustogarov, «...Спальмовой ветвью МИРА» Ф.Ф. МАРТЕНС—юрисст, дипломат, публицист («... with the palm branch of peace» F.F. Martens, Jurist, Diplomat, Publicist (1993)); Benvenuti, 'La clausola Martens e la tradizione classica del diritto naturale nella codificazione del diritto internazionale umanitario', in *Studi in memoria di G. Barile* (1995), p. 173 ff.; Pustogarov, 'F.F. Martens (1845–1909), a Humanist of Modern Times', in *International Review of the Red Cross* (1996) 300–314. See also Lammasch, 'Friedrich von Martens und der Berliner Vertrag', 11 *Zeitschrift für das Privat und öffentliche Recht der Gegenwart* (1884) 405 ff. It is also worth mentioning the recent historical novel by the distinguished Estonian writer Jaan Kross, *Professor Martensi Äasõit*, 1984 (French transl.: *Le départ du professeur Martens*, 1990).

³ See for instance G. Schwarzenberger, *The Legality of Nuclear Weapons* (1958) 10–11. For this distinguished scholar, the purpose of the clause was 'to forestall an unintended and cynical argument *a contrario*. Because the [Hague] Regulations on Land Warfare were not exhaustive, the Parties wished to avoid the interpretation that anything that was not expressly prohibited by these Regulations was allowed. . . . What, however, this clause was not meant to settle with binding force for the Parties was how rules of warfare came into existence. Its only function was to preserve intact any pre-existing rules of warfare, on whatever law-creating process they happened to rest'. A similar position would seem to have been taken by Abi-Saab, 'The Specificities of Humanitarian Law', in *Studies and Essays in Honour of J. Pictet* (1984) 274–275.

argue instead that the clause serves as a general interpretative guideline whenever doubts concerning the construction of principles and rules of international humanitarian law arise; the clause would aim at enhancing the demands of humanity and public conscience, which should therefore be taken into account in the interpretation of these principles or rules.⁴

A second group of scholars as well as some judges instead maintain that the clause has had an important impact on the *sources of international law*. It has in fact, on this view, expanded such sources, at least in the area of international humanitarian law.⁵

Another author that can be regarded as belonging to this category is N. Singh. In his view, 'the supreme intention of the Martens' clause is to negate any possibility of the omitted questions, not covered by written rules, being left to the 'arbitrary opinion of military commanders'. To ensure this, '... Martens rightly suggested that the appeal should be to "the best customs of the best peoples", and even to supplement or modify such customs by "moral considerations, in order to fill up the gaps in the laws of war on land as formulated by the quasi-legislative organ of the Society of Nations"' (N. Singh and E. McWhinney, *Nuclear Weapons and Customary International Law*, 2nd ed. (1989) 47).

Cf. also Y. Sandoz, C. Swinarski, B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 39; Greenwood, 'Historical Development and Legal Basis', in D. Fleck (ed.) *The Handbook of Humanitarian Law in Armed Conflicts* (1995) 28.

⁴ For some authors, the clause has primarily an interpretative value as well as the value of impelling states to take account of humanitarian considerations when drafting or agreeing upon new rules of international humanitarian law. See for example E. Spetzler, *Luftkrieg und Menschlichkeit – Die völkerrechtliche Stellung der Zivilpersonen im Luftkrieg* (1956) 129–131.

For G.L. Binz, 'Die Martens'sche Klausel', *Wehrwissenschaftliche Rundschau — Zeitschrift für die Europäische Sicherheit* (1960) 139–160, the clause 'hat ihren dreifachen Sinn keineswegs verloren: An die Einhaltung anerkannter Normen ernstlich zu mahnen, ihre Auslegung im Geiste der Zivilisation zu verlangen und schliesslich dort Engpässe zu überwinden, wo das geltende Kriegsrecht überhaupt versagt. Vielleicht ist die Martens'sche Klausel heute das einzige ethische Korrektiv gegen den Kalten Utilitarismus der Politik und gegen den Formalismus der Diplomatie' (at 160).

⁵ For such commentators see in particular: B.V.A. Röling, *International Law in an Expanded World* (1960) 37–38. The distinguished Dutch scholar first of all harshly assails Schwarzenberger for his 'narrow historical interpretation of the clause', which 'is not borne out by later events', among which Röling includes the Nuremberg judgment, the ICJ's pronouncement in the *Corfu Channel* case, and the *Rauter* case. In his view, the clause, as laid down in the provisions on denunciation in the four 1949 Geneva Conventions, 'presupposes that the principles of the law of nations, as they result from the usages among civilized peoples, the laws of humanity and the dictates of the public conscience, contain specific rules of conduct in the event that the treaties are no longer binding' (at 38). Röling however does not specify how these principles have come into being. He adds only that 'the concept of civilisation, or the custom or general opinion of civilized peoples, was a source of standards, not merely in the laws of war, but also in the laws of peace ...'

Mention should also be made of Strebel, 'Martens'sche Klausel', in Strupp and Schlochauer (eds), *Wörterbuch des Völkerrechts*, vol. 2 (1961) 484–485. According to this author, the effect of the clause cannot be seen as immediately giving normative force (*normative Kraft*) to the usages of nations, the laws of humanity or the dictates of public conscience; rather, if there is a clear position of states on the matter, in case of doubt it is to be assumed that there exists in international law a principle based on one of these three categories (usages, laws of humanity and dictates of the public conscience), and this principle must be applied, unless there exists a conflicting principle of international law that ought to prevail because it enjoins states to make an exception. ('In der Klausel sind soziologisch und ethisch tragende Grundlagen von Völkerrechtsgrundsätzen derart aufgeführt, dass bei klarer Stellungnahme der unter gesitteten Völkern feststehenden Gebräuche oder der Gesetze der Menschlichkeit oder der Forderungen des öffentlichen Gewissens zu einem konkreten Phänomenon im Zweifel anzunehmen ist, dass auch ein entsprechender Völkerrechtsgrundsatz besteht und verletzt ist, es sei denn, dass überwiegende andere

More specifically, some commentators contend that the clause has created two new sources of law; i.e. the laws of humanity and the dictates of public conscience. Others have adopted a more sophisticated approach.⁶ In particular, in the view of one publicist, by virtue of the clause, the principles of humanity and the dictates of public conscience do become principles of international law *en bloc*; however, the precise content of these principles must be ascertained by courts of law in the light of changing conditions. This determination is made by establishing what standards

Völkerrechtsgrundsätze oder regeln eine Ausnahme gebieten', at 485, emphasis added.) Later this author slightly changed his position. He stated recently that the clause has three different legal meanings: first, 'it precludes conclusions to the effect that what is not forbidden by the [Hague] Regulations would be allowed'; secondly, it permits the application of established principles and rules 'to new technological developments and new situations in general'; thirdly, it 'does not refer simply to three sources of law (established custom or usages, laws of humanity, and dictates of public conscience) but it refers also to principles of international law resulting from any of these three sources or from their combined significance'; Strebel, 'Martens' Clause', in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 3 (1997) 327).

Another author also attributes normative value to the clause: Münch, 'Die Martens'sche Klausel und die Grundlagen des Völkerrechts', 36 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1976) 347–371. According to him the three elements indicated in the clause do constitute sources of law: in his view 'die Gebräuche der gesitteten Staaten [werden] zur Norm, nicht nur die allgemein anerkannten und geübten Gebräuchen . . . die Menschlichkeit auch ohne Anerkennung und eingewurzelte Übung Normen hervorbringt und . . . das öffentliche Gewissen [kann] verbindliche Forderungen stelle . . . (at 365). This author concludes that the three elements of the clause must be seen as 'Leitideen der zwischenstaatlichen Lebensordnung' (at 368).

It would seem that, at least in some respects, a similar attitude was taken by a US Military Tribunal sitting at Nuremberg in the *Krupp* case. According to the Tribunal, the clause at issue was 'a general clause, making the usages established among civilized nations, the laws of humanity and the dictates of the public conscience into the legal yardstick to be applied if and when the specific provisions of the [Hague] Convention and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare' (emphasis added), in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law no. 10*, vol. 9, Part II, 1341. See also this paper, *infra*.

⁶ For instance, a rigorous and original view was set forth by G. Sperduti, *Lezioni di diritto internazionale* (1958) 68–74. According to this scholar, there exists in international law, next to the customary process, another norm-creating process which he calls 'legal recognition of demands of public conscience' ('riconoscimento giuridico di esigenze della coscienza pubblica'). Through this source, general rules come into being by a process that is different from that of custom because the norms produced through this other source (i) were originally *moral* norms (ii) before becoming international legal norms *were devoid of any legal or practical value in the international community*, a value that they acquire only once they come into existence as general norms through this norm-creating process, and (iii) their legal recognition in the international community often occurs through their *repetition in provisions of international treaties* or the *accumulation of state declarations*. Sperduti gives as examples of such norms those prohibiting the slave trade and the norm that prohibits wars of aggression and which in addition declares them to be international crimes. In his view, the Martens Clause envisages both customary law proper (in that it refers to the usages of civilized nations) and this norm-creating process (in that it adverts to the dictates of public conscience). See also the Dissenting Opinion of Judge Weeramantry to the Advisory Opinion of the International Court of Justice in the *Legality of the Threat or Use of Nuclear Weapons* case (ICJ Reports (1996) 260–269).

states consider at a certain moment to be required by humanity or public conscience.⁷ In other words, the clause does not immediately and directly transform the laws of humanity and the dictates of public conscience into international legal standards. Rather, it permits the crystallization into such legal standards of only those ‘principles’ that states consider, at a particular moment, as consonant with humanity and the dictates of public conscience. Thus, the view of states acts as a sort of filter designed both to prevent arbitrariness (or at least subjective appraisals by courts and other interpreters), and to make the elevation of ‘principles’ to international legal standards contingent upon the approval of states. Clearly, under this construction, the opinion of states plays a different role from that required by the customary process; in addition, no practice is required, unlike the requirements of the customary lawmaking process.

Finally, according to a third group of commentators, the clause expresses notions that have *motivated and inspired* the development of international humanitarian law.⁸

3 Does the Clause Serve to Dismiss Possible *a contrario* Arguments?

Let us first of all deal with this construction of the clause, which is by far the most widespread. If this were to be the true meaning and purport of the clause, one could not escape the conclusion that the clause states the obvious and is therefore pointless. Indeed, it is self-evident that in international law, as in any other legal system, if a matter is not covered by a set of rules (say, treaty provisions), it can nevertheless be governed by another, distinct, body of law (for example, custom), if the requisite conditions are met. The warning issued by the clause would simply have a sort of

⁷ A highly sophisticated and extremely well-argued construction of the clause was advanced by Judge Shahabuddeen in his Dissenting Opinion to the Advisory Opinion of the International Court of Justice on *Legality of the Threat or Use of Nuclear Weapons* (*ibid.* at 405–411). In his view, the clause ‘provided authority for treating the principles of humanity and the dictates of public conscience as principles of international law, leaving the precise content of the standard implied by these principles of international law to be ascertained in the light of changing conditions’ (*ibid.* 406). ‘The basic function of the clause was to put beyond challenge the existence of principles of international law which residually served, with current effect, to govern military conduct by reference to the “principles of humanity and . . . the dictates of public conscience”’(408). He noted, further, that ‘[t]he word “remain” would be inappropriate in relation to the principles of humanity and . . . the dictates of public conscience’ unless these were conceived of as presently capable of exerting normative force to control military conduct’ (*ibid.*). In short, according to Judge Shahabuddeen, the clause imported into international law principles of humanity and the dictates of public conscience. It would be primarily for courts to find whether there existed a general principle resulting from the laws of humanity or the dictates of public conscience. To make such a finding, courts must look to the views of states. However, in this respect, such views ‘are relevant only for their value in indicating the state of the public conscience, not for the purpose of determining whether an *opinio iuris* exists’ (at 410), for instance as to the legality of the use of nuclear or other weapons.

⁸ For some scholars, the Martens Clause ‘states the whole animating and motivating principle of the law of war’. In their view, the three notions it sets out permeate, and constitute the driving force of, the whole of the body of international humanitarian law. See for instance the Foreword of Lord Wright to vol. XV of the *Law Reports of Trials of War Criminals*, at p. xiii (the words just cited are his), as well as Benvenuti, ‘La clausola Martens e la tradizione classica del diritto naturale nella codificazione del diritto internazionale umanitario’, *supra*, note 2, 173 *et seq.*

moral or political value. From the viewpoint of law, it would be redundant. In addition, the authors advancing the view under discussion fail to explain why the clause, instead of simply limiting itself to referring to principles and rules 'outside' the treaty containing the clause, also mentioned — and this was indeed its novelty — the 'laws of humanity' and the 'dictates of public conscience'.

4 Does the Clause Create Two New Sources of International Law?

Of the three interpretative trends adumbrated above, the most radical is that which assigns to the clause a norm-creating character, whether directly (in that the clause is viewed as a norm establishing two new sources of law) or indirectly (in that the clause is regarded as a norm which raises to the rank of principles of international law standards of conduct perceived by states as required by, or at least consistent with, the laws of humanity or the dictates of public conscience). Let us therefore concentrate on this construction of the clause.

For this purpose, it may be worthwhile firstly to examine the preparatory work at the 1899 Hague Conference, the intention expressed in 1899 by Martens himself, and finally, the evolution of state practice. Indeed, to prove the validity of such a radically innovative proposition, one ought to show that this was in fact the intention of Martens when he proposed the clause and that the other delegates did not object to it. Still more importantly, one ought to demonstrate that, whatever the intention of Martens and the positions taken by states at The Hague, case law and state practice in fact consistently bear out this normative value of the clause. In other words, one should be able to show that, on the strength of and by virtue of the clause, courts and states have applied general principles resulting from the laws of humanity or the dictates of public conscience, or in other words, that such principles have been acted upon in practice.

A The Hague Negotiations in 1899

In reality, the famous clause was not proposed by Martens with a humanitarian goal in mind. It was viewed, instead, as an expedient way out of a diplomatic deadlock between the small powers, led by Belgium, and the major powers, consisting, amongst others, of Russia and Germany. It may be fitting briefly to recall how the deadlock emerged and what steps Martens took to end it.

In June 1899, the Hague Diplomatic Conference tackled the question of adopting the parts of the 1874 Brussels Declaration (which had not become a legally binding instrument) that dealt with belligerent occupation. The Belgian delegate immediately voiced strong objections in the Second Commission of the Conference, where the question was being discussed. In short, he took issue on two points with the major powers that were pushing for the adoption of the relevant provisions of the Declaration. First, he noted that some Articles of the Declaration granted extensive

powers to occupying powers, particularly with respect to the possibility of changing the laws of the occupied state, of using its civil servants, of raising new levies and requisitioning goods. According to the Belgian delegate, although this was what actually occurred in the case of belligerent occupation, it was wrong, and contrary to the interests of small countries, to lay down in a treaty a legal right for occupying powers to do such things.⁹ Secondly, the Brussels Declaration's provisions concerning lawful combatants did not provide for the right of all citizens of an occupied country to resist occupation, whereas in his view this was a fundamental right of all inhabitants of a country being invaded by the enemy.¹⁰ In both these areas the Belgian delegate proposed generally to leave matters *unregulated by treaty*: in his view it was preferable to remit such matters to customary international law, however vague.¹¹ In addition, with regard to the first of the two areas, the Belgian delegate also proposed the deletion of some provisions and the adoption of new ones.¹² In short, Belgium proposed on the one hand to limit the rights of occupying powers (both by adopting provisions that greatly restricted these rights and by leaving other matters unregulated by treaty) and, on the other hand, to suppress any provision on lawful combatants, so as again to remit the matter to general international law. These proposals were in part strongly supported by Great Britain, which put forward a proposal concerning lawful combatants in occupied territories that took up the main points made by Belgium,¹³ and Switzerland.¹⁴ They were, however, forcefully opposed by Russia¹⁵ and Germany.¹⁶

Interestingly, in the case of Russia, a two-pronged strategy of attack was followed.

⁹ The Belgian delegate Beernaert made his speech on 6 June 1899, in the Sixth Meeting of the Second Sub-Commission. His speech was reproduced in full (see *Conférence Internationale de la Paix*, La Haye 18 Mai–29 Juillet 1899, Troisième Partie (1899) 111–113).

¹⁰ *Ibid.* 112–113. Mr Beernaert said the following: 'A vouloir restreindre la guerre aux Etats seulement, les citoyens n'étant plus en quelque sorte que de simples spectateurs, ne risque-t-on pas de réduire les éléments de la résistance, en énervant le ressort si puissant du patriotisme? Le premier devoir du citoyen n'est-il pas de défendre son pays, et n'est-ce pas à l'accomplissement de ce devoir que tous, nous devons les plus belles pages de notre histoire nationale? D'autre part, dire aux citoyens de ne pas se mêler aux luttes où le sort de leur pays est engagé, n'est-ce pas encourager encore ce mal d'indifférence qui est peut-être l'un des plus graves dont souffre notre temps? Les petits pays surtout ont besoin de pouvoir compléter les éléments de leur défense, en disposant de toutes leurs ressources... Notre pays est de si peu d'étendue que, par surprise, il pourrait être occupé presque tout entier en deux jours, notre armée étant refoulée dans Anvers, réduit de la résistance. Pourrions-nous, en vue de cette situation si grave, dégager en quelque sorte nos concitoyens de leurs devoirs envers le pays, en semblant tout au moins leur déconseiller de contribuer à la résistance?' (at 112–113).

¹¹ *Ibid.* at 112 ('il y a là des situations qu'il vaut mieux abandonner au domaine du droit des gens, si vague qu'il soit'; see also 113). At the outset of his speech, the Belgian delegate had set forth the following general proposition: 'A mon avis, il y a certains points, qui ne peuvent faire l'objet d'une convention et qu'il vaudrait mieux laisser comme aujourd'hui, sous l'empire de cette loi tacite et commune qui résulte des principes du droit des gens' (*ibid.* at 111).

¹² *Ibid.* at 113.

¹³ *Ibid.* at 154.

¹⁴ *Ibid.* at 154–156.

¹⁵ *Ibid.* at 113–116.

¹⁶ *Ibid.* at 156–157.

Martens (regarded by other delegates as ‘the real head of the Russian delegation’¹⁷) assailed the Belgian proposals with a conspicuous display of grandiloquent rhetoric. Another member of the Russian delegation, Gilinski (a colonel of the Russian General Staff) instead raised technical objections. In short, Martens advanced three arguments. First, he asserted that to leave matters unregulated by treaty, by remitting them to a vague body of law (principles and customary rules) was detrimental not only for the large powers (which would be uncertain about their rights), but also for smaller states (as they would not know which obligations bound the major powers). Secondly, to fail to agree upon specific treaty rules would have the consequence of showing to the military that for the second time (the first being the Brussels Conference of 1874) experts and diplomats could not fashion rules on the matter. Consequently, the military would feel free to interpret the laws of warfare as they pleased. Thirdly, and with specific reference to the question of lawful combatants, Martens emphasized that the Hague Conference in no way intended to remain blind to the heroism of the inhabitants of countries occupied by the enemy; the Conference, however, was not designed to codify all the cases that might arise, including cases of heroism and patriotism.¹⁸

It would seem that Martens himself was aware that his rhetorical fireworks were unable to change the mind of the Belgians.¹⁹ In any case, the other Russian delegate preferred to be straightforward and even blunt. He took issue with a proposal made, after the speech of the Belgian delegate, by the British delegate which was *inter alia* designed to meet some of the concerns of Belgium by conferring the status of lawful combatant on the population of an occupied territory.²⁰ He simply stated that it was impossible to grant to the population of an occupied territory the right to attack lines of communication, for without such lines the foreign occupying army could not

¹⁷ This was how he was described by the head of the United States delegation, White: see A.D. White, *Autobiography*, vol. II (1906) at 270.

¹⁸ *Ibid.* at 113–116 and 151–152. In the speech he made after tabling his proposal concerning the clause, on 20 June 1899 Martens stated the following: ‘Il . . . faut se rappeler que ces dispositions [namely Articles 9 and 10, dealing with the classes of lawful combatants and *levée en masse*] n’ont pas pour objet de codifier tous les cas qui pourraient se présenter. Elles ont laissé la porte ouverte aux sacrifices héroïques que les nations seraient prêtes à faire pour se défendre: une nation héroïque est, comme tous les héros, au dessus des codes, des règles et des faits. Ce n’est pas à nous . . . de mettre des bornes au patriotisme: notre tâche est seulement d’établir par un commun accord entre les Etats, les droits des populations et les conditions à remplir pour ceux qui désirent légalement se battre pour leur patrie’ (at 152).

¹⁹ According to a Russian author who has recently studied Martens’ diaries (V.V. Pustogarov), ‘Martens objected [to the Belgian proposals] and objected brilliantly, evoking applause from those present. Yet he understood that rhetorical art alone was not enough to secure agreement’. In his diary he wrote: ‘As if by eloquence one could make the representatives of the Powers break their obligations and not carry out their instructions! How stupid and naive!’ [note 24: AVPR/Foreign Policy Archives of Russia, op.787,d.9,yed.khr.5, I.60]. Martens knew that the Belgian delegate in delivering his speech was acting not spontaneously but in accordance with instructions from Brussels (*supra* note 2, at 162, unofficial translation from the Russian original).

²⁰ *Ibid.* at 154. The British proposal was worded as follows: ‘Rien dans ce chapitre ne doit être considéré comme tendant à amoindrir ou à supprimer le droit qui appartient à la population d’un pays envahi de remplir son devoir d’opposer aux envahisseurs, par tous les moyens licites, la résistance patriotique la plus énergique.’

survive.²¹ Similarly, the German delegate, also in criticizing the British proposal, noted that the interests of large armies imperatively required security for their lines of communication and their areas of occupation. In his view it consequently proved impossible to reconcile such interests with the concerns of occupied populations. The best way out was to pass over in silence matters upon which no agreement was possible.²²

Arguably the speech and the proposed amendments of the Belgian delegate had not been particularly disruptive. Generally speaking, the Belgian stance was rather weak and, in a way, legally and politically unfocused. As was admitted by the Belgian delegate himself, this position was essentially inspired by moral and patriotic sentiments as well as the fear that national parliaments of small countries would otherwise not authorize the ratification of the Convention.²³ The position of major powers was clear. Except for Great Britain, they were in favour of granting extensive rights to occupying powers. It was naive to hope that they would renounce their position by simply leaving the matter unregulated by treaty law, hence governed by the then vague customary principles. In addition, it was injudicious and indeed illusory to suggest that treaty law should refrain from defining the categories of lawful combatants in modern warfare and, once again, consign the matter to loose general principles of customary law. As for granting the status of lawful combatants to partisans and *franc-tireurs* in occupied territories, this proposal was totally unacceptable to the Great Powers; it was therefore unrealistic to think that it could have been adopted.

Strikingly, other major delegations perceived the difference between the competing positions as undramatic.²⁴ Nevertheless, the Belgian position frightened the President of the Sub-Commission, Martens. He felt that the Belgian attitude might have a snowball effect and lead to the Conference's failure. Such a failure would be a repeat of the 1874 Brussels Conference. More importantly, it would strike a serious blow to the prestige of the convenor of the Hague Conference, Tsar Nicholas II.²⁵ Accordingly, Martens proposed the adoption of the clause.²⁶

²¹ *Ibid.* at 157.

²² *Ibid.* at 156–157.

²³ *Ibid.* at 111–112.

²⁴ Thus, for instance, within the United States delegation the disagreement was reported as follows: 'On one side are those who think it best to go at considerable length into more or less minute restrictions upon the conduct of invaders and invaded. On the other side, M. Beernaert of Belgium, one of the most eminent men from that country, and others, take the ground that it would be better to leave the whole matter to the general development of humanity in international law. M. de Martens insists that now is the time to settle the matter, rather than leave it to individuals who, in time of war, are likely to be more or less exasperated by accounts of atrocities and to have no adequate time for deciding upon a policy' (*supra* note 17, at 292).

²⁵ This was later emphasized by Martens in his book *La Paix et la Guerre* (1901). He pointed out the following: 'Cette manière de penser [of the Belgian delegate and the delegates of other small countries] mettrait en péril toute l'oeuvre de la Conférence de Bruxelles en écartant la détermination des lois et coutumes de guerre qui sont d'une importance vitale pour les populations paisibles des territoires envahis. La suppression des articles les plus importants de la déclaration de Bruxelles aurait compromis toute cette oeuvre généreuse et désintéressée entreprise par la Russie' (at 122–123).

²⁶ *Ibid.* at 152 (Eleventh Meeting of the Second Sub-Commission, 20 June 1899). Already in its original version, as proposed that day by Martens, the clause had a final paragraph which stated as follows: 'C'est

Plainly, the Martens Clause essentially referred to the question of lawful combatants in occupied territories. It totally ignored the other issue raised by Belgium, namely the rights and powers of occupying states concerning respect for, or modification of, local laws, the raising of levies, the requisitioning of goods, etc. In addition, no mention was made of the Belgian suggestions to delete certain provisions of the Brussels Draft on such rights and powers and to adopt instead new provisions. On all these matters Belgian demands were only minimally met in later negotiations at the Conference. Nevertheless the Belgian delegate — probably aware of the fragility of Belgium's position vis à vis the Great Powers — quickly declared that he was happy to accede to the proposal, although the clause did not entirely satisfy his concerns.²⁷ Indeed, he went so far as to call upon the British delegate to withdraw his specific proposal concerning lawful combatants in occupied territory, on account of Martens' statement and proposed clause.²⁸

In the interpretation of Belgium, the clause proposed by Martens remitted to customary international law the major bone of contention, namely the question of which persons not belonging to the armed forces of the occupied country might be regarded as lawful combatants in occupied territory.²⁹ Seen within the context of its origin,³⁰ the celebrated clause appears to be a typical diplomatic ploy to paper over

dans ce sens que doivent s'entendre notamment les articles 9 et 10 adoptés par la Conférence' (these two provisions, which correspond to the present Articles 1 and 2 of the Hague Convention, deal with the classes of lawful belligerents and *levée en masse*). The clear purpose of this paragraph was to specify that the clause primarily intended to cover the specific issue of who should be treated as a lawful combatant in occupied territories. According to what has recently been suggested by a Russian author who studied Martens' diaries, 'by agreement with the Belgian delegate, whom he had known long and well, [Martens] took the document sent from Brussels, edited it in his own way to include some positions of principle, and suggested its adoption' to the Conference. See Pustogarov, *supra* note 2, at 162.

²⁷ *Ibid.* at 153.

²⁸ *Ibid.* at 158. The British delegate, seeing that only his and the Swiss delegations were prepared to vote for his proposed article, withdrew his proposal (*ibid.* at 159).

²⁹ *Ibid.* at 153. The Belgian delegate noted the following: 'La Conférence laissait *non réglées* les questions relatives aux *soulèvements en territoire occupé* et aux *faits de guerre individuels*. . . Il n'y a donc de réglé que ce point qu'il faut tenir comme belligérants les armées, les milices, les corps organisés et aussi la population, qui, même sans organisation, prend spontanément les armes dans le territoire non-occupé. Dans tous les autres cas, toutes les autres situations sont réglés par le droit des gens dans les termes de la déclaration que vient de lire le Président . . . Demain comme aujourd'hui les droits du vainqueur, loin d'être illimités, seront restreints par les lois de la conscience universelle et pas un pays, pas un général n'oserait les enfreindre, puisque ce serait se mettre au ban des nations civilisées' (emphasis added).

³⁰ In the event, the clause was adopted by the Sub-Commission, and subsequently by the Second Commission and the Plenary, as an integral part of the draft being discussed, and later became part of the preamble of the Convention. See the report presented, on behalf of the Second Sub-Commission, by the rapporteur Rolin, to the Second Commission (annex to the minutes of the Meeting of 5 July 1899, *ibid.* Troisième Partie, at 32–36). See also the report by Rolin, on behalf of the Second Commission, to the Plenary (annex to the minutes of the Fifth Meeting, of 5 July 1899, *ibid.* Première Partie, at 49–51). Furthermore see the minutes of the Eighth Meeting of the Plenary (27 July 1899), where the Martens Clause was adopted (*ibid.* Première Partie, at 195–197). It should be stressed that in his report to the Plenary, Rolin emphasized that the clause adopted by the Commission was primarily designed to answer the objections raised by Belgium to the two provisions (former Articles 9 and 10, new Articles 1 and 2) concerning lawful combatants (*ibid.* Première Partie, at 49–51). See the relevant part of the report made by Rolin to the Plenary (Annex to the Minutes of the Fifth Meeting of the Plenary, *ibid.* Première Partie, at 49–51) and the discussion in the Plenary (*ibid.* at 42–46).

strong disagreement between states by skilfully deferring the problem for a future discussion. The clause met the concerns of the Great Powers, for it obviated the need to tamper with the relevant provisions of the Brussels Declaration, which to a large extent upheld their demands. The clause, on the face of it, also satisfied the demands of smaller countries, because it left open the possibility of arguing that there existed principles or customary rules of international law granting the status of lawful combatants to nationals of an occupied country taking up arms against the occupying power.

Clearly, this possible argument was belied by international law and the practice of states. Both in 1899 and later, until at least 1949, civilians living in already occupied territories were *not allowed* by customary international law to take up arms against the occupying power. This notion was clearly spelled out by Martens himself in his writings of 1900–1901 on the application of the laws of warfare in the 1877–1878 war between Russia and the Ottoman Empire³¹ (a circumstance that once again highlights how ingenious and indeed cunning Martens proved to be at the 1899 Hague Conference). Only at the 1949 Geneva Conference were partisans and members of organized resistance movements in occupied territory upgraded to the rank of lawful combatants, provided they met certain requisite conditions (see Article 4(A)(2) of the Third Geneva Convention).

Thus, in the event, the Martens Clause proved to be an adroit way for a number of Great Powers to outwit the smaller countries. Cleverly acting on behalf of those Great Powers, Martens, through his clause, ultimately promised to lesser countries pie in the sky. To put it better, he went through the pretence of giving them half a loaf, while in actual fact he handed to them merely a string of polished and high-minded words.

B Martens' Intentions (and His 'Shaky' Positivism)

We could stop at this point and conclude that the preparatory work convincingly shows that the clause essentially served as a diplomatic ploy. Could one nevertheless argue that Martens *also intended* to introduce through it a novel and radical means of international lawmaking, by elevating humanity and the dictates of conscience to the rank of new sources of international law? In other words, can it be submitted that, beyond the diplomatic skirmishes at the Hague Conference, what in fact Martens sought to achieve was the introduction of a revolutionary idea in the international body of law concerning warfare?

To my mind, it is fitting to undertake this investigation, if only to leave no stone unturned and to clarify this point once and for all. However, one clearly enters uncharted waters, where great prudence is required, among other things because our scholarly search in this area can really only be based on circumstantial evidence.

To argue for an affirmative answer to the question set out above, one could lay

³¹ See *La Paix et la Guerre*, *supra* note 25, at 368–387. It appears from what is stated, for instance, at 380 (where the Hague Convention is mentioned) that at least this part of the book was written after the 1899 Hague Conference.

emphasis on the repeated reference by many delegates, in the debates preceding and following the adoption of the clause, to '*les principes du droit des gens*' as constituting customary law, and the widely accepted notion that the matter left unregulated at The Hague, but covered by the clause, fell within the ambit of such *principes*. This would seem to point to a positivist approach underlying the clause: matters left unregulated by the Hague Convention might have been governed by customary law resulting, amongst other things, from the laws of humanity or the dictates of public conscience. In addition, one could recall a general point rightly made by Wehberg with regard to Martens' attitude: Martens' humanitarianism was a blend of both idealism and a keen desire to advocate the official position of Russia.³² True, other contemporaries of Martens such as the Austrian Lammasch³³ and the British Holland³⁴ instead emphasized Martens' general tendency to propound ideas and legal constructs which safeguarded the interests of Russia. Nevertheless, the general remark by Wehberg, which may appear to be more balanced than the other assessments, could lead one to support the following proposition: the famous clause, while admittedly designed to take account of Russia's interest in averting the Conference's failure, also intended to enhance the interests of humanity by using an innovative and forward-looking formula.

However, there are quite a few elements that would support the contrary interpretation. First of all, one thing should make us at least suspicious regarding both the true significance Martens intended to attribute to the clause and the motivations that led him to table it: Martens himself – a man ready to extol his own merits – never took pride in the clause. In his numerous books and writings he instead emphasized other contributions of his which he regarded as major accomplishments. Thus, it is striking that in the two writings he devoted to the 1899 Hague Conference, he totally ignored his own proposals concerning the clause. In a lengthy lecture he gave at St Petersburg in 1900, he mentioned only some insignificant trifles.³⁵ In a voluminous book of 1901 on peace and war, he gave an account of the Belgian opposition to the adoption at The Hague of some provisions of the Brussels Declaration, but then failed to mention the most significant fact: it was on account of his own counter-proposal

³² Wehberg, *supra* note 2, at 351 ('Man wird freilich in v. Martens keinen reinen Idealisten erblicken dürfen. Er war wohl gleichzeitig ein russischer Politiker').

³³ In a very critical survey of Martens' textbook on international law, Lammasch wrote, amongst other things, that one of the main features of Martens' writings lay in the fact that such writings tended 'to lay the scientific foundations of the Russian foreign policy in the East' (Lammasch, *supra* note 2, at 411).

³⁴ See the obituary published by T.E. Holland, *supra* note 2, at 11 ('He was essentially a patriot, and a faithful exponent of the humane theories of his Imperial masters; so much so that his arguments sometimes suggested rather the diplomatist, in constant touch with his Foreign Office, than the jurist who adorned the chair of International Law at St.Petersburg').

³⁵ See *La Conférence de la Paix à La Haye — Etude d'histoire contemporaine* (1900), especially at 23–27. After pointing out that the Hague Convention on the Laws of Land Warfare also contained provisions on military occupation, *levée en masse*, inviolability of private property, etc., Martens added: 'Il est certain que cette Convention contient encore quelques lacunes; il était impossible de tout prévoir. Ainsi, entre autres, on n'a pas visé le cas des prisonniers de guerre jouant au *foot ball* et au *cricket*, comme ont pu le faire dernièrement les prisonniers anglais à Prétoria' (at 27).

aimed at inserting the clause that the Belgian opposition was overcome.³⁶ Similarly, his contemporaries passed over the clause in silence and emphasized instead the importance of his fifteen-volume *Recueil des traités* (1874–1909) and his two-volume *Treatise of International Law* (1882–3),³⁷ as well as — with specific regard to the Hague codification of 1899 and 1907 — his contribution to the establishment of the institution of arbitration and the setting up of commissions of enquiry. The fact that his fame should be linked to something which was during his lifetime not regarded by him or others as significant is perhaps not so striking. After all, Grotius — as was appositely stressed by Huizinga³⁸ — was chiefly renowned in his century for his *De veritate religionis christianae*, whereas we now tend to believe that he owes his lasting fame instead to *De iure belli ac pacis*. The fact remains, however, that in Martens' lifetime, no one paid any attention whatsoever to the clause and he himself — in spite of his evident and repeated boasting of other diplomatic successes — did not look upon it as a major achievement nor even as a notable contribution to the Peace Conference.

Furthermore, one should not overlook the fact that Martens' positivism was not watertight. True, he insisted that modern international law theorists should study only 'positive legal rules' as expressed in 'customs, treaties and reciprocal relations of states', without indulging in political considerations.³⁹ However, he also noted that the representatives of modern legal scholarship dealing with international law ought to have but one goal: 'to neatly establish the positive legal principles that must govern relations among states, by consulting not only history, the material circumstances, the real conditions of life, but also the requirements of scientific truth and the concept of law prevailing in the civilised world'.⁴⁰

In addition, as was rightly underscored by Nussbaum,⁴¹ Martens took into account many factors that should have been extraneous to a rigorous legal analysis. This, for instance, holds true for Martens' conception of the degree of binding force of treaties, which he made contingent upon 'the extent to which they conform to reasonable requirements of states and [on] their reciprocal relations'. In contrast, one cannot share Nussbaum's criticism whereby another factor that should have remained foreign to legal analysis was Martens' concept of expediency, which, in his view should operate as the supreme principle of international administrative law.)⁴²

³⁶ See *La Paix et la Guerre*, *supra* note 25, at 119–127.

³⁷ It was translated into German, French, Spanish, Serbian, Persian and Japanese. I shall quote here from the French translation in three volumes: *Traité de droit international* (1883–1887).

³⁸ Huizinga, 'Grotius' Plaats in de Geschiedenis van den Menschelijken Geest' (The Place of Grotius in the History of the Human Mind) (1925), in *Verzamelde Werken*, vol. II (1948) 382–389, at 382.

³⁹ *Traité*, vol. I, at 233 (para. 39).

⁴⁰ *Traité*, vol. I, at 201 (para. 34): 'établir nettement les principes juridiques positifs qui doivent diriger les rapports entre les Etats, en consultant non seulement l'histoire, les circonstances matérielles, les conditions réelles de la vie, mais encore les exigences de la vérité scientifique et le sentiment du droit qui prévaut dans le monde civilisé'.

⁴¹ Nussbaum, 'Frederic de Martens, Representative Tsarist Writer of International Law', *supra* note 2, at 54.

⁴² See Nussbaum, *cit. supra* note 2, at 54. This criticism does not take into account that the criterion of expediency must be relied upon by administrative bodies in their day to day action.

It should be added that in quite a few writings Martens brilliantly combined legal analysis with historical and political investigation. See, in particular, *Par la justice vers la paix*, without date (but 1904).

The serious inconsistencies that marred most of Martens' writings should also be emphasized. Thus, for instance, Martens' insistence on human rights as a crucial element of the international community⁴³ was indisputably extremely modern and indeed forward-looking. However, it cannot be easily reconciled either with his view that in international relations, states' interests should be the overriding factor or his awe and admiration – at least around the period of the 1899 Conference — for the despotic Russian authorities, as aptly recalled by Pustogarov on the basis of the contents of Martens' diaries.⁴⁴ Furthermore, his emphasis on human rights (which, on close scrutiny, revealed a rather narrow view of such rights) under those circumstances and in that context may be taken to reveal a strong affinity for natural law doctrines.⁴⁵ At a higher level of abstraction, Martens' making the idea of 'international community' the lynchpin of his own conception of international law,⁴⁶ while again extremely modern and appealing, is at odds with his view of the scope of international law. According to Martens, this body of law only applied to so-called 'civilised countries' (which comprised the international community) whereas 'Muslim, pagan and savage' peoples, as well as such states as Turkey, Persia, China and Japan were outside that community. It followed that as between the former and the latter categories of states, only natural law might apply.⁴⁷

Another side of Martens' approach to international law deserves to be emphasized; namely, his conspicuous lack of legal exactitude, particularly as compared to those Swiss, German and Austrian contemporaries of his — Bluntschli, Jellinek, Bergbohm, Holtzendorf, Zorn, Lammasch — whom he nevertheless either knew and cited, or took issue with.

In short, all the aforementioned features of Martens' position make it possible to argue that in proposing his clause, the Russian publicist did not intend also to envisage the possibility of considering 'the laws of humanity' and 'the dictates of

⁴³ See in particular *Traité*, vol. I, at iii (preface), at 14–15, 427–431. See also vol. III, 186–187.

⁴⁴ Pustogarov, *supra* note 2, Ch. 8 ('F.F. Martens' Social and Political Views'), at 196–228.

⁴⁵ For Martens, the fundamental rights that civilized states recognized for any individual, regardless of his nationality, were: (1) the right to physical life; (2) the right to the development of one's intellectual faculties; and (3) the right to move freely within states united by international links, including the right to emigrate. From these fundamental rights others followed, including the right of all to respect for his person, honour and health, the right to property, the right to get married, etc. (*Traité*, vol. I, at 440–441). Martens clearly took a natural law approach to human rights ('Ces droits [de l'homme] découlent de la nature et des conditions de l'humanité et ne peuvent donc pas être créés par la législation. Ils existent par eux-mêmes', at 14; and see also at 441).

The natural law slant of Martens was also underscored by Pustogarov, *supra* note 2, at 82–83: 'Recalling Martens' constant references to the inalienable rights of the individual, or considering his theory of international intercourse, one cannot fail to find essential elements of an attachment to natural law. This is fully in line with his endeavour to synthesize the positive sides of both tendencies [i.e. positive law and natural law]. Considering what has been said [above], in my view Martens can be assigned to the positivist camp only very conditionally' (unofficial translation from the Russian original).

⁴⁶ See *Traité*, vol. I, 236, 265 *et seq.*, in particular 272–275.

⁴⁷ *Traité*, vol. I, at 238–241 (para. 41), 398, 240–241 and 398. It is notable that, as mentioned by Martens himself, one of his contemporaries, namely the Swiss Bluntschli (*Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt*, 3rd ed. (1878) paras 7–8) was of the view that the international community embraced all peoples, including those supposedly less advanced.

public conscience' as distinct sources of law. He used loose language for the purpose merely of solving a diplomatic problem.

C The Evolution of International and National Case Law

Let us now consider whether, in spite of what can be concluded from the preparatory work and Martens' general outlook, judicial and legislative developments as well as state practice subsequent to the adoption of the clause in 1899 nevertheless render it possible to maintain that the laws of humanity and the dictates of public conscience have gradually taken the shape and significance of distinct sources of international law. An affirmative conclusion would by no means be surprising, for after all what counts in international dealings is actual practice, more than the intentions of diplomats or the contents of negotiations conducted in multilateral fora.

I shall start with case law. The Martens Clause has been cited in a number of cases, some national and others international. These cases may be grouped in three categories.⁴⁸ The first category, which is by far the most extensive, comprises cases where the clause was simply used to confirm or bolster the interpretation of other international rules of humanitarian law. The second category includes a case where the clause was resorted to in order to suggest an original construction of existing rules of humanitarian law, based on the demands of humanity as expressed in international standards on human rights. The third category embraces a case where the clause was used to exclude *a contrario* interpretations of humanitarian law treaties.

1 Cases Where the Clause Was Substantially Used ad abundantiam

The first case is *Klinge*, decided in 1946 by the Supreme Court of Norway. The defendant, a member of the Gestapo, had been charged with 'maltreatment and torture of Norwegian patriots' under the Norwegian Criminal Code of 1902 jointly with a Royal Decree of 4 May 1945 that gave courts the power to impose death sentences instead of imprisonment for acts such as those perpetrated by Klinge. Having been sentenced to death by the Court of Appeal, the defendant appealed to the Supreme Court, claiming that the application of the Royal Decree to acts that he had committed before May 1945 was at variance with Article 97 of the Norwegian Constitution, whereby '[n]o law must be given retroactive effect'. The Supreme Court, by a majority, dismissed the appeal. Judge Skau, who delivered the judgment, held that the grave acts of torture, of which Klinge had been found guilty, were not only expressly prohibited by Norwegian law, but were also contrary to the 'laws of humanity' and the 'dictates of public conscience' mentioned in the Martens Clause. They were therefore war crimes and as such punishable 'by the most severe penalties, including the death penalty'.⁴⁹ The Court added the following:

In other words, the criminal character of the acts dealt with in the present case as well as the

⁴⁸ To the cases examined in the text one should now add *Kupreškić*, decided by Trial Chamber II of the ICTY on 14 January 2000 (Case no. IT-95-16-T). See *infra*, in this paper.

⁴⁹ See *Annual Digest and Reports of Public International Law Cases, Year 1946*, at 263.

degree of punishment are already laid down in International Law in the rules relating to the laws and customs of war. These rules are valid for Norway as a belligerent country.⁵⁰

On the face of it, the Court's decision equated the 'laws of humanity' and the 'dictates of public conscience' with international legal standards. However, it is apparent that the Court's holding was based on a twofold misconstruction of international law. First, torture of enemy civilians, whether or not guilty of unlawful military operations against the occupying power, was implicitly prohibited by customary international rules resulting from the Hague Regulations of 1907 — at least if these are liberally interpreted. Hence, it amounted to a war crime. This, in a sense, was acknowledged by the same Supreme Court, for after citing the Martens Clause as authority for its proposition, it referred also to Article 46 of the 'Rules of Land Warfare' (on the duty of occupants to respect 'family honour and rights, the lives of persons and private property' of the inhabitants of occupied territories) and 'Article 61' of the 'Geneva Convention'.⁵¹ No resort to the Martens Clause would therefore have been necessary in this regard — except for supporting a liberal interpretation of Article 46 and the corresponding customary rule. Secondly, nowhere could one find in treaty or general international law, as it existed after World War II, any rules regarding penalties for war crimes. Clearly, this was a matter remitted to each state acting under its own legislation. The contention could, however, be made that, in spite of its manifestly fallacious interpretation of international law, the Norwegian ruling concerning the clause nevertheless carries some legal weight. It is doubtful whether the clause was referred to merely *ad adjuvandum* or was instead regarded as dispositive of the matter. Probably the better interpretation is that the clause was relied upon by the Court primarily to bolster the construction of Article 46 of the Hague Regulations to the effect that torture is prohibited, with the consequence that, if acts of torture are committed, they amount to a war crime.

The fact that courts tend to use the clause primarily to strengthen propositions made on the basis of other arguments is even more evident in *Krupp*, a case decided in 1948 by a United States Military Tribunal sitting at Nuremberg. The defendants had been accused of 'having exploited . . . territories occupied by German armed forces in a ruthless manner, far beyond the needs of the army of occupation and in disregard of the needs of the local economy'.⁵² The Tribunal mentioned the various provisions of the Hague Regulations on belligerent occupation, in particular Articles 46–56 and found that those provisions were binding upon Germany 'not only as a treaty but also

⁵⁰ *Ibid.*

⁵¹ It is not clear what Geneva Convention the Court intended to refer to. In 1946, when it delivered its decision, two Geneva Conventions were still applicable, that of 1929 on the Wounded and Sick and the other Convention, also of 1929, on Prisoners of War. The former contains only 39 articles; the latter, at Article 61, deals with the issue of sentencing of prisoners of war tried by the detaining power. It does not appear that other provisions of the Convention may be regarded as germane to the matter under discussion.

⁵² See *Trials of War Criminals*, *supra* note 5, at 1338.

as customary law'.⁵³ It then went on to quote (or rather to misquote) the Martens Clause and observed the following:

The preamble [to the 1899 and 1907 Hague Convention] is much more than a pious declaration. It is a general clause, making the usages established among civilized nations, the laws of humanity, and the dictates of public conscience into the legal yardstick to be applied if and when the specific provisions of the Convention and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare.⁵⁴

The Tribunal then stated: 'However, it will hardly be necessary to refer to these more general rules. The Articles of the Hague Regulations, quoted above, are clear and unequivocal.'⁵⁵ Indeed, the Tribunal applied those provisions, and not the Martens Clause, to the facts at issue. Thus, it is apparent that the *obiter dictum* in *Krupp* was merely an expression of the views of the judges concerning the legal value of the clause. In other words, the Tribunal did not use the clause to infer from it that, as a result of the clause, new sources of law had been instituted in the international community and that, *in casu*, rules deriving from such sources were applicable.

The same holds true for *Rauter*, decided in 1949 by the Dutch Special Court of Cassation. At issue was the question of whether the Germans occupying the Netherlands were entitled to take reprisals against the civilian population. The Court mentioned Article 50 of the Hague Regulations prohibiting 'collective penalties, pecuniary or otherwise' and rightly added that 'the basic idea (*grondgedachte*) of this Article is apparently that no Occupant of foreign territory may — any more than may the lawful sovereign of the Occupant in his own territory — take steps against those who are innocent [of] acts performed by others'.⁵⁶ The Court then noted that such behaviour was also contrary to the principles mentioned in the Martens Clause. Plainly, this reference to the clause was made *ad abundantiam* and without attributing to the clause any particular legal value.

The Court referred again to the clause when it examined another argument put forth by the appellant: the argument whereby he was being prosecuted for acts which were not unlawful at the time of their commission and that consequently, the Dutch Special Criminal Law applied by the Court of Appeal infringed the principle *nullum crimen, nulla poena sine praevia lege poenali*. The Court of Cassation dismissed the argument. It first noted that the Hague Regulations of 1907 forbade certain acts and at the same time included the Martens Clause in the preamble. Consequently 'every deliberate transgression of these international firmly established rules of warfare' constituted an international crime. The appellant's argument was flawed for it ignored the fact that for a long time these transgressions had been known as 'war crimes'.⁵⁷ Secondly, the Court held that the appellant's contention that the Dutch

⁵³ *Ibid.* at 1340.

⁵⁴ *Ibid.* at 1341.

⁵⁵ *Ibid.*

⁵⁶ See text of the decision in *Nederlandse Jurisprudentie* (1949) no. 87, 155–156 (English translation in *Annual Digest and Reports of Public International Law Cases, Year 1949*, at 541).

⁵⁷ See *Nederlandse Jurisprudentie*, at 156 (the Court spoke of 'elke opzettelijke overtreding van deze internationaal vastgestelde regelen van oorlogvoering'); see also *Annual Digest*, at 542.

Special Criminal Law had introduced a new ‘crime against humanity’ was without merit; in this connection the Court pointed out that in fact ‘the said Preamble prescribes in so many words submission to the “lois de l’humanité”’.⁵⁸ Thirdly, the Court emphasized that the principle of non-retroactivity of criminal legislation was not absolute ‘in the sense that its application cannot thwart that of other principles whose recognition is of equally grave concern for the legal order’.⁵⁹ In this connection the Court averred that the interests of the legal order did not permit that extremely serious violations of generally accepted principles of international law should not be punishable solely on the basis that no threat of punishment had previously existed.

Clearly, the first two points were rather vague, shallow and misleading. In particular, it is not clear whether the Court intended to hold that, by virtue of the Martens Clause, any conduct contrary to the ‘principles of humanity’ and the ‘dictates of public conscience’ was to be regarded as amounting to a war crime or to a crime against humanity, even when such conduct was not prohibited by any international legal rule. Arguably the Court did not intend to go so far, and relied upon the clause essentially to bolster its third argument, to which it probably attached decisive importance (and indeed this argument seems by far to be the best articulated and decisive of the three).

A similar approach was taken by Trial Chamber I of the ICTY in the *Martić* decision, handed down in 1996 under Rule 61 of the ICTY’s Rules of Procedure and Evidence. *Martić*, the former president of the self-proclaimed Republic of Serbian Krajina, had been accused of having ordered the shelling of Zagreb on 2 and 3 May 1995, which resulted in the killing of innocent civilians, in violation of the laws of warfare. The Trial Chamber found that the shelling was a war crime: it violated the rules of both customary and treaty law prohibiting attacks on civilians, in particular attacks on civilians by way of reprisals, as well as the principle whereby the right of the parties to an armed conflict to choose methods and means of warfare is not unlimited. The Trial Chamber then added that the prohibition against attacks on civilians and the general principle limiting the means and methods of warfare ‘also derive from the Martens Clause’.⁶⁰

Formally speaking, of greater weight is the Advisory Opinion delivered in 1996 by the International Court of Justice (ICJ) in the *Legality of the Threat or Use of Nuclear Weapons* case. In spite of what would seem at first glance, on close scrutiny it can be said that here as well the reference to the clause was substantially made *ad*

⁵⁸ See *Nederlandse Jurisprudentie*, *ibid.* (for a slightly different English translation see *Annual Digest*, *ibid.*: ‘In fact, this was covered by the said Preamble relating to the “laws of humanity”’).

⁵⁹ See *Nederlandse Jurisprudentie*, at 157 (‘Dit beginsel echter geen absoluut karakter draagt in dien zin dat de werking daarvan niet zou kunnen worden doorkruist door die van andere beginselen bij welker erkenning evenzeer gewichtige belangen der rechtsorde zijn betrokken’). For a slightly different English translation see *Annual Digest*, at 543 (‘Its operation may be affected by other principles whose recognition concerns equally important interests of justice’).

⁶⁰ See the *Martić* case, ICTY, case no. IT-95-11-R61, para. 13. The Trial Chamber added the following: ‘This clause has been incorporated into basic humanitarian instruments. . . Moreover, these norms also emanate from elementary considerations of humanity which constitute the foundations of the entire body of international humanitarian law applicable to all armed conflict’ (*ibid.*).

abundantiam, for the sole purpose of strengthening a conclusion already reached on the basis of specific international rules and principles.

In surveying the law applicable to the threat or use of nuclear weapons, in particular international humanitarian law, the Court mentioned the clause three times. First, after considering the two cardinal principles of humanitarian law (concerning the protection of civilians and the prohibition of any means or method of warfare causing unnecessary suffering to combatants), the Court referred to the clause ‘in relation to these principles’, and stated that it ‘has proved to be an effective means of addressing the rapid evolution of military technology’ (para. 78). It may be noted, with respect, that the significance of this reference to the clause is obscure. Probably the Court intended to articulate the idea that the clause has served as the inspirational force prompting states to humanize war and ban weapons that cause excessive suffering. One fails to see what other meaning could be attributed to this rather terse statement of the Court.

The Court returned to the clause when dealing with the applicability of Additional Protocol I to states not parties to it. In this respect the Court recalled that ‘all states are bound by those rules in Additional Protocol I which, when adopted, were merely the expression of the pre-existing customary law, such as the Martens Clause, reaffirmed in the first Article of Additional Protocol I’ (para. 84).

It may be noted that once again, the reference to the clause is far from illuminating. The Court neither explains how the clause has become part of customary international law, nor does it go into the implications of its customary nature. In particular, the Court does not tackle the crucial issue: if the clause is binding upon all states, what are its legal effects? In other words, what are the obligations upon states that flow from the clause? Does the clause establish new sources of international law? Or does it instead bring into being humanitarian standards of conduct? If so, can these standards be identified by the addressees themselves, or may they only be elaborated by courts of law? None of these queries can be answered in the light of the Court’s pronouncement.

The Court came back to the clause at the end of its perusal of existing legal principles on the threat or use of weapons, concluding as follows:⁶¹

Finally, the Court points to the Martens Clause, whose continuing existence and applicability is not to be doubted, as an affirmation that the principles and rules of humanitarian law apply to nuclear weapons.

It is difficult to grasp the purport of this proposition. One plausible meaning is that, for the Court, the clause elevates the principles of humanity and the dictates of public conscience to yardsticks by which to gauge the behaviour of states. It would follow that, judged on the strength of such yardsticks, the use of nuclear weapons might prove to be contrary to those principles and dictates. However, the Court does not go so far as to draw these implications. Instead, it states that ‘the principles and rules of humanitarian law’ — not the principles of humanity or the dictates of public

⁶¹ *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 6 at para. 87.

conscience — apply to these weapons. The Court simply states that the clause is ‘an affirmation’ that the principles and rules of humanitarian law apply to nuclear weapons. On what basis the Court infers such an ‘affirmation’ is nevertheless arcane.

2 Cases Where the Clause Served to Advance an Original Interpretation of Certain Rules of International Humanitarian Law

An innovative approach was taken by the Conseil de guerre de Bruxelles in the *K.W.* case (judgment of 8 February 1950). The Military Court, without being directly cognizant of *Klinge*, in fact took up one of the arguments made there by the Norwegian Supreme Court. However, it framed the legal issue at stake in a much more appropriate and correct manner.

The defendant, a police officer, had been accused of violations of the laws and customs of war, in that he had caused serious injury to a number of civilians detained after fighting against the German occupiers in occupied Belgium. The Court pointed out that Article 46 of the Regulations annexed to the IVth Hague Convention on the Laws and Customs of War on Land imposed upon the occupying power the duty to respect ‘the lives of persons’. However, no provision of the Regulations expressly prohibited acts of violence and ill treatment (*violences et sévices*) against the inhabitants of occupied territories. The Court thus referred to the Martens Clause. It noted in this regard that in its search for the principles of international law resulting from the principles of humanity and the dictates of the public conscience, it was to be guided by the Universal Declaration of Human Rights, Article 5 of which provides that ‘[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’. The Court then found that the acts performed by the accused against his victims amounted to torture and cruel treatment and concluded that they constituted violations of the customs of war.⁶²

This judgment is exceedingly interesting in at least two respects; first, because it demonstrates that the clause may be of invaluable importance at the interpretative level and secondly, because it points to the proper modalities of construction of customary principles or rules of humanitarian law. By virtue of the clause, reference should thus not be made to vague principles of humanity, but rather to those human rights standards that have been laid down in international instruments such as the Universal Declaration. They may, among other things, be used as guidelines for determining the proper interpretation to be placed upon vague or insufficiently comprehensive international principles or rules.

3 Cases Where the Martens Clause Was Used to Reject Possible a contrario Arguments

Finally, one should mention a ruling made in 1995 by the Constitutional Court of Colombia on the constitutionality of the Colombian law implementing the 1977 Second Additional Protocol to the Geneva Conventions. After examining various

⁶² See the text of the decision in 30 *Revue de droit pénal et de criminologie* (1949–1950) at 562–568.

provisions of the Protocol, the Court also considered the preambular paragraph of the Protocol which refers to the principles of humanity and the dictates of public conscience. The Court took it to be an illustration of the Martens Clause,⁶³ and stated that the purpose of this clause was to rule out the possibility of regarding as authorized any conduct not prohibited by the Protocol.⁶⁴

4 *Summing-up*

It is apparent from the above survey that mention of the clause has been made primarily to pay lip service to humanitarian demands, rather than for the purpose of supporting the notion that two new sources of international law had come into existence around 1899. Beyond mere general statements such as those in the *Krupp* case, no international or national court has ever found that a principle or rule had emerged in the international community as a result of ‘the laws of humanity’ or the ‘dictates of the public conscience’. In other words, no international or national court has propounded and acted upon the notion that there existed in the international community two additional and distinct sources of law, in addition to the treaty and custom processes. Courts have referred to ‘humanity’, either explicitly citing the Martens Clause or implicitly adverting to it, only to spell out the notion that in interpreting international rules one should not be blind to the requirements of humanity,⁶⁵ or to find international standards serving the purpose of circumscribing the discretionary power of belligerents in the face of loose international rules, or to stress that the clause expresses the spirit behind the treaty or customary formation of most rules of international humanitarian law.⁶⁶ Thus, the clause has implicitly or explicitly been used as a sort of general instruction concerning the *interpretation* of certain international rules or as a means of better understanding the thrust of modern humanitarian law.

⁶³ For the wording of that preambular paragraph, see *infra*, in the text of this paper, where it is also shown why this paragraph is substantially different from the Martens Clause.

⁶⁴ It stated the following: ‘The clause indicates that Protocol II must not be interpreted in isolation but must be viewed at all times within the context of the entire body of humanitarian principles, as the treaty simply extends the application of these principles to non-international armed conflicts. Hence the Constitutional Court considers that the absence of specific rules in Protocol II relating to the protection of the civilian population and to the conduct of hostilities in no way signifies that the Protocol authorizes behaviour contrary to those rules by the parties to the conflict.’ (Ruling no. C-225/95, English translation reported in M. Sassòli and A.A. Bouvier (eds), *How Does Law Protect in War?*, ICRC (1999) at 1363–1364).

⁶⁵ See for example the *Corfu Channel* case, ICJ Reports (1949) at 22.

⁶⁶ See for example *Military and Paramilitary Activities in and against Nicaragua (Merits)*, ICJ Reports (1986) para. 218; *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 6 at para. 78 (see also paras 84 and 86). In para. 87, the Court stated the following: ‘Finally, the Court points to the Martens Clause, whose continuing existence and applicability is not to be doubted, as an affirmation that the principles and rules of humanitarian law apply to nuclear weapons.’ However, to fully grasp the purport and meaning of this passage, one ought to take account of the fact that previously the Court had stated that ‘in the view of the vast majority of states as well as writers there can be no doubt as to the applicability of humanitarian law to nuclear weapons’ (para. 85) and had further noted that the same position had been taken by such states as the Russian Federation, the UK and the US (para. 86).

D The Evolution of State Practice

1 Treaties

Our conclusion concerning the case law is confirmed by an appraisal of state practice. On some occasions when the clause has been restated in international treaties, no follow up has been given to such restatement at the practical level. This is the case with regard to the four Geneva Conventions of 1949, which contain the clause in their provisions on denunciation⁶⁷ (provisions that have never been applied in practice, possibly also because no state has ever denounced these Conventions) and of the 1981 'Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects' (this clause may be found in para. 5 of the preamble).

On the other hand, on some occasions and with limited reference to certain segments of international humanitarian law, states have taken a position that might be interpreted as giving the clause a special legal dimension. This is confirmed by fairly recent legal developments. The states gathered at Geneva at the 1974–1977 Diplomatic Conference restated the clause in Article 1(2) of Protocol I (on international armed conflicts).⁶⁸ By contrast, in the preamble of Protocol II (on internal armed conflicts) they took up the clause in a different manner, i.e. as a reference not to the *legal principles* deriving from the laws of humanity or the dictates of public conscience, but to the *principles of morals* ('Recalling that, in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience'). The different wording of the two clauses clearly shows that, when states are wary of excessive intrusion into state sovereignty, they simply call upon states to act in keeping with moral standards. On the contrary, in cases where major interests are at stake but where it is simultaneously felt that states' conduct ought to be governed by law (this could be said of the area of international armed conflicts), states do not shy away from proclaiming the existence of principles and customary rules brought about by considerations of humanity or the dictates of public conscience.

Can one draw from these two different approaches the conclusion that the Martens Clause, while applicable to international armed conflict, may not be applied to internal conflicts? Such a conclusion would be contrary to the whole spirit of international humanitarian law: this body of law, in its contemporary state of development, does not make its applicability contingent on fine legal distinctions.

⁶⁷ Articles 63(4) of the First Convention, 62(4) of the Second, 142(4) of the Third and 158(4) of the Fourth. Article 63 of the First Convention stipulates that: '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 conscience.' The provisions of the other Conventions are identical.

⁶⁸ This clause provides that '... in cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.'

Unnecessary suffering is prohibited whether it is caused by a belligerent within the framework of an international armed conflict or within a civil war. Indiscriminate attacks on civilians are banned, whatever the general context within which they occur. One therefore fails to see why the legal value of the clause should be confined to some classes of armed conflicts and not to others. The restrictive wording of the preamble of the Second Additional Protocol only reflects the recalcitrance of the states gathered at Geneva in 1974–1977 in extensively regulating internal armed conflicts. It would be fallacious and contrary to the object and purpose of international humanitarian principles to infer more from that preamble and its difference vis à vis Article 1(2) of the First Additional Protocol.

2 *Statements before the ICJ*

Important indications as to the position of states and their *opinio iuris* concerning the clause may also be drawn from the statements made by many states in the written and oral proceedings before the ICJ in the *Legality of the Threat or Use of Nuclear Weapons* case.

A number of states, including Australia, Mexico, Iran, New Zealand, Zimbabwe, Nauru and Malaysia,⁶⁹ took the view that the threat or use of nuclear weapons was unlawful amongst other reasons because it would run counter to the clause. However, they did not specify in great detail what legal meaning could, in their opinion, be attributed to the clause. In substance, they stated that the clause refers to humanitarian principles and the dictates of public conscience and resort to nuclear

⁶⁹ As for Australia, see ICJ, CR, 30 October 1995, at 45 and 57; for Mexico, see CR, 3 November 1995, at 69 (for this state the purpose of the clause is 'to confirm the enforcement of international law even in cases where existing international conventions do not stipulate the rules to be applied in determined situations'; see also the Written Statement of Mexico, in *Compilation of Written Statements*, UNAW 95/3, 13); for Iran see CR, 6 September 1995, at 38 and 44; for New Zealand see CR, 9 September 1995, at 28 (for this state 'fundamental general principles of humanitarian law . . . continue to give life to the law, even although specific provisions regulating an area in a particular way have not yet been made'; see also the Written Statement of New Zealand, in *Compilation of Written Statements*, UNAW 95/3, at 19.); for Samoa see CR, 13 November 1995, at 55–56; for Zimbabwe see CR 15 November 1995, at 37 (the clause states 'that in considering new weapons systems or methods of warfare, the principles of customary international law and the dictates of public conscience shall apply. The threat and use of nuclear weapons violate both customary international law and the dictates of public conscience'); for Nauru see the Response, in *Compilation of Written Comments*, AWW, 95/2, 13 July 1995, at 13 ('The Martens Clause seems to require the application of general principles of law. It speaks of the laws of humanity and the dictates of public conscience'. General principles of law recognized by civilized nations would therefore seem to embody the principles of humanity and the public conscience. Inhumane weapons and weapons which offend the public conscience are therefore prohibited') and 32–34. As for Malaysia, see the Statement in *Compilation of Written Comments*, AWW 95/2, 13 July 1995, at 33–34 ('The Martens Clause makes it indisputably clear that the customary rules of armed conflict as well as the dictates of public conscience are relevant to the question before the Court', at 33; 'The United Kingdom's interpretation of the Martens Clause reduces it to a non-entity by requiring "a rule of customary international law" for its application. What if some horrible new weapon were invented, eagerly adopted by most of the world's generals and roundly condemned as inhumane by most of the world's peoples? The United Kingdom's position would, in effect, make the legal advisors to the world's Ministries of Defence and Foreign Affairs the guardians of the public conscience. That is not what Frederic [*sic*] de Martens had in mind', at 34).

weapons would be contrary to such principles or dictates. It would seem that they thus implicitly propounded the view that the clause has resulted in *importing* into international law, as legally binding standards, both the principles of humanity and the dictates of public conscience.

A contrary view was put forward by countries such as the United States and the United Kingdom. For these states, the clause merely encapsulates a ban on a possible *a contrario* argument: under the clause, if cases are not covered by the rules of the Hague or Geneva Conventions, it does not necessarily follow that they are unregulated, for they may be governed by customary rules — if such rules exist with regard to a particular matter — or other treaties.⁷⁰ A more radical view was advanced by Russia: ‘today the “Martens Clause” may formally be considered inapplicable’.⁷¹

As noted above, the ICJ, faced with these conflicting views, did not take sides in its Advisory Opinion. It did not uphold the view of the majority of states appearing before it, and suggesting — either implicitly or in a convoluted way — the expansion of the scope of the clause so as to upgrade it to the rank of a norm establishing new sources of law. Nor did it confine itself to attaching an exclusively interpretative purport to the clause, as advocated by the United States and the United Kingdom. It can be respectfully submitted that the Court took a sort of middle-of-the-road attitude, by expounding rather loose and ambiguous propositions bound to raise more problems than they solved.

E Concluding Remarks

The stark difference of opinion existing among states and the failure of the ICJ to articulate a clear-cut and specific view on the matter bears out the conclusion that can be reached on the basis of a detailed survey of case-law. Surely the clause does not envisage — nor has it brought about the birth of — two autonomous sources of international law, distinct from the customary process.

It should be added that, were one to hold a contrary view, one would fail to discern the constituent elements of the new sources: would they consist, as custom, of *usus*

⁷⁰ As the United States representative Matheson put it: ‘The Martens Clause clarifies that the absence of a specific treaty provision prohibiting the use of nuclear weapons does not, standing alone, compel the conclusion that such use is or is not unlawful. At the same time, however, the clause does not independently establish the illegality of nuclear weapons, nor does it transform public opinion into rules of customary international law. Rather, it simply makes clear the important protective role of the law of nations and clarifies that customary international law may independently govern cases not explicitly addressed by the Conventions. This is what gives content and meaning to the Martens Clause. Therefore, when as here, customary international law does not categorically prohibit the use of nuclear weapons, the Martens Clause does not independently give rise to such a prohibition’ (ICJ, Verbatim Records, 15 November 1995, CR 95/34, at 98). See also the Written Statement of the UK, *Compilation of Written Statements*, UN AW 95/31, 47–48, para. 3.58, *ibid*.

⁷¹ See *Compilation of Written Statements*, ANW, 13 July 1995, at 13. After noting that the clause began with the words ‘[u]ntil a more complete code of the laws of war has been issued’ (*ibid.* at 11), the Russian Memorandum pointed out the following: ‘As to nuclear weapons the “Martens Clause” is not working at all. A “more complete code of the laws of war” mentioned there as a temporary limit was “issued” in 1949–1977 in the form of Geneva Conventions and Protocols thereto, and today the “Martens Clause” may formally be considered inapplicable’ (*ibid.* at 13).

and *opinio*? If so, in what respect would they differ from the normal customary norm-creating process? If not, what would be the specific structural elements of these new norm-creating processes? It is striking that, except for one or two publicists,⁷² no court or state has ever tackled this crucial question. This, it is submitted, further bolsters the conclusion that these new sources have not in fact materialized.

5 The Legal Purport That Can Be Justifiably Attributed to the Clause: or Is It Simply a Diplomatic Gimmick?

As a result of the above analysis, should we conclude that the clause is solely a manifestation of diplomatic skill, and is per se devoid of any legal impact on international humanitarian law? It cannot be gainsaid that over the years the clause has had a great resonance in international relations. Clearly, in spite of its ambiguous wording and its undefinable purport, it has responded to a deeply felt and widespread demand in the international community: that the requirements of humanity and the pressure of public opinion be duly taken into account when regulating armed conflict. If the clause had not struck a chord with the sentiments prevailing in the world community, one could not explain why it has been evoked or relied upon so often, both by international lawmakers, by national and international courts and by diplomats. There is a further reason for attaching some legal value to the clause: namely, the general principle of construction whereby international instruments should not be presumed to be devoid of any legal significance and practical scope.

In an attempt to ascribe plausible legal significance to the clause, three points can be made.

A *The Clause and the Interpretation of International Rules*

First of all, the clause may serve as fundamental guidance in the interpretation of international customary or treaty rules. In case of doubt, international rules, in particular rules belonging to humanitarian law, must be construed so as to be consonant with general standards of humanity and the demands of public conscience. In order to avoid arbitrary constructions or abuse, the ‘standards of humanity’ should be deduced from international human rights standards and the ‘demands of public conscience’ ought to be ascertained by taking into account resolutions and other authoritative acts of representative international bodies.

However, the question arises as to how this interpretative principle should be coordinated with the view taken by the International Court of Justice in a string of

⁷² See the contributions of Sperduti, *supra* note 6, and Shahabuddeen, *supra* note 7.

cases (*Corfu Channel*, *Nicaragua* and *Legality of the Threat or Use of Nuclear Weapons*)⁷³ concerning ‘elementary considerations of humanity’. It has been convincingly argued that, for the Court, those ‘considerations’ constitute a general principle of international law imposing direct obligations upon states.⁷⁴ However, it would seem that neither the Court nor scholars have clarified two important points. First, the question of the conditions under which the ‘considerations of humanity’ become applicable; in particular whether they come into play whenever the legal regulation provided by a treaty or customary rule is doubtful, uncertain or lacking in clarity, or whether instead they also become operational when treaty or customary rules exist that run contrary to them; in other words, whether these ‘considerations’ may be attributed the rank of *jus cogens*.⁷⁵ The second point that has not been clarified regards the content of the ‘considerations of humanity’: how does one establish their scope and purport or, in other words, by what yardstick can one determine whether or not certain obligations are imposed by them? In addition, may such a finding be made only by courts, or can states and other international subjects also determine what specific conduct is required by this general principle of international law in a particular case?

In any event, if the view is taken that there now exists a general principle of international law concerning considerations of humanity, it could be maintained that the relationship of this principle with the Martens Clause, as construed above, is twofold. First, the clause has been at the origin of the general principle. It can be reasonably argued that the principle has evolved after World War II chiefly as a result of its being spelled out and, in a way, ‘codified’ by the International Court of Justice in the *Corfu Channel* case. If this is so, it cannot be denied that one of the most prominent and forceful ‘historical’ sources of the principle was precisely the Martens Clause. Secondly, there is room for the view that the clause, in as much as it embodies the principle of interpretation advocated above, is a sort of *lex specialis* vis à vis the general principle of international law upheld by the ICJ, in that it only refers to humanitarian law, whereas the principle embraces the whole body of international law. In this respect, the clause would restate and strengthen the general principle in the specific area of international humanitarian law.⁷⁶

B The Clause and the Sources of International Law

A second legal effect of the clause can be seen in the area of sources of law. If one disregards the historical origin of the clause and the intentions of its proponent, and considers it in its present logical and legal dimension, the clause may be construed as

⁷³ See the *Corfu Channel* case, ICJ Reports (1949) 22; *Nicaragua* case (Merits), *ibid.* (1986) para. 218 and *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 6, at para. 79. On these cases see the remarks of Dupuy, ‘Les “considérations élémentaires d’humanité” dans la jurisprudence de la Cour Internationale de Justice’, *Mélanges en l’honneur de N. Valticos* (1999) 117–130.

⁷⁴ See on this matter the important considerations of Dupuy, *ibid.* at 119–128.

⁷⁵ On this point see however the considerations of both the ICJ in *Legality of Use or Threat of Nuclear Weapons*, *supra* note 6, at para. 78 and of Dupuy, *ibid.* at 123–124.

⁷⁶ For an illustration of the role the clause may have for interpretative purposes, see the judgment of 14 January 2000 in *Kupreškić*, cited *supra* note 48, paras. 535–536 (on the question of precautions to be taken for the protection of civilians in case of attacks on military objectives).

having *some indirect impact* on traditional sources of international law, in particular the customary process. It is a fact that the clause puts the ‘laws of humanity’ and the ‘dictates of public conscience’ on the same footing as the ‘usages of states’ (i.e., state practice) as historical sources of ‘principles of international law’. As we have seen, this fact does not entail that the three categories have the same importance for norm-creating purposes. However, equating the three ‘sources’ may at least entail that whenever a principle derives from the laws of humanity, it must not necessarily be based on either state practice or the dictates of public conscience (similarly, a principle resulting from state practice need not be grounded in the other two categories; by the same token, a principle stemming from the dictates of public conscience need not be supported by state practice or by considerations of humanity). It follows that it is logically admissible to infer from the clause that the requirement of state practice for the formation of a principle or a rule based on the laws of humanity or the dictates of public conscience may not be prescribed, or at least may not be so high as in the case of principles and rules having a different underpinning or rationale. In other words, when it comes to proof of the emergence of a principle or general rule reflecting the laws of humanity (or the dictates of public conscience), as a result of the clause the requirement of *usus* (*les usages établis entre nations civilisées*) may be less stringent than in other cases where the principle or rule may have emerged instead as a result of economic, political or military demands. Put differently, the requirement of *opinio iuris* or *opinio necessitatis* may take on a special prominence. As a result, the expression of legal views by a number of states and other international subjects concerning the binding value of a principle or a rule, or the social and moral need for its observance by states, may be held to be conducive to the formation of a principle or a customary rule, even when those legal views are not backed up by widespread and consistent state practice, or even by no practice at all. Thus, arguably the Martens Clause *operates within the existing system of international sources* but, in the limited area of humanitarian law, *loosens* the requirements prescribed for *usus*, while at the same time *elevating opinio (iuris or necessitatis)* to a rank higher than that normally admitted.⁷⁷

What would justify this conclusion? From the viewpoint of substance, one could mention the need — in the area of the law of warfare — for humanitarian demands to efficaciously counterpoise compelling military requirements and their devastating impact on human beings, even before such humanitarian demands have been translated into actual practice. What would be the purpose of requiring prior state practice for the formation of a general legal prohibition, when what is at stake is, for

⁷⁷ For original constructions of the role of *opinio iuris* in the case of humanitarian principles see Sperduti, *supra* note 5, 68–74; Shahabuddeen, Dissenting Opinion in the case of *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 6, 409–411 (the issue is also briefly discussed by Dupuy, ‘Les “considérations élémentaires d’humanité” dans la jurisprudence de la Cour Internationale de Justice’, *supra* note 73, at 127).

The legal construct suggested in the text is however different from that proposed by the two eminent international lawyers. First, as for Sperduti, he conceives the new norm-creating process as applicable to the whole body of international law, while the view propounded here only applies — more realistically, it would seem — to humanitarian law. Secondly, Sperduti tends to play down the ‘laws of humanity’ while

instance, the use of extremely deadly means or methods of warfare seriously imperilling civilians? To wait for the development of practice would mean, in substance, legally to step in only after thousands of civilians have been killed contrary to imperative humanitarian demands. The original and unique 'restructuring' of the norm-creating process in the area of humanitarian law, as suggested here, would thus serve as a sort of *antidote* to the destructiveness of war: restraints on the most pernicious forms of belligerence must be complied with by combatants whenever authoritatively required by states and other international subjects, even if such restraints have not been previously put into practice.

From the angle of legal interpretation, the above conclusion would seem to rest on two arguably solid grounds. First and more generally, it rests upon the need to take account of the aforementioned fundamental principle whereby legal clauses must be so construed as to prove meaningful, with the consequence that any interpretation making them pointless must be dismissed whenever possible. Secondly, it rests upon the necessity to draw some legal sense from the widespread acclaim which the clause has attracted over the years in international relations, as a means of at least attenuating the most pernicious effects of modern warfare.⁷⁸

C *The Future of the Clause*

Thirdly, it seems appropriate to suggest *de lege ferenda* that states should cease restating the clause in treaties or other international instruments. Given the ambiguity marring the clause, what is the purpose of continuing with the ritualistic and rather hollow habit of proclaiming it again and again? To be sure, states should be

by the same token overemphasizing the 'dictates of public conscience'; this would seem contrary to the spirit of the Martens Clause. Thirdly, his examples of norms produced through the norm-creating process at issue are questionable, for both in the case of slave trade and in that of aggression some state practice evolved before it was widely admitted that a general norm had emerged on the matter.

As for the view of Judge Shahabuddeen, it is different from that propounded here. The distinguished judge argues that the clause imports into international law all the laws of humanity and dictates of public conscience, thus transforming them into legal standards; it would then be for courts of law to ascertain the content of these standards, by reference to states' views. Whatever the role of courts in this process, the fact however remains that the clause would turn out to be a principle which brought into being *two new norm-creating processes*. This, however, has not been accepted by case law and state practice, as we have seen above. What would then legally justify this theoretical construct? In addition, what would justify the proposition that, although the laws of humanity and the dictates of public conscience are transformed by the clause into legally binding standards, they cannot however be applied before a court of law makes a finding about their exact contents? Given the present conditions of adjudication in the international community, this proposition would entail that states and other international subjects would not be in a position to act upon one of the standards produced through these new sources until a court has pronounced on the matter. Thus the laws of humanity and the dictates of public conscience would be very slow in coming into effect as standards of behaviour. What is even more serious, they would only operate subject to the condition that a court of law has made a finding on the matter. What would warrant such a unique and indeed odd legal condition?

⁷⁸ For a very recent case where a court has played down the role of *usus*, on account of the entry into force of the Martens Clause, see *Kupreškić*, *supra* at note 48, paras 537–544 (on the question of reprisals against civilians).

commended for feeling the need to uphold the clause. They proclaim it because they admit that humanitarian demands should not go unheeded in international dealings. However, if this is so, states should endeavour to act in a more meaningful manner and attach some significance to the restatement of the clause. For instance, they could reword it as a general principle for the interpretation of international humanitarian law.⁷⁹ Or, in addition to this step, states could couch the clause as a norm concerning the formation of this body of law: the clause would aim at taking into account the demands of humanity as they are articulated by the public conscience emerging in the world community, regardless of any attendant practice.⁸⁰

6 Conclusion

The introduction into international law, through the Martens Clause, of a means of taking into account humanity was not achieved out of humanitarian motivations. Rather, it formed part of diplomatic manoeuvring designed to overcome political difficulties in the international arena. The clause, so appealing both because, and in spite of, its ambiguity, brought about considerable confusion in international relations and has been at the source of many illusions and demands which were not matched by the harsh realities of international dealings.

However, the initial rationale behind this undertaking and the uncertainties to which it gave rise should not lead us to underestimate its importance for international relations. Here, as in any other path of life, what ultimately matters is the overall effect that a legal construct may produce, regardless of the intentions of its author or proponent. One could go so far as to argue in Hegelian terms that what matters is the action of the 'Wiles of Reason' (*List der Vernunft*), which may use individuals as mere tools to build the most significant edifices of history.⁸¹ Be that as it may, it cannot be denied that advances in the world community may sometimes take strange and often mysterious paths. What counts is of course not so much *how* these advances are made, but rather that they *be made*, lest this body of law remain encumbered by the numerous fetters imposed by the traditional respect for state sovereignty.

⁷⁹ For instance, states could lay down that, in case of doubt, rules of international humanitarian law should always be construed so as to take account of the laws of humanity and the dictates of public conscience.

⁸⁰ For instance, states could proclaim that in cases not specifically regulated by treaty law or by customary rules, states and other parties to an armed conflict should comply with general principles emerging in international dealings and recognized by states, intergovernmental and non-governmental organizations as imposed by the demands of humanity and the dictates of public conscience.

⁸¹ See the splendid pages of G.W.F. Hegel, *Vorlesungen über die Philosophie der Geschichte* (1840) in *Werke*, vol. IX (1927–1930) 83–84.