

## THE ENDURING LEGACY OF THE MARTENS CLAUSE: RESOLVING THE CONFLICT OF MORALITY IN INTERNATIONAL HUMANITARIAN LAW

### ABSTRACT

The true meaning of the Martens Clause has bewildered legal scholars for centuries. There are multiple and competing views as to how the legal effect of this Clause should be correctly defined, each with sufficient credible support in case law, treaty provisions and academic commentary. This article explores three of the most commonly advanced interpretations of the Martens Clause, including the ways in which the Clause is used to nullify *a contrario* arguments, reference to the Clause in aid of judicial interpretation, and finally the perspective that the operative content of the Clause has acquired the status of a peremptory norm of customary international law. Rather than attempting to analyse each position in order to find the one true meaning of the Clause, this article instead takes a holistic view of the history of the Clause in an attempt to understand why it has been so difficult to agree on its meaning definitively. In doing so, specific attention is paid to the intractable moral dilemmas that are brought about during times of armed conflict and, with reference to such extreme circumstances, it is concluded that the ambiguity of this Clause is what allows it to be so useful. There is something subtle and nuanced about the intention of the Martens Clause which has been impossible to distil for over a century, yet it continues to provide a moral safe harbour that we are evidently loath to forego.

### I INTRODUCTION

There is an inescapable discomfort that exists within international humanitarian law ('IHL'). On one hand, humanity has shown its insatiable appetite for war and violence throughout the ages. Paradoxically, as we have evolved systems of law to civilise ourselves, these same systems have been required to regulate the inevitable chaos of war. Faced with the knowledge that armed conflict will certainly occur, whereby disgraces upon humanity and dignity will lash and scar the lives of undeserving peoples while leaving a trail of death and destruction in their wake, it

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follows that there must be a concerted effort on the part of the international community to develop and apply a system of IHL, so as to quell and pacify belligerents, and to ameliorate human suffering, where possible. Yet on the other hand, such a system of laws necessarily entails the reduction of innocent human life into units of measurement, the kind that can be traded for military advantage and extinguished with relative impunity.<sup>1</sup> Such a system must ascribe positive value to intangibles like pain, grief, destruction, torture and murder if it is to be effective at all. The discomfort, therefore, is in attempting to reconcile this contradiction with our moral conscience.

The Martens Clause is a curious artefact of IHL. Having emerged in history as little more than a cunning ‘diplomatic ploy’,<sup>2</sup> many scholars are quick to dismiss its relevance within the modern context of international law, citing the ulterior motives behind its origin as evidence of an intended lack of positive legal value.<sup>3</sup> Despite this, the Clause has been consistently cited, restated and referred to in treaties, case law, jurisprudence and academic commentary since the Hague Peace Conference of 1899 (‘Hague Conference’).<sup>4</sup> This has led to a prolific, yet convoluted debate as to the true meaning and application of the Clause within contemporary IHL. The many disparate viewpoints cover the full gamut of potential interpretations of the Martens Clause, from merely acting to nullify *a contrario* arguments, to serving as an aid to judicial interpretation, and even so far as establishing new peremptory norms of international law. However vexed this debate has become, there nonetheless appears to be an alluring quality to the operative content of the Clause, which refers to

the laws of humanity, and the dictates of the public conscience.

What is it about these two seemingly modest concepts that have been so difficult to define? And if they are to be properly treated as mere relics of a bygone era, when IHL was a fledgling and rudderless domain of international law, why then have we been unable to confine them to history and put the debate to rest? It would seem that amidst the endless conjecture, there is something deeply attractive and precious in these words. It is something that stokes our desire to view IHL as a moral creation, and not simply as the rules by which the carnage of war is regulated.

<sup>1</sup> Scott Graham, ‘The Non-Combatant Casualty Cut-Off Value: Assessment of a Novel Targeting Technique in Operation Inherent Resolve’ (2018) 18(4) *International Criminal Law Review* 655, 670–1; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) arts 48, 51, 57.

<sup>2</sup> Antonio Cassese, ‘The Martens Clause: Half a Loaf or Simply Pie in the Sky?’ (2000) 11(1) *European Journal of International Law* 187, 197.

<sup>3</sup> VV Pustogarov, ‘The Martens Clause in International Law’ (1999) 1(2) *Journal of the History of International Law* 125, 129–31; Rupert Ticehurst, ‘Le clause de Martens et le droit des conflits armés’ [The Martens Clause and the Law of Armed Conflict] (1997) 79(824) *International Review of the Red Cross* 133, 135.

<sup>4</sup> Michael Salter, ‘Reinterpreting Competing Interpretations of the Scope and Potential of the Martens Clause’ (2012) 17(3) *Journal of Conflict & Security Law* 403, 405.

This article explores the history of the Martens Clause, and then proceeds to assess the various ways in which the Clause has influenced the interpretation and application of IHL. In pursuing the theme of inherent moral conflicts within IHL and the struggle to reconcile them, this article argues that the Martens Clause is to be viewed properly as a serendipitous opportunity — something that was brought about by circumstance, and has since unwittingly infused IHL with a natural, moral character, to the benefit of all that fall beneath its authority.

## II HISTORICAL CONTEXT

In the late 19<sup>th</sup> century the nature of war was changing. The industrial revolution had exponentially improved the capacity of nations to wage war, having delivered an enhanced ability to manufacture weapons more precisely and en masse,<sup>5</sup> together with frightening new weapon systems like exploding bullets and poison gas, which emboldened the devastating consequences of combat.<sup>6</sup> Further, the activation of universal military conscription following the French Revolution also played a role in swelling the ranks of armies, leading to a proliferation of the effects of warfare well beyond that which had been previously experienced.<sup>7</sup> As the brutality of post-industrial armed conflict began to materialise on the battlefield, the international community recognised the need to adapt new systems of law to regulate the effects of these changes.<sup>8</sup>

The Hague Conference was a product of the groundswell movement towards the codification of IHL that was gaining momentum towards the turn of the 20<sup>th</sup> century, including: the signature of the Lieber Code in 1863;<sup>9</sup> the 1864 *Geneva Convention*;<sup>10</sup> the 1868 *St Petersburg Declaration*;<sup>11</sup> the establishment of the Institut de Droit

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<sup>5</sup> Larry H Addington, *The Patterns of War Since the Eighteenth Century* (Indiana University Press, 2<sup>nd</sup> ed, 1994) 102–5.

<sup>6</sup> Jeffrey Kahn, “‘Protection and Empire’: The Martens Clause, State Sovereignty, and Individual Rights” (2016) 56(1) *Virginia Journal of International Law* 1, 19.

<sup>7</sup> *Ibid* 18–19.

<sup>8</sup> Henry Dunant, *A Memory of Solferino* (International Committee of the Red Cross, 1986) 9.

<sup>9</sup> Francis Lieber et al, *General Orders No 100: Adjutant-General’s Office, Instructions for the Government of Armies of the United States in the Field* (D Van Nostrand, 1863) (‘Lieber Code’). See also Richard S Hartigan, *Lieber’s Code and the Law of War* (Precedent Publishing, 1983).

<sup>10</sup> *Geneva Convention for the Amelioration of the Condition of the Sick and Wounded of Armies in the Field*, opened for signature 22 August 1864, (1907) 1(2) *American Journal of International Law* 90 (entered into force 22 June 1865).

<sup>11</sup> *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*, opened for signature 29 November 1868, (1907) 1(2) *American Journal of International Law* 95 (entered into force 11 December 1868).

International in 1873;<sup>12</sup> and the failed Brussels Conference of 1874.<sup>13</sup> At the Hague Conference, the second sub-commission, chaired by one Friedrich Martens, was tasked to

revise the declaration concerning the laws and customs of war elaborated in 1874 by the Conference of Brussels, which has remained unratified to the present day.<sup>14</sup>

Of relevance were the ensuing negotiations that would attempt to address the question of how to deal with the status of the so-called *Franco-Tireurs*<sup>15</sup> — what would today be regarded as civilians taking ‘direct part in hostilities’. During the course of the Franco-Prussian War, the *Franco-Tireurs* wreaked devastation over the Prussian forces by exploiting their ability to conduct military operations under the guise (and protection) of civilian status.<sup>16</sup> The greater state powers at the conference, such as the Russian and German Empires, considered the conduct of the *Franco-Tireurs* to be disingenuous and undeserving of any protected status.<sup>17</sup> Surreptitiously, they held the *Franco-Tireurs* in great contempt for their ability to frustrate their military campaigns, and accordingly preferred to retain unfettered rights to deal with them harshly through lengthy prison sentences and executions upon capture.<sup>18</sup> The voice of the lesser state powers was led by the Belgian delegate Auguste Beernaert, who advanced a contrary argument that demanded it was a fundamental right, if not a patriotic responsibility, of all inhabitants of a country to resist the invasion of an enemy.<sup>19</sup> Accordingly, he was resolute in demanding the recognition of some form of protected status for these forces in the face of great pressure.

This impasse between the greater and lesser powers produced a diplomatic deadlock — the kind that Martens feared might fundamentally jeopardise the success of the Conference.<sup>20</sup> If the Conference was to fail, in addition to casting aspersions on the reputation of Tsar Nicholas II (convenor of the Conference and Martens’ direct

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<sup>12</sup> Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2002) 41.

<sup>13</sup> *Project of an International Declaration Concerning the Laws and Customs of War*, opened for signature 27 July 1874, (1907) 1(2) *American Journal of International Law* 96 (entered into force 27 August 1874).

<sup>14</sup> Arthur Eyffinger, *The 1899 Hague Peace Conference: The Parliament of Man, the Federation of the World* (Kluwer Law International, 1999) 263, quoted in Kahn (n 6) 20. See also Count Mouravieff, ‘Second Russian Circular’ (Letter, First Hague Peace Conference, 11 January 1899).

<sup>15</sup> Fernand Grenier, *Franco-Tireurs and Guerrillas of France: A Record of French Resistance* (Cobbett Publishing Company, 1943).

<sup>16</sup> David Turns, ‘Classification, Administration, and Treatment of Battlefield Detainees’ in Ana María Salinas de Frías, Katja LH Samuel and Nigel D White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press, 2012) 426, 438.

<sup>17</sup> JM Spaight, *War Rights on Land* (Macmillan and Co, 1911) 41–5.

<sup>18</sup> Kahn (n 6) 21.

<sup>19</sup> *Ibid* 23; Cassese (n 2) 194.

<sup>20</sup> Cassese (n 2) 196.

superior),<sup>21</sup> Martens also feared that armies would thereafter consider themselves to be unconstrained by IHL.<sup>22</sup>

In reference to the impending failure of the Conference, Martens warned the delegation that

[t]wice, in 1874 and in 1899, two great international conferences have gathered together the most competent and eminent men of the civilised world on the subject. They have not succeeded in determining the laws and customs of war. They have separated, leaving utter vagueness for all these questions. These eminent men, in discussing these questions of the occupation and the rights and duties of invaded territories, have found no other solution than to leave everything in a state of vagueness and in the domain of the law of nations! How can we, the commanders in chief of the armies, who are in the heat of action, find time to settle these controversies, when they have been powerless to do so in time of peace, amid worldwide absolute calm and when the governments had met for the purpose of laying down solid bases for a common life of peace and concord? Under these circumstances, it would be impossible to deny to belligerents an unlimited right to interpret the laws of war to suit their fancy and convenience.<sup>23</sup>

Thus, in order to give some ground to the *Francs-Tireurs*, while stopping well short of a protective regime that would have been unpalatable to the greater state powers, the infamous Martens Clause was proposed. In its original form, it reads 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*.<sup>24</sup>

While it was evident to the lesser powers that the Clause merely contemplated a *potential* argument that the *Francs-Tireurs* were lawful combatants, their leverage was very slight, and with the fate of the entire conference riding on their accession, a compromise was reached and the Clause was adopted.

This combination of circumstances that produced the Martens Clause is often relied upon to subvert its legal rigour. Academics are quick to point to the fact that Martens — himself a man evidently willing to extol his own virtues — never celebrated the Clause as a personal humanitarian triumph in the wake of the Hague

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<sup>21</sup> Ibid.

<sup>22</sup> Rotem Giladi, 'The Enactment of Irony: Reflections on the Origins of the Martens Clause' (2014) 25(3) *European Journal of International Law* 847, 854.

<sup>23</sup> Friedrich Martens, *The Proceedings of the Hague Peace Conferences: Translation of the Official Texts*, ed James Brown Scott (Oxford University Press, 1920) 507.

<sup>24</sup> Ibid 208 (emphasis added).

Conference.<sup>25</sup> Consequently, it is argued by inference that the Clause operates merely as a ‘stopgap measure fully determined by its original historical context’.<sup>26</sup> This view however fails to account for the scope, variety and authority of subsequent matters that have since invoked the Clause as something a great deal more significant.

Consequently, the question remains — how should one properly construe the legacy of the Martens Clause in IHL?

### III ARGUMENTUM A CONTRARIO

Notwithstanding the evident political gamesmanship that inspired the drafting and ratification of the Martens Clause, its substance does align with more pure motives as well. Delegates to the Hague Conference were cognisant of the generality of the clauses they adopted, and readily conceded the fact that it would be impossible to ‘concert regulations covering all the circumstances which arise in practice’.<sup>27</sup> This necessarily resulted in significant gaps within the regulations as they applied to state practice, which some states have subsequently sought to rely upon as constituting an ‘implicit legal authorisation’<sup>28</sup> of conduct that would otherwise be in direct contravention of the object and spirit of the regulations. Such exploitation of these legal vacuums is best encapsulated by a strictly positivist interpretation of the *Lotus* principle<sup>29</sup> — namely that ‘when it is unclear whether rules of international law apply to a situation, it is presumed that there are no rules and that States are free to act’.<sup>30</sup> However, the intention of the delegates to the Hague Conference was expressly that unforeseen cases should not, in the absence of written undertaking, be left to the arbitrary judgement of military commanders.<sup>31</sup>

Thus, on one rather popular (albeit narrow) reading of the Martens Clause, it functions in a residual capacity to nullify an *argumentum a contrario*, or an ‘argument to the contrary’. Viewed through this lens, the Clause lies dormant until such time as state actors seek to exploit a gap in the law so as to legitimise conduct that would be abhorrent to standards of humanity and public conscience. In such a scenario, the Martens Clause would operate to remind states that even in the absence of regulation,

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<sup>25</sup> Cassese (n 2) 199.

<sup>26</sup> Salter (n 4) 407.

<sup>27</sup> Eyffinger (n 14) 313.

<sup>28</sup> Pustogarov (n 3) 131. See also Georges Abi-Saab, ‘The Specificities of Humanitarian Law’ in Christophe Swinarski (ed), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (Martinus Nijhoff Publishers, 1984) 265, 274.

<sup>29</sup> *SS ‘Lotus’ (France v Turkey) (Judgment)* [1927] PCIJ (ser A) No 10 (‘*Lotus*’).

<sup>30</sup> Hugh Handeyside, ‘The *Lotus* Principle in ICJ Jurisprudence: Was the Ship Ever Afloat?’ (2007) 29(1) *Michigan Journal of International Law* 71, 79.

<sup>31</sup> Eyffinger (n 14) 313.

there exist fundamental duties of international law from which no derogation is permitted, and which can lead to criminal sanction if breached.<sup>32</sup>

While this interpretation stops well short of elevating the content of the Martens Clause to that of an independent legal norm, it does inject an elastic quality to the law of armed conflict, by establishing a legal foundation for IHL to expand and absorb issues well beyond the scope that was foreseeable throughout the 20<sup>th</sup> century. This was explicitly recognised by the International Court of Justice ('ICJ') in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* ('*Nuclear Weapons Advisory Opinion*')

The Court would likewise refer, in relation to these principles, to the Martens Clause ... which has proved to be an effective means of addressing the rapid evolution of military technology.<sup>33</sup>

And further:

[T]he Court points to the Martens Clause, whose continuing existence and applicability is not to be doubted.<sup>34</sup>

This is evidence of the continued relevance of the Clause in the modern context of IHL, where this particular function may become increasingly relevant in the near future. In much the same way that the industrial revolution exponentially accelerated the rate of military advancement towards the close of the 19<sup>th</sup> century, and thus galvanised the international community to take action to regulate the shifting landscape, we are again faced with a similar dilemma today. With the rise of artificial intelligence, machine learning, autonomous weapons systems and cyber warfare,<sup>35</sup> humanity is wading into an era of military technology that was entirely unimaginable to the founders of IHL. These new forms of technology develop much faster than the law,<sup>36</sup> and may in fact pose an existential threat to entire states, if not to all of humanity. In this context, the Martens Clause can be relied upon to charge those standards of 'humanity' and 'public conscience' with authoritative legal weight, and consequently constrain these advances in military technology.<sup>37</sup> Within this context of unprecedented technological advancement, the utility of the Martens Clause enables us to circumvent the correspondingly slow and ineffectual process of legal reform that would leave humanity exposed to the gravest of consequences. It does so

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<sup>32</sup> Salter (n 4) 409.

<sup>33</sup> *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 257 ('*Nuclear Weapons Advisory Opinion*').

<sup>34</sup> *Ibid* 260.

<sup>35</sup> Marcus Schulzke, 'Autonomous Weapons and Distributed Responsibility' (2013) 26(2) *Philosophy & Technology* 203; Gary D Solis, 'Cyber Warfare' (2014) 219(1) *Military Law Review* 1.

<sup>36</sup> Ticehurst (n 3) 142.

<sup>37</sup> Michael C Horowitz, 'Public Opinion and the Politics of the Killer Robots Debate' (2016) 3(1) *Research & Politics* 1–8, 2.

by allowing recourse to an existing interpretive device, the limitations of which are bound only by our conceptions of humanity and morality.

Notwithstanding the operation of the Martens Clause outlined above, there remains significant evidence to suggest that the Clause represents more than simply a residual device that applies solely to plug gaps in the law. To end the enquiry at this point would be negligently premature.

Two broader interpretations of the Clause will be discussed at length below, namely: its use as an aid to judicial interpretation; and the argument that the ‘laws of humanity’ and the ‘public conscience’ have been elevated to the status of *jus cogens*, or peremptory norms of customary international law.

#### IV AID TO JUDICIAL INTERPRETATION

The Martens Clause begins to meaningfully impact the course of IHL when it is applied beyond gaps in treaty or custom, and is empowered to bring its influence to bear on questions of judicial interpretation and construction. On this view, when faced with the need to resolve ambiguities in the law produced by two or more conflicting interpretations, ‘the [C]ause authorises judges to select that interpretation of fact and law which best gives effect to the standards endorsed by this measure’.<sup>38</sup> In vesting the Martens Clause with the ability to directly influence the interpretation and application of the concrete provisions of IHL, the ‘standards of humanity’ and ‘public conscience’ become defining factors of its development.

In order to correctly assess how these standards influence judicial interpretation, it becomes necessary to explore their definitions in greater depth. On the standards of ‘humanity’, Jean Pictet expounded his views in the following quote:

[C]apture is preferable to wounding an enemy, and wounding him better than killing him; that non-combatants shall be spared as far as possible; that wounds inflicted be as light as possible, so that the injured can be treated and cured; that wounds cause the least possible pain; that captivity be made as endurable as possible.<sup>39</sup>

This perspective beautifully encapsulates the harrowing moral conflict of IHL, and by deference to the standards of humanity, succeeds in framing the conduct of warfare as a regrettable yet necessary truth that should be permitted only so far as is absolutely necessary to achieve a precise military objective — and not an inch further. Implicit in Pictet’s words are recognitions of the humanity of the enemy, of

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<sup>38</sup> Salter (n 4) 413.

<sup>39</sup> Jean Pictet, *Development and Principles of International Humanitarian Law: Course Given in July 1982 at the University of Strasbourg as Part of the Courses Organized by the International Institute of Human Rights* (Martinus Nijhoff Publishers, 1985) 62.

the intractable moral dilemma of war, of the injustice ascribed to the soldiers who are imperilled on the battlefield, and of the urgent need for some moral infusion to find its way into the interpretive framework.

As for ‘public conscience’, this standard appears to imbue IHL with a democratic quality, whereby the collective voice of the public could be theoretically sufficient to sway judicial interpretation in a direction that accords with public opinion.<sup>40</sup>

Thus, if the true essence of the Martens Clause is that of an aid to judicial interpretation, whereby in cases of ambiguity, IHL ‘should be construed in a manner consonant with standards of humanity and the demands of public conscience’,<sup>41</sup> then judges have at their disposal these concepts of natural law to inform the progressive evolution of positivist doctrines. In this sense, the Clause has been described as ‘a translator of moral imperatives into concrete legal outcomes’,<sup>42</sup> and has enabled judges to import such moral imperatives into their decision making without the need to jeopardise their independence or integrity.

This stance has found strong support in the relevant case law. At Nuremberg, the Military Tribunal was forthcoming about its interpretive approach that favoured principles of humanity and moral standards over approaches that ran counter to such principles.<sup>43</sup> In the the case of *KW*,<sup>44</sup> the *Conseil de guerre de Bruxelles* was guided by the *Universal Declaration of Human Rights*<sup>45</sup> to attribute definitive standards of conduct to the principles of humanity, which enabled an interpretation of the facts as amounting to a violation of the customs of war. In the case of *Kupreškić*,<sup>46</sup> the

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<sup>40</sup> Horowitz (n 37) 3. See also Sean McBride, ‘The Legality of Weapons for Societal Destruction’ in Christophe Swinarski (ed), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (Martinus Nijhoff Publishers, 1984) 401, 406.

<sup>41</sup> Cassese (n 2) 187.

<sup>42</sup> Salter (n 4) 437.

<sup>43</sup> Ibid 413, quoting *United States of America v Alstötter (Opinion and Judgment)* (Nuremberg Military Tribunal Under Control Council Law No 10, Case No 3, 3–4 December 1947) III Trials of War Criminals Before the Nuremberg Military Tribunals 954, 979.

<sup>44</sup> *KW (Opinion and Judgment)* (Conseil de guerre de Bruxelles [Military Court of Brussels], 8 February 1950) (1949–50) 30 *Revue de droit penal et de criminologie* [Journal of Criminal Law and Criminology] 562 (*KW*), discussed in Cassese (n 2) 207. See also Michael Salter and Maggi Eastwood, ‘Establishing the Foundations for the International Criminalisation of Acts of Genocide: From the Martens Clause to the International Criminal Court’ in Paul Behrens and Ralph Henham (eds), *Elements of Genocide* (Routledge, 2013) 20, 32.

<sup>45</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948).

<sup>46</sup> *Prosecutor v Kupreškić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case IT-No 95-16-T, 14 January 2000) (*Kupreškić*).

Martens Clause was invoked first and foremost as an aid to judicial interpretation. As stated by Judge Cassese:

[T]his Clause enjoins, as a minimum, reference to those principles and dictates any time a rule of international humanitarian law is not sufficiently rigorous or precise: in those instances the scope and purport of the rule must be defined with reference to those principles and dictates.<sup>47</sup>

Endorsements of this magnitude are demonstrative of the perceived value of the Clause. By virtue of its application as an aid to judicial interpretation, the Martens Clause has succeeded in establishing a baseline of moral accountability in circumstances of armed conflict.

However, this approach does not provide for instances in which there is no existing rule to be interpreted, thereby rendering the Martens Clause essentially ‘parasitic upon a pre-existing and clearly pertinent rule’.<sup>48</sup> Additionally, the option to invoke the Clause ultimately lies with the judge, and there is no requirement that they exercise that discretion.<sup>49</sup> This subjects the idealistic vision of the Clause to the political leanings of individual judges, and is thus left on shaky ground. As such, the final perspective to be analysed is also the most radical, and would impute to the Clause the most concrete of assurances — namely, its elevation to the status of *jus cogens*.

## V *JUS COGENS*

The basic argument for ascribing the status of *jus cogens* to the Martens Clause is that, throughout its storied history since 1899,<sup>50</sup> the ‘laws of humanity’ and the ‘dictates of public conscience’ have acquired the same normative value as that of *usus*, or state practice<sup>51</sup> (referred to in the Clause as ‘the usages established between civilised nations’).<sup>52</sup> Certain courts have gone so far as to equate these principles with the legal yardstick applied to circumstances not otherwise covered by specific regulations<sup>53</sup> —

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<sup>47</sup> Ibid [525].

<sup>48</sup> Salter (n 4) 419 (emphasis omitted).

<sup>49</sup> Ibid 420.

<sup>50</sup> Ibid 405.

<sup>51</sup> Cassese (n 2) 214.

<sup>52</sup> *Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Law and Customs of War on Land*, opened for signature 29 July 1899, 187 CTS 429 (entered into force 4 September 1900) preamble, quoted in James Brown Scott (ed), *The Hague Conventions and Declarations of 1899 and 1907* (Oxford University Press, 3<sup>rd</sup> ed, 1918) 102.

<sup>53</sup> *United States of America v Krupp (Opinion and Judgment)* (Nuremberg Military Tribunal Under Control Council Law No 10, Military Tribunal IIIA, Case No 10, 31 July 1948) IX Trials of War Criminals Before the Nuremberg Military Tribunals 1327 (*Krupp*).

a view that has greatly strengthened the argument for peremptory status among various commentators.<sup>54</sup>

This stance comes under fire however when assessed against the standard process for the creation of norms of customary international law, which historically requires that two elements be present. First, the objective element of state practice, and second the subjective element, being the belief on the part of a state that its practice was carried out in adherence to a legal obligation, referred to as *opinio juris*.<sup>55</sup> In the context of the amorphous words of the Martens Clause, evidence of *usus* is commonly absent, leading to condemnation from positivist commentators of apparent disobedience to these criteria in the process of creating peremptory norms.<sup>56</sup>

However, one might argue that to require evidence of *usus* as a prerequisite to give effect to the humanitarian objects of the Clause at law would be equivalent to mounting a legal intervention ‘only after thousands of civilians have been killed contrary to imperative humanitarian demands’.<sup>57</sup> This perverse scenario was well captured by the dissenting Judge Shahabuddeen in the *Nuclear Weapons Advisory Opinion*:

If state practices are regulated decisively only by norms derived from such practices themselves, then in effect the status quo becomes its own criteria for justification.<sup>58</sup>

Thus in the specific context of the Martens Clause, jurists have been willing to concede that the customary process can rely upon the demands of humanity or the dictates of public conscience to support the emergence of new peremptory norms, ‘even where state practice is scant or inconsistent’.<sup>59</sup> In these circumstances, *opinio juris* is regarded as ‘the decisive element heralding the emergence of a general rule or principle of humanitarian law’,<sup>60</sup> while the requirements for *usus* are correspondingly loosened.<sup>61</sup>

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<sup>54</sup> International Law Commission, *Draft Code of Crimes Against the Peace and Security of Mankind*, 46<sup>th</sup> sess, 2329<sup>th</sup> mtg, Agenda Item 4, UN Doc A/CN.4/SER.A/1994 (3 May 1994). See generally Ticehurst (n 3) 138; Theodor Meron, ‘The Martens Clause, Principles of Humanity, and Dictates of Public Conscience’ (2000) 94(1) *American Journal of International Law* 78, 88; Salter (n 4) 424; Cassese (n 2) 188–9.

<sup>55</sup> Omri Sender and Michael Wood, ‘A Mystery No Longer? *Opinio Juris* and Other Theoretical Controversies Associated with Customary International Law’ (2017) 50(3) *Israel Law Review* 299, 300–2. See also Raphael M Walden, ‘The Subjective Element in the Formation of Customary International Law’ (1977) 12(3) *Israel Law Review* 344.

<sup>56</sup> Salter (n 4) 436.

<sup>57</sup> Cassese (n 2) 215.

<sup>58</sup> *Nuclear Weapons Advisory Opinion* (n 33) 406.

<sup>59</sup> *Kupreškić* (n 46) [527].

<sup>60</sup> *Ibid.*

<sup>61</sup> Cassese (n 2) 214.

This evolution of customary international law to accommodate an expansive interpretation of the Martens Clause betrays a deep commitment to the sentiments it contains. The trend towards the humanisation of armed conflict<sup>62</sup> appears to be borne of a sincere appetite amongst international law jurists to expand humanitarian protections, with the Martens Clause providing a coherent and legally defensible pathway towards their expansion. For example, courts and tribunals were willing to invoke the Martens Clause in a number of cases following World War II in order to block the defence of retrospective criminalisation, essentially laying a foundation for criminal breaches prior to the subsequent enactment of the provisions relevant to the conduct.<sup>63</sup> By a deductive assessment, the Martens Clause appears to have been the only normative device capable of attributing culpability, and thus should be seen to have ‘acquired the status of [an] independent norm whose violation constitutes an international crime’.<sup>64</sup>

However useful the Clause may have been to ensure that justice could be done in these cases, where war criminals may otherwise have escaped punishment, the question remains as to the ongoing normative relevance of the Clause in the contemporary context — these legal loopholes having since been closed. Absent more recent examples of the Clause being invoked in this manner, one may speculate as to whether peremptory status was ascribed merely as a desperate means of avoiding unthinkable injustices during an extreme chapter of human history. Would it be fair then to say that the normative status of the Martens Clause persists today, though it holds no operational relevance? And how long will it be before humanity again needs to rely upon its content for the normative authority to avert a moral disaster? As humanity continues to flirt with this myriad of hypotheticals, it might be said that we are never more than a breath away from dependence on the safe harbour of the Clause. Would it not therefore be preferable to know whether they will in fact constitute peremptory norms when the time comes?

## VI CONCLUSION

The impact of the Martens Clause in IHL is a complicated topic and does not lend itself easily to any obvious conclusions. There are multiple and competing views, some of which can coexist, and others which are mutually exclusive. Rather than selecting one of these options and arguing in its favour, I instead contend that this debate represents a dialectic enquiry into the merits of positive and natural law,

<sup>62</sup> *Kupreškić* (n 46) [529].

<sup>63</sup> See, eg, *Krupp* (n 53); *Trial of Hans Albin Rauter (Judgment)* (Netherlands Special Court in ‘S-Gravenhage [The Hague], Case No 88, 4 May 1948) XIV Law Reports of Trials of War Criminals 89; *KW* (n 44); *Public Prosecutor v Klinge (Judgment)* (Supreme Court of Norway, 27 February 1946) 13 *Annual Digest and Reports of Public International Law Cases* 262.

<sup>64</sup> Salter (n 4) 425, citing Rhea Schircks, *Die Martens’sche Klausel: Rezeption und Rechtsqualität* [The Martens Clause: Reception and Legal Status] (Nomos, 2002) 42.

and their proper places within the developmental framework of the laws of armed conflict.<sup>65</sup>

In most other areas of international law, it is uncontroversial to advance a strictly positivist position. The black letter of the law is definitive, distinct and unambiguous. This gives effect to legal certainty, and is accordingly inflexible to moralistic and natural law concepts.<sup>66</sup> In cases where the zeitgeist outgrows a particular legal position, the meandering pace of reform is merely inconvenient. In other words, *it is not life or death*.

The laws of armed conflict are different. They regulate the means by which people are killed, property is destroyed, and the geopolitical landscape is altered. Here we are dealing with the most numinous and sacrosanct elements of the human experience, the seriousness of which demand the utmost scrutiny and attention. It must always be remembered that when a human life is reduced to a unit of measurement, we are not measuring in inches but rather in miles. Where there are defects, loopholes and technicalities in the black letter of the law, irrevocable damage is inflicted upon people for which no atonement is ever possible. When the law lags behind, where are we to seek refuge before the necessary changes are made? How much injustice can we live with, or will we accept, while the interval plays out? And what should we say to those — the faceless victims owed to the inflexible tenets of positivism — who succumb to the powerlessness of their position? When we truly confront the gravity of these questions, it becomes obvious that natural law must have a place in IHL.

Writers such as Kennedy have observed that

[a]bsolute rules lead us to imagine we know what violence is just, what unjust, always and for everyone. But justice is not like that — it must be imagined, built by people, struggled for, redefined, in each conflict in new ways. Justice requires leadership — on the battlefield and off.<sup>67</sup>

Indeed there is a long line of academic critique on the triumph of the law in dealing with armed conflict and what may be missed in its reduction of bloodshed on the battlefield to procedural rules.<sup>68</sup> It is here, resident within the law, that the Martens Clause offers a glimpse of the type of moral jeopardy that should be embraced in decision-making under the law in a time of armed conflict.

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<sup>65</sup> Ticehurst (n 3) 140–1.

<sup>66</sup> Salter (n 4) 410.

<sup>67</sup> David Kennedy, *Of War and Law* (Princeton University Press, 2006) 104.

<sup>68</sup> See also Nathaniel Berman, 'Privileging Combat? Contemporary Conflict and the Legal Construction of War' (2004) 43(1) *Columbia Journal of Transnational Law* 1; Paul W Kahn, 'Lessons for International Law from the Gulf War' (1993) 45(2) *Stanford Law Review* 425; Dale Stephens, 'Roots of Restraint in War: The Capacities and Limits of Law and the Critical Role of Social Agency in Ameliorating Violence in Armed Conflict' (2019) 10(1) *Journal of International Humanitarian Legal Studies* 58.

The Martens Clause drew its first breath as little more than a diplomatic ploy,<sup>69</sup> forced upon weak states by Russia and Germany in order to save the Hague Conference, and in many ways this culture of domination has continued ever since. As stronger states have driven the philosophical evolution of IHL to be primarily positivist, it follows that through the selective ratification of treaties and consent to emerging customary norms, the greatest military powers can ‘control the content of the laws of armed conflict’,<sup>70</sup> much to the detriment of those beneath them.

Accordingly, the greatest achievement of the Martens Clause in IHL has been simply to provide a positivist basis for the incorporation of natural law concepts. This clause may be one of the most contentious features of the law of armed conflict, constantly subject to competing interpretations and characterised with regard to its dubious history. It may never be possible to reach a consensus and distil the true meaning of the Clause. Perhaps no such precise definition exists. But if nothing else, regardless of power, status or political leanings, it has succeeded in making two things impossible to ignore — *the laws of humanity and the dictates of public conscience*.

If we can agree that these principles are important and should not be overlooked, then the legacy of the Martens Clause has been to ensure that they are afforded the respect they deserve. Consequently, I argue that the Martens Clause is best understood as a gift from the ‘wiles of reason’, which is said to ‘use individuals as mere tools to build the most significant edifices of history’.<sup>71</sup> Martens likely never considered the importance of his work during the Hague Conference, yet more than a century later we are discussing it with the sincere belief that it has impacted the course of history in a significant and positive manner. Thus, it is not *what* was meant by the Clause that counts, but rather what it *has* meant to us in previous years.

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<sup>69</sup> Cassese (n 2) 197.

<sup>70</sup> Ticehurst (n 3) 142.

<sup>71</sup> Cassese (n 2) 216, discussing Georg Wilhelm Friedrich Hegel, *The Philosophy of History*, tr J Sibree (Batoche Books, 2001) 83–4 [trans of: *Vorlesungen über die Philosophie der Geschichte* (1840)].