

THE MARTENS CLAUSE: A STUDY OF ITS FUNCTION AND MEANING

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ABSTRACT. This paper is an analysis of the importance of the Martens Clause for the protection of human beings even against circumstances that are out the humanitarian legal domain. Taking into account the fact that scholars are unable to unanimously agree on how the Clause fills gaps in the law of armed conflicts, the paper studies some of these different interpretations for the Clause. The authors argue that the Clause cannot be read as a moral obligation, but rather as the legal element which acknowledges the binding nature and autonomy of considerations of humanity and public conscience as sources of law. Since the Martens Clause safeguards humankind's interests, it can be applied to ban non-regulated dehumanizing means and methods of warfare.

KEYWORDS: Martens Clause; International Humanitarian Law; Humanization of International Law; dictates of the public conscience; proportionality principle; reprisals.

RESUMO. Este artigo é uma análise da importância da Martens Clause como um instrumento hábil a proteger o ser humano até de circunstâncias que não estão expressamente proibidas pelas normas humanitárias internacionais. Pelo fato de que a doutrina é incapaz de concordar unanimemente em como a Cláusula preenche as lacunas do sistema jurídico internacional, várias das interpretações utilizadas são estudadas. Defende-se, nesse trabalho, que a Cláusula não deve ser lida como uma mera obrigação moral, mas como um elemento legal que reconhece a natureza vinculante e autônoma das considerações de humanidade e da consciência pública como fontes de normas jurídicas. A Cláusula Martens, por proteger os interesses da humanidade, pode ser usada como um argumento a favor da proibição de meios e métodos de guerra desumanos e não regulados pela lei humanitária.

PALAVRAS-CHAVE: Cláusula Martens; Direito Internacional Humanitário; Humanização do Direito Internacional; princípios da humanidade; ditames da consciência pública; princípio da proporcionalidade; represálias.

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1 INTRODUCTION

The object and purpose (*raison d'être*) of International Humanitarian Law is to protect the victims of armed conflicts³ and also to regulate the means and methods of warfare applied in the hostilities,⁴ based on a balance between military necessity and humanity.⁵ Every single humanitarian rule constitutes a dialectical compromise between these two opposing forces.⁶ Nils Melzer points out that

³ International Humanitarian Law has several treaties mainly concerned with the protection of the victims of armed conflicts, including *inter alia*: *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, Geneva, 12 August 1949 [I-GC]; *Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)*, Geneva, 12 August 1949 [II-GC]; *Convention relative to the Treatment of Prisoners of War (Third Geneva Convention)*, Geneva, 12 August 1949 [III-GC]; *Convention relative to the Treatment of Civilian Persons in Time of War (Fourth Geneva Convention)*, Geneva, 12 August 1949 [IV-GC]; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (First Additional Protocol)*, 8 June 1977 [I-PA]; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Second Additional Protocol)*, 8 June 1977 [II-PA]. This group of rules was called "Geneva Law", up until the adoption of the Additional Protocols of 1977, which had merged it with the "Hague Law".

⁴ International Humanitarian Law has several treaties mainly concerned with limitations or prohibitions of specific means and methods of warfare, including *inter alia*: *Hague Convention (VI) relative to the Status of Enemy Merchant Ships at the Outbreak of Hostilities*, The Hague, 18 October 1907; *Hague Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines*, The Hague, 18 October 1907; *Hague Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention*, The Hague, 18 October 1907; *Hague Convention (IX) relative to the Bombardment by Naval Forces in Time of War*, The Hague, 18 October 1907; *Convention on Cluster Munitions*, Dublin, 30 May 2008 [2008 Dublin Convention]; *Protocol for the Prohibition of Poisonous Gases and Bacteriological Methods of Warfare*, Geneva, 17 June 1925 [1925 Geneva Protocol]; *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*, Geneva, 10 October 1980 [1980 Geneva Convention]. This group of rules was called "Hague Law", up until the adoption of the Additional Protocols of 1977, which had merged it with the "Geneva Law".

⁵ *The Public Committee against Torture in Israel & the Palestinian Society for the Protection of Human Rights and the Environment v. The Government of Israel* at all, Israeli Supreme Court Sitting as the High Court of Justice, Judgment, HCJ 769/02, 11 December 2005 at para.22 [Targeted Killing case]; Michael N. Schmitt. "Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance", *Virginia Journal of International Law*, vol. 50, No. 4, 2010, 795-839 at 798 [Schmitt]; Elizabeth Salmón. *Introducción al Derecho Internacional Humanitario* (Lima: ICRC, 2004) at 23 [Salmón]; Marco Sassòli, Antoine A. Bouvier & Anne Quintin, *How Does Law Protect in War?*, Vol. I, 3rd ed. (ICRC: Geneva, 2011), Chapter 9 at 9 [Sassòli, Bouvier & Quintin]; Christopher Greenwood. "Historical development and legal basis", 1-43 at 38. In Dieter Fleck (ed.) *Handbook of humanitarian law in armed conflicts* (New York: Oxford University Press, 2008) [Greenwood]; Hans-Peter Gasser, "Protection of the Civilian Population", 237-324 at 249. In Dieter Fleck (ed.) *Handbook of*

[k]eeping that balance is a difficult and delicate task, particularly in contemporary armed conflicts marked by a continued blurring of the traditional distinctions and categories upon which the normative edifice of [International Humanitarian Law] has been built and upon which its functionality depends in operational practice.⁷

Regardless of how hard it may be, the belligerent parties are legally obliged to pursue its military aims restricted by considerations of humanity.⁸

One of the strongest evidence of this legal duty is the notorious Martens Clause.⁹ It was suggested for the first time by Fyodor Fyodorovich Martens (1845-1909),¹⁰ Russia's delegate to the 1899 Hague Peace Conference.¹¹ The Clause aimed to handle a disagreement between the States which attended to the Conference regarding the status

humanitarian law in armed conflicts (New York: Oxford University Press, 2008); Stefan Oeter, "Methods and Means of Combat", 119-236 at 127. In Dieter Fleck (ed.) *Handbook of humanitarian law in armed conflicts* (New York: Oxford University Press, 2008) [Oeter]; Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2004) at 16 [Dinstein].

⁶ Schmitt, *ibid.*

⁷ Nils Melzer, "Keeping the balance between military necessity and Humanity: a response to four critiques of the ICRC's interpretive guidance on the notion of direct participation in hostilities", *New York University Journal of International Law and Politics*, vol.42, No. 831, 2010, 831-916 at 833. For an analysis of this "blurring of the traditional distinctions and categories", cf. *Targeted Killing case, supra* note 5.

⁸ Schmitt, *supra* note 5 at 800; Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law*, 1st ed., vol.1 (Cambridge: Cambridge University Press, 2005) at Rule 70 [Henckaerts & Doswald-Beck]; *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (St. Petersburg Declaration)*, Saint Petersburg, 11 December 1868; *Convention (IV) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, The Hague, 18 October 1907 at art.23(e)[IV-HC]; *1980 Geneva Convention, supra* note 4 at preamble; *Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996*, Vienna at art. 3(3); *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Ottawa Convention)*, Ottawa, 18 September 1997, preamble; *Rome Statute of the International Criminal Court*, UNDoc.A/CONF.183/9, 17 July 1998 at art. 8(2)(b)(xx)[*Rome Statute*]; *I-PA, supra* note 3, art.35(2).

⁹ Schmitt, *ibid.* at 800;

¹⁰ For a biography of Fyodor Fyodorovich Martens and details of his professional life, cf. Vladimir V. Pustogarov, "Fyodor Fyodorovich Martens (1845-1909) - a humanist of modern times", *International Review of Red Cross*, No.312, 30 June 1996, 310-314.

¹¹ Greenwood, *supra* note 5 at 33-34; Antonio Cassese. "The Martens Clause: Half a Loaf or Simply Pie in the Sky?", *European Journal of International Law*, vol.11, No 1, 2000 at 187-216 at 187 [Cassese].

of resistance movements in occupied territories and their respective rights.¹² The majority of the attending nations decided that those who fought against occupying powers did not fit into the combatant status codified in the Hague Regulations. The Belgian delegation and other small States, preoccupied with future occupations of their respective territories, openly opposed this proposal.¹³ The disagreement was so intense that it was threatening to dissolve the conference. To avoid this, Fyodor Martens suggested that the Hague Convention should not be seen as the final word on the definition of the combatant status and that the people engaged on resistance movements were protected by principles of International Law derived from custom, laws of humanity and the requirements of the public conscience.¹⁴ This provision was unanimously accepted¹⁵ and 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.¹⁶

The Martens Clause is considered, for that reason, "[t]he most important achievement of the Hague Conferences [...]".¹⁷ It aims to extend international protection

¹² *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Rep.1996, p.226 (Dissenting Opinion of Judge Weeramantry) at 483 [Weeramantry]; Theodor Meron, "The Martens Clause, Principles of Humanity, and Dictates of Public Conscience", *American Journal of International Law*, Vol.94, No.1, 2000, 78-89 at 79 [Meron (2000)]; Rupert Ticehurst. "The Martens Clause and the Laws of Armed Conflict", *International Review of Red Cross*, No.317, 1997, online: <<http://www.icrc.org/eng/resources/documents/misc/57jnhy.htm>> [Ticehurst].

¹³ Ticehurst, *ibid.*; Vladimir V. Pustogarov, "The Martens Clause in International Law", *Journal of the History of International Law*, Vol.1, No.125, 1999, 125-135 at 126 [Pustogarov].

¹⁴ Pustogarov, *ibid.*; Greenwood, *supra* note 5 at 34.

¹⁵ Pustogarov, *ibid.* at 127; Martin Arpo, "The Martens Clause and International Crimes in Estonia", *ENDC Proceedings*, vol. 15, 2012, 101 - 106 at 102.

¹⁶ *IV-HC*, *supra* note 8 at 9th perambulatory clause. A more recent version of the Martens Clause can be found in the article 1(2) of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, as follows: "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."

¹⁷ Oeter, *supra* note 5 at 120.

to all individuals at all circumstances,¹⁸ even when these circumstances are not covered by positive law.¹⁹ Besides, its "[...] continuing existence and applicability is not to be doubted [...]"²⁰ because repeated references to it have been made in conventions on International Humanitarian Law²¹ and judicial decisions,²² attesting its unquestionable customary nature.²³ In sum, this Clause should be understood as an instrument for the protection of every human being²⁴ and the acknowledgment that although humanitarian

¹⁸ Salmón, *supra* note 5 at 52; Meron (2000), *supra* note 12 at 88; Jean Pictet. *Development and Principles of International Humanitarian Law* (Geneva: Henry Dunant Institute, 1985) at 59-60.

¹⁹ Antônio Augusto Cançado Trindade. *A Humanização do Direito Internacional*, (Belo Horizonte: Del Rey, 2006) at 390-391 [Cançado Trindade (2006)].

²⁰ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Rep.1996 at para.87 [*Nuclear Weapons case*]. The same conclusion can be found in: Ticehurst, *supra* note 12.

²¹ *I-GC*, *supra* note 3 at art.63(4); *II-GC*, *supra* note 3 at art.62(4); *III-GC*, *supra* note 3 at art.142(4); *IV-GC*, *supra* note 3 at art.158(4); *I-PA*, *supra* note 3 at art.1(2); *II-PA*, *supra* note 3 at 4th perambulatory clause; *2008 Dublin Convention*, *supra* note 4 at 11th perambulatory clause; *1925 Geneva Protocol*, *supra* note 4 at 1st and 2nd perambulatory clauses; *1980 Geneva Convention*, *supra* note 4 at 5th perambulatory clause.

²² *Nuclear Weapons case*, *supra* note 20 at para.87; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, ICJ Rep.1986 at para.218 [*Nicaragua case*]; *Prosecutor v. Kupreškic*, Judgment, Trial Chamber, Case No. IT-95-16-T, 14 January 2000 at paras.525-527 [*Kupreškic case*]; *Prosecutor v. Furundzija*, Judgment, Trial Chamber, Case No. IT-95-17/I-T, 10 December 1998 at paras.137 and 168 [*Furundzija case*]; *Prosecutor v. Jean-Paul Akayesu*, Judgment, Chamber I, Case No. ICTR-96-4-T, 2 September 1998 at para.566-567 [*Akayesu Case*]; *Kononov v. Latvia*, Judgment, ECtHR, Application No. 36376/04, 17 May 2010 at paras.87, 92, 207, 215 and 218.

²³ *Nuclear Weapons case*, *ibid.* at paras.78 e 84; Weeramantry, *supra* note 12 at 486; Pustogarov, *supra* note 13 at 131 and 134; ICRC, "International Humanitarian Law: Answers to your Questions", Geneva, October 2002 at 7; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Rep.1996 (Dissenting Opinion of Judge Shahabuddeen) at 405 [Shahabuddeen]; César Amorim Krieger, *Direito Internacional Humanitário: O Precedente do Comitê Internacional da Cruz Vermelha e o Tribunal Penal Internacional* (Curitiba: Juruá, 2004) at 245 [Krieger]; Iain Scobbie, "Principle or Pragmatics? The Relationship between Human Rights Law and the Law of Armed Conflict", *Journal of Conflict & Security Law*, Vol. 14 No. 3, 2010, 449–457 at 449. Some jurists also defend the peremptory nature (*jus cogens*) of the obligations within the Martens Clause. Cf. Pustogarov, *supra* note 13 at 134; Cançado Trindade (2006), *supra* note 19 at 96.

²⁴ Pustogarov, *ibid.*; Cançado Trindade (2006), *ibid.* at 391; Salmón, *supra* note 5 at 49; Jann K Kleffner. "Protection of the wounded, sick, and shipwrecked", 601-700 at 620. In Dieter Fleck (ed.) *Handbook of Humanitarian Law in Armed Conflicts* (New York: Oxford University Press, 2008) [Kleffner]. ICTY already made this clear in its decision in the case *Prosecutor v. Furundzija* (1998): "The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law." Cf. *Furundzija case*, *supra* note 22 at para.183.

positive norms are advanced, they hardly may be considered fully complete.²⁵ It is one of the strongest evidence that the Law is not perfect, but instead it is continuously searching for accuracy, entirety and fairness.

The studying of the Martens Clause provides great theoretical and practical debates in the humanitarian literature. Hence, the present essay aims to demonstrate the function of the Clause²⁶ and also the theories trying to explain the its meaning and scope.²⁷

2 THE LEGAL SCOPE OF THE MARTENS CLAUSE AS A GAP-FILLER

The *raison d'être* of the Martens Clause is to remind the International Community that no legal *lacunae* can be used as an excuse to perform actions contrary to the remaining "[...] principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."²⁸ For that reason, the Clause must be understood as a "gap-filler"²⁹ that can be applied when the humanitarian rules are silent³⁰ or in circumstances when "[...] international humanitarian law is not sufficiently rigorous or precise."³¹ Thus, the Clause provides a legal limitation

²⁵ Cançado Trindade (2006), *supra* note 19 at 95; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, Commentary - General principles and scope of application, ICRC at para.55, online: <<http://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleUNID=6C86520D7EFAD527C12563CD0051D63C>> [*ICRC's Commentaries on the I-PA*].

²⁶ Cf. the topic 2 of this paper.

²⁷ Cf. the topic 3 of this paper.

²⁸ *I-PA*, *supra* note 3 at art.1(2); Pustogarov, *supra* note 13 at 131; Cançado Trindade (2006), *supra* note 19 at 391; Kleffner, *supra* note 24 at 619-620; Shahabuddeen, *supra* note 23 at 405; Meron (2000), *supra* note 12 at 88; John Cerone. "The Jurisprudential Contributions of the ICTR to the Legal Definition of Crimes against Humanity—the Evolution of the Nexus Requirement", *New England Journal of International and Comparative Law*, Vol.14. No.2, 2008, 191-201 at 192 [Cerone]; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Rep.1996, p.226 (Separate Opinion of Judge Ranjeva) at 301. However, it must be clear that Judge Ranjeva presented a very narrow definition to the Martens Clause: "The law of armed conflict is a matter of written law, while the so-called Martens principle performs a residual function."

²⁹ Cerone, *ibid.* at 192.

³⁰ Salmón, *supra* note 5 at 34; Schmitt, *supra* note 5 at 801; Charlotte Lülff. "Modern Technologies and Targeting under International Humanitarian Law", Working Paper, Vol. 3, No. 3, December 2013 at 17 [Lülff].

³¹ *Kupreškic case*, *supra* note 22 at para.525.

of the discretionary power of the belligerents³² in favor of the irremovable protection of human beings.³³

Essentially, "[t]he Martens Clause demonstrates that [International Humanitarian Law] is excluded from any positivist assertion to the effect that all which is not forbidden in international law is permitted."³⁴ As a matter of fact, the Permanent Court of International Justice, in the *Case of the S.S. "Lotus"*, concluded the exact opposite. It ruled that a State action that is not expressly prohibited by an international norm cannot be rendered illegal.³⁵ This case concerns a dispute between France and Turkey on the legality of the criminal trial and conviction of the captain of the French vessel S.S. Lotus, by Turkish authorities, after this ship was involved in a collision in the high seas with the S.S. Boz-Kourt, a Turkish steamer, resulting in the latter's sinking and the death of eight people on board. The Permanent Court concluded that as there was no prohibition for Turkey's actions, they must remain lawful.³⁶

Christopher Gregory Weeramantry, a former-ICJ judge, accurately clarifies that this *obiter dictum* was confined to the Law of Sea and, thus, the circumstances *in casu* were very distant from those in which Humanitarian Law applies.³⁷ Therefore, the Martens Clause was already a well-recognized principle at the time of the *Lotus* decision, but it was just not relevant to it.³⁸ Moreover, at that time, International Law was strictly segregated in two categories: the laws of war and the laws of peace. The Permanent Court's ruling was formulated exclusively within the context of the latter.³⁹

Therefore, the Clause should be understood as a tool to cover gaps in the humanitarian normative branch. However, it is far from clear how this role really works, existing some different approaches to deal with it.

³² Cassese, *supra* note 11 at 208; Meron (2000), *supra* note 12 at 88.

³³ Meron (2000), *ibid.*

³⁴ Schmitt, *supra* note 5 at 800; Cançado Trindade (2006), *supra* note 19 at 403; Cerone, *supra* note 28 at 192; Krieger, *supra* note 23 at 245; ICRC's *Commentaries on the I-PA*, *supra* note 25 at para.55

³⁵ *The Case of the S.S. "Lotus" (France v. Turkey)*, Judgment, PCIJ, Series A, No. 10, 1927 at 21[S.S. "Lotus" Case].

³⁶ *Ibid.*

³⁷ Weeramantry, *supra* note 12 at 495.

³⁸ *Ibid.*

³⁹ *Ibid.*

3 THE MEANING(S) OF THE MARTENS CLAUSE

Determining the exact significance of the Martens Clause has been a difficult goal to achieve,⁴⁰ since it involves concepts that are not expressly defined by International Law, such as "principles of the law of nations", "dictates of public conscience" and "laws of humanity". Consequently, the wording of the Clause has "[...] given rise to a multiplicity of often conflicting interpretations."⁴¹

The present paper will focus in four of these: **(1)** the Clause as a reflex of Natural Law and moral obligations; **(2)** the Clause as a reminder that custom remains binding in the absence of conventional norms; **(3)** the Clause as a source to induce the creation of customary rules; **(4)** the Clause as an hermeneutic guidance to interpret humanitarian rules; and, finally, **(5)** the Clause as the acknowledgment of the legal autonomy of the principles of humanity and the dictates of public conscience.

3.1 The Martens Clause as a reflex of Natural Law and moral obligations

Certain writers define the Martens Clause simply as a "moral reference" from Natural Law.⁴² Rupert Ticehurst, for example, believes that the Martens Clause "[...] indicates that the laws of armed conflict do not simply provide a positive legal code, they also provide a moral code."⁴³ Ticehurst also teaches:

The Martens Clause provides a link between positive norms of international law relating to armed conflicts and natural law. One of the reasons for the decline of natural law was that it was wholly subjective. Opposing States claimed the support of contradictory norms of natural law. However, the Martens Clause establishes an objective means of determining natural law: the dictates of the public conscience. This makes the laws of armed conflict much richer, and permits the participation of all States in its development. The powerful military States have constantly opposed the influence of natural law

⁴⁰ Greenwood, *supra* note 5 at 34; Shahabuddeen, *supra* note 23 at 405-406; Ticehurst, *supra* note 12.

⁴¹ Cassese, *supra* note 11 at 188; United Nations Environment Programme. *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law* (UNEP: Nairobi, 2009) at 46.

⁴² Gary D. Solis. *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge: Cambridge University Press, 2010) at 57.

⁴³ Ticehurst, *supra* note 12.

on the laws of armed conflict even though these same States relied on natural law for the prosecutions at Nuremberg.⁴⁴

John Cerone, former-legal advisor to the International Criminal Tribunal for Rwanda, writes that the Clause invokes "[...] *natural law* to provide residual protection against acts that were not expressly prohibited by the operative text." [Emphasis added]⁴⁵ Consequently, the Martens Clause should be understood as "[...] a moral imperative rather than a foundation of concrete and precise regulations."⁴⁶

The Russian scholar Vladimir Vasilievich Pustogarov also supports this rationale. He assumes that "[...] the Martens clause unites the norms and principles of positive law with the norms and principles of natural law."⁴⁷ Pustogarov goes on and states that

[the Martens Clause] is explicable in many respects as a breaking off of positive law from natural law - the first principle of the international law of our time. In distinction from positive law, natural law is universal and binding for individuals and states alike. The Nuremberg tribunal relied precisely upon the norms of natural law in defining the criminality of the Nazi military command. In its verdict, it confirmed the permanent significance of natural law as a basis of contemporary international law. The Martens clause as a connecting link between positive and natural law has such an abiding significance.⁴⁸

We believe those conclusions are erroneous. If the International Community ratifies those assumptions, it will be endorsing the conjecture that the Martens Clause is just morally advisable and not legally compelling. Currently, considerations of humanity are an important part of International Law⁴⁹ and as such they have an established legal value, what feeds the Clause with a strong deontological nature, not one just axiological or moral.

⁴⁴ *Ibid.*

⁴⁵ Cerone, *supra* note 28 at 192.

⁴⁶ Lülff, *supra* note 30 at 17.

⁴⁷ Pustogarov, *supra* note 13 at 134.

⁴⁸ *Ibid.* at 132.

⁴⁹ *Nuclear Weapons case*, *supra* note 20 at para.87; *Nicaragua case*, *supra* note 22 at para.218.

3.2 The Martens Clause as a reminder that custom remains binding in the absence of conventional norms

There is no room for doubt that armed conflicts are still regulated by the rules of customary International Law, when treaties are silent or inapplicable due to any reason whatsoever.⁵⁰ As a reflex of this truth, the Martens Clause should be merely considered an open door to incorporate customary rules in order to fill any gap in the conventional humanitarian regime.⁵¹ Accordingly, the ICTY's current President, Theodor Meron, affirms:

It is generally agreed that the Clause means, at the very least, that the adoption of a treaty regulating particular aspects of the law of war does not deprive the affected persons of the protection of those norms of customary humanitarian law that were not included in the codification. The Clause thus safeguards customary law and supports the argument that what is not prohibited by treaty may not necessarily be lawful.⁵²

Christopher Greenwood, ICJ's current British judge, supports the same view. According to him, "[t]he Martens Clause should be treated as a reminder that customary international law continues to apply even after the adoption of a treaty on humanitarian law [...]."⁵³ He goes further and affirms that it is unreasonable to apply the Clause as to impose that all weapons and means of warfare must be in accordance with the public conscience, even when their use in the battlefield does not contravene specific rules of customary international law, as for example, the unnecessary suffering principle.⁵⁴ Greenwood believes that arguing the contrary "[...] is impracticable since 'the public conscience' is too vague a concept to be used as the basis for a separate rule of law and has attracted little support."⁵⁵

⁵⁰ *Report on the Minimum Humanitarian Standards*, Sub-commission on Prevention of Discrimination and Protection of Minorities, UN Doc.E/CN.4/1998/87, 5 January 1998 at 84.

⁵¹ Meron (2000), *supra* note 12 at 85-89; Salmón, *supra* note 5 at 32-34 and 49; Krieger, *supra* note 23 at 244.

⁵² Theodor Meron, *The Humanization of International Law*, The Hague Academy of International Law (Leiden/Boston: Martinus Nijhoff Publishers, 2006) at 27 [Meron (2006)].

⁵³ Greenwood, *supra* note 5 at 35.

⁵⁴ *Ibid.* at 34.

⁵⁵ *Ibid.* at 34-35.

Although this is the most widespread interpretation of the Martens Clause,⁵⁶ it is not persuasive at all. Antonio Cassese clarifies that if the purpose of the Clause is to avoid conventional vacuums exclusively through customary norms, it just states the obvious and it is, therefore, pointless and redundant.⁵⁷ This interpretation is not derived from the Clause itself, but from the general legal theory of the sources of International Law.⁵⁸ Accept this reading of the Clause is nothing more than admitting that it does not bring anything new to the international *corpus juris*.

Arguments in favor of Cassese find place in the laws of treaty interpretation. The *Vienna Convention on the Law of Treaties* (1969) imposes that "[a] treaty shall be interpreted in good faith in accordance with *the ordinary meaning to be given to the terms of the treaty* in their context and in the light of its object and purpose." [Emphasis added]⁵⁹ Hence, the phrasing of any treaty is a fundamental aspect for its interpretation, which means that the interpreter have to consider every single word of a treaty as relevant.⁶⁰

Having the previous point in mind, the repeated adoption of the terms "dictates of public conscience" and "laws of humanity" did not aim to condense the Martens

⁵⁶ Cassese, *supra* note 11 at 192.

⁵⁷ *Ibid.* at 192-193.

⁵⁸ The ICJ already delivered this conclusion in the *Nicaragua Case* when ruling about the relationship between treaty-law and customary law. In this *obiter dictum* the Court stated: "On a number of points, the areas governed by the two sources of law do not exactly overlap, and the substantive rules in which they are framed are not identical in content. But in addition, even if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability. Nor can the multilateral treaty reservation be interpreted as meaning that, once applicable to a given dispute, it would exclude the application of any rule of customary international law the content of which was the same as, or analogous to, that of the treaty-law rule which had caused the reservation to become effective. [...] It rather demonstrates that in the field in question, the importance of which for the present dispute need hardly be stressed, customary international law continues to exist alongside treaty law. The areas governed by the two sources of law thus do not overlap exactly, and the rules do not have the same content. [...] It will therefore be clear that customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content." Cf. *Nicaragua case*, *supra* note 22 at paras.175-179.

⁵⁹ *Vienna Convention on the Law of Treaties*, 1155 UNTS 331, 22 May 1969 at art.31(1) [VCLT].

⁶⁰ *Prosecutor v. Stanislav Galic*, Judgment, Trial Chamber, Case No. IT-98-29-T, 5 December 2003 at para.91. In this judgment can be found the following statement: "No word in a treaty will be presumed to be superfluous or to lack meaning or purpose."

Clause exclusively to customary rules.⁶¹ If this was its drafters' intentions, they would have referenced custom exclusively in the text of one of the numerous appearances of the Clause, what did not happen even once. Besides, the Second Additional Protocol of 1977 does not even mention custom, doing reference only to principles of humanity and the dictates of the public conscience.⁶²

As a last argument, if Greenwood and Meron's view is right, the Martens Clause would be applicable exclusively when treaties are silent and, given that, gaps in other sources of International Humanitarian Law, especially custom, would remain unaffected. This conclusion would expose the human person to possible injuries and death.

Taking into account that the *raison d'être* of the Clause is to avoid legal gaps in order to protect human dignity,⁶³ reducing it to cover exclusively gaps in treaties would not solve the problem, but only replace it, since the Martens Clause would become useless and meaningless if there were no treaties or customary rules governing this new factual situation. Hence, the Clause does not aim to preserve the entirety of treaties, but to ensure the fullness of the whole humanitarian legal system throughout the principle of humanity and dictates of public conscience.⁶⁴ It is nothing more than the humankind's insurance that "there is no lawless void"⁶⁵ and advocating the opposite would merely weaken the Clause.

Conclusively, a definition of the Martens Clause as a tie between custom and treaties is not convincing, because it ignores the "dictates of public conscience" and the "laws of humanity" and empties its protective potential.

⁶¹ Shahabuddeen, *supra* note 23 at 406.

⁶² *II-PA*, *supra* note 3 at 4th perambulatory clause.

⁶³ According to the *Vienna Convention on the Law of Treaties*, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose*." [Emphasis added] Thus, for ends of interpretation, the *raison d'être* of a conventional rule is as important as its wording. Cf. *VCLT*, *supra* note 59 at art.31(1).

⁶⁴ Cançado Trindade goes further and states that the Martens Clause is not just a source of Humanitarian Law but also a source of general International Law itself. Cf. Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium*, vol. II, The Hague Academy of International Law (Leiden/Boston: Martinus Nijhoff Publishers, 2005) at 192[Cançado Trindade (2005)]; Cançado Trindade (2006), *supra* note 19 at 390-391; *Juridical Condition and Rights of the Undocumented Migrants*, IACtHR, Advisory Opinion OC-18/03 of 17 September 2003. Ser.A No.18, Concurring Opinion of Judge Cançado Trindade, para.29.

⁶⁵ Michael N. Schmitt. "Wired warfare: Computer network attack and *jus in bello*", *IRRC*, Vol. 84, No 846, June 2002, 365-399 at 369.

3.3 The Martens Clause as a source to induce the creation of customary rules

According to the well established ICJ's case-law, a customary rule can only exist if it fulfills two cumulative criteria: the *opinio juris sive necessitatis* (or just *opinio juris*) and uniform State practice.⁶⁶ While the latter comprehends "[...] a constant and uniform usage practised by the States in question",⁶⁷ the former is the "[...] belief that a state activity is legally obligatory [...]".⁶⁸

However, the ICTY and Antonio Cassese argue that the Martens Clause provides an exception to the ICJ's dual mandatory prerequisites for the establishment of a custom. They argue that the scope of the Clause is to transform customary *lex ferenda* into *lex lata*, through a process in which the *opinio juris sive necessitatis* plays a much greater role than State practice.⁶⁹ In other words,

[...] this Clause clearly shows that principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. The other element, in the form of *opinio necessitatis*, crystallizing as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law.⁷⁰

According to them, as there is no State practice to confirm that laws of humanity and the public conscience "[...] have been elevated to the rank of independent sources of international law [...]",⁷¹ these two factors can only be applied to induce the creation of new norms in the universe of the customary law.

German Professor Charlotte Lülff goes beyond and interprets the Martens Clause as the basis to "[...] the possibility of a legal rule of customary character, not based on

⁶⁶ *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, ICJ Rep.1985 at para.27[*Continental Shelf*]; *Legality of the Threat or Use of Nuclear Weapons*, ICJ Rep.1996 at para.64; *North Sea Continental Shelf (Federal Republic of Germany v. Denmark and Netherlands)*, ICJ Rep.1969 at para.27[*North Sea Continental Shelf*].

⁶⁷ *North Sea Continental Shelf*, *ibid.* at paras.73-74; *Nicaragua Case*, *supra* note 22 at para.186; *Asylum Case (Colombia v. Peru)*, ICJ Rep.1950 at 277[*Asylum Case*].

⁶⁸ Malcolm Shaw, *International Law*, 6th ed. (Cambridge: Cambridge University Press, 2008) at 84; *North Sea Continental Shelf*, *ibid.* at para.77; *Asylum Case*, *ibid.* at 276-277; *S.S. Lotus Case*, *supra* note 35 at 28; *Nicaragua Case*, *supra* note 22 at paras.183 and 207.

⁶⁹ *Kupreškic case*, *supra* note 22 at para.527; Cassese, *supra* note 11 at 211.

⁷⁰ *Kupreškic case*, *ibid.* at para.527.

⁷¹ *Ibid.* at para.525.

State practice and *opinio juris*, but on a moral foundation."⁷² Thus, under her reasoning, both elements of custom are dispensable to create a new *lex lata*, since the moral commands preserved in the Clause has the power to replace State practice and *opinio juris* when the interests of humanity are in need for protection.

An example of this reasoning concerns the prohibition of reprisals, as the ICTY believes that the prohibition of reprisals against civilians or civilian objects located in combat zones is a general customary rule, even if there is no uniform State practice supporting this conclusion.⁷³ The law of armed conflict defines reprisals as "[...] acts resorted to by one belligerent which would otherwise be unlawful, but which are rendered lawful by the fact that they are taken in response to a violation of that law committed by the other belligerent."⁷⁴ In the same sense, they are considered "[...] drastic and exceptional measures [...]"⁷⁵ carried on to compel the enemy to follow its international humanitarian obligations.⁷⁶ Reprisals' legality is conditioned to several strict requirements⁷⁷ well-regulated by International Law.⁷⁸ Acts of pure revenge or retaliation are always prohibited.⁷⁹

Currently, conventional rules⁸⁰ and customary law⁸¹ prohibit reprisals against civilians under the power of the enemy. However, there is no consensus if this

⁷² Lülf, *supra* note 30 at 16.

⁷³ *Kupreškic case*, *supra* note 22 at paras.527-536.

⁷⁴ *Prosecutor v. Milan Martić*, Judgment, Trial Chamber I, Case No. IT-95-11-T, 12 June 2007 at para.465[*Martić Case*]

⁷⁵ *Ibid.* The same conclusion can be found in: Meron (2006), *supra* note 52 at 14.

⁷⁶ *Martić Case*, *supra* note 74 at para.465; Meron (2006), *ibid.* at 13.

⁷⁷ *Martić Case*, *ibid.* at para.465. The ICRC Customary Rule No. 145 states that "[w]here not prohibited by international law, belligerent reprisals are subject to stringent conditions." Cf. Henckaerts & Doswald-Beck, *supra* note 8 at Rule 145.

⁷⁸ *Prosecutor v. Kupreškic*, *supra* note 22 at para.535: "It should also be pointed out that at any rate, even when considered lawful, reprisals are restricted by; (a) the principle whereby they must be a last resort in attempts to impose compliance by the adversary with legal standards (which entails, amongst other things, that they may be exercised only after a prior warning has been given which has failed to bring about the discontinuance of the adversary's crimes); (b) the obligation to take special precautions before implementing them (they may be taken only after a decision to this effect has been made at the highest political or military level; in other words they may not be decided by local commanders); (c) the principle of proportionality (which entails not only that the reprisals must not be excessive compared to the precedent unlawful act of warfare, but also that they must stop as soon as that unlawful act has been discontinued) and; (d) 'elementary considerations of humanity' [...]."

⁷⁹ Meron (2006), *supra* note 52 at 13.

⁸⁰ *I-GC*, *supra* note 3 at art.46; *II-GC*, *supra* note 3 at art.47; *III-GC*, *supra* note 3 at art.13(3); *IV-GC*, *supra* note 3 at art.33(3); *I-PA*, *supra* note 3 at art.52(1).

prohibition can be applied to civilians or civilian objects still in combat zones.⁸² In fact, articles 51(6)⁸³ and 52(1)⁸⁴ of the 1977 First Additional Protocol, respectively, proscribe such conducts against the civilian population and civilian assets. It is not clear, though, whether this provision is a mere codification of a pre-existing custom or whether it has subsequently become a general customary rule. If it has such customary character this rule also binds States non-parties to the Protocol, as United States, Israel, Eritrea, Azerbaijan, Somalia, Pakistan, Turkey, India, Thailand, Iran and Indonesia.

According to the ICTY, the prohibition of reprisals against civilians or civilian objects in combat zones is not the codification of a previous custom. The Tribunal says that the State practice is not substantial or uniform enough to support the current customary nature of articles 51(6) and 52(1).⁸⁵ That very same court, however, and its former-President, Antonio Cassese, support that this prohibition binds all States and non-State armed groups, because the Martens Clause has the power to fill gaps in the humanitarian legal system via the creation of customary rules to protect the human person, even when there is no uniform State practice supporting this custom. Humanity's need for protection overrules the absence of an agreement among States.⁸⁶

Nonetheless, some scholars present a far more conservative approach on the same matter. Theodor Meron is one of them. He believes that the absence of uniform practice and consensus among States and writers demonstrates that the invocation of the Martens Clause alone is not enough to support the ICTY's and Cassese's conclusion.⁸⁷ Meron, however, states that reprisals against civilians in the battlefield are indeed unlawful, but as a result of the influence of human rights in armed conflicts and the role of the main humanitarian principles, not because of the Martens Clause.⁸⁸

⁸¹ Henckaerts & Doswald-Beck, *supra* note 8 at Rule 146; *Kupreškic Case*, *supra* note 22 at para.527.

⁸² *Kupreškic Case*, *ibid.* at para.527.

⁸³ Article 51(6) affirms: "Attacks against the civilian population or civilians by way of reprisals are prohibited." Cf. *I-PA*, *supra* note 3 at art. 51(6).

⁸⁴ Article 52(1) affirms: "Civilian objects shall not be the object of attack or of reprisals." Cf. *I-PA*, *supra* note 3 at art.52(1).

⁸⁵ *Kupreškic case*, *supra* note 22 at para.527.

⁸⁶ *Ibid.*; Cassese, *supra* note 11 at 211.

⁸⁷ Meron (2000), *supra* note 12 at 250; Meron (2006), *supra* note 52 at 13.

⁸⁸ Meron (2006), *ibid.* at 14-15.

Despite the divergences on reprisals, it is clear that a *tu quoque* argument has no place in the International Law of our days, e.g., no State or armed group can justify a breach of a humanitarian obligation by alleging that the adverse belligerent party committed similar breaches.⁸⁹ Humanitarian Law, as well as International Human Rights Law,⁹⁰ does not constitute "[...] a narrow bilateral exchange of rights and obligations [...]."⁹¹ As a matter of fact, these two legal branches are composed by a system of absolute, unconditional and non-reciprocal norms.⁹² In other words, they are two bodies of non-synallagmatic⁹³ and *erga omnes* obligations.⁹⁴

In this regard, the ICTY affirms that:

The absolute nature of most obligations imposed by rules of international humanitarian law reflects the progressive trend towards the so-called "humanisation" of international legal obligations, which refers to the general erosion of the role of reciprocity in the application of humanitarian law over the last century. [...] The underpinning of this shift was that it became clear to States that norms of international humanitarian law were not intended to protect State interests; they were primarily designed to benefit individuals qua human beings. [...] This trend marks the translation into legal norms of the "categorical imperative" formulated by Kant in the field of morals: one ought to fulfil an obligation regardless of whether others comply with it or disregard it.⁹⁵

⁸⁹ *Prosecutor v. Kupreškic*, Decision on Evidence of the Good Character of the Accused and the Defence of *tu quoque*, Trial Chamber, Case No. IT-95-16-T, 17 February 1999[Defence of *tu quoque*].

⁹⁰ *The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts. 74 and 75)*, IACtHR, Advisory Opinion No.OC-2/84, 24 September 1982 at para.29; Cançado Trindade (2005), *supra* note 64 at 357; Payam Akhavan, "The Silence of Positivism: A Benefitting Tribute to Suffering?", *Hague Yearbook of International Law*, Vol.13, 2000, 113-120 at 115.

⁹¹ *Kupreškic case*, *supra* note 22 at para.517.

⁹² Rosalyn Higgins, "Ethics and International Law", *Leiden Journal of International Law*, Vol.23, No.2, 2010, 277-289 at 283.

⁹³ *Kupreškic case*, *supra* note 22 at para.517; Cançado Trindade (2005), *supra* note 64 at 357; UNHRC, *General Comment 24: issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, CCPROR, UNDoc.A/50/40, 1995 at para.17.

⁹⁴ *Kupreškic case*, *supra* note 22 at para.517; Defence of *tu quoque*, *supra* note 89; Salmón, *supra* note 5 at 35; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Rep.2004 at para.157.

⁹⁵ *Prosecutor v. Kupreškic*, *ibid.* at para.518.

Therefore, following the “humanization” of International Law, the Martens Clause must be read and applied as to improve the legal system so the victims of military hostilities are better protected.

Taking this account, the ICTY's, Cassese's, and Lül's view of the Martens Clause as a catalyst for the creation of customary rules, although very interesting, cannot prevail. A custom can never exist without both of its elements (*opinio juris* and State practice), as already insistently ruled by the ICJ.⁹⁶ The International Society cannot accept a fallacious definition of custom just to guarantee human protection, since this would expose the Law and its protective rules and procedures to unacceptable abuses. The authors of this essay are not in position to challenge the existence of the Humanization of International Law,⁹⁷ but they cannot accept the application of this phenomenon to create irrational concepts. The Humanization of International Law comes from no less than strong deontological aspects of the legal system.

3.4 The Martens Clause as an hermeneutic guidance to interpret humanitarian rules

As told by the English legal philosopher Herbert L. A. Hart, Law is a linguistic system and, as such, has an "open texture", characterized by the incapacity of the law-creator to describe a specific prohibited behavior in its entirety and completeness.⁹⁸ Hart sustains that creation of legal norms is nothing more than "[...] a general feature of human language"⁹⁹ and the "[...] uncertainty at the borderline is the price to be paid for the use of general classifying terms in any form of communication concerning matters

⁹⁶ *Nicaragua Case*, *supra* note 22 at para.183 and 207; *North Sea Continental Shelf*, *supra* note 66 at para.77; *Asylum Case*, *supra* note 67 at paras.276-277; *Continental Shelf*, *supra* note 66 at para.27; *Nuclear Weapons Case*, *supra* note 20 at para.64.

⁹⁷ *Kupreškic case*, *supra* note 22 at para.518.

⁹⁸ H. L. A. Hart, *The Concept of Law*, 2nd ed. (New York: Oxford University Press, 1994) at 127-129[Hart]. Hart states that this "open texture" is inherent to the legal phenomenon, because the man is unable to create "[...] a rule so detailed that the question whether it applied or not to a particular case was always settled in advance, and never involved, at the point of actual application, a fresh choice between open alternatives. Put shortly, the reason is that the necessity for such choice is thrust upon us because we are men, not gods." He continues: "Plainly this world is not our world; human legislators can have no such knowledge of all the possible combinations of circumstances which the future may bring." Cf. Hart, *supra* note 98 at 128.

⁹⁹ Hart, *ibid.* at 128.

of fact."¹⁰⁰ Intricate rules provide space to an adjudicator decide if a particular action is or is not under the role of this linguistically formulated rule.¹⁰¹ Hence, the decision-maker constantly finds himself in the hard position to choose which possible interpretation is acceptable and suitable to the rule under analysis.¹⁰²

Accordingly, part of the humanitarian literature suggests that the Martens Clause is one of the possible hermeneutic bias available to the decision-making authority. This school of thought provides that the Martens Clause is nothing more than a guidance for judges and politicians to interpret Humanitarian Law. According to this theory, in case of doubt or obscurity during the application or interpretation of humanitarian principles and rules, the option to be chosen is the one that most enhances the demands of humanity.¹⁰³ Likewise, this view of the Clause can be applied to reject *a contrario* arguments, which would allow States to act as they please when humanitarian conventions are silent.¹⁰⁴

An application of this appraisal of the Clause can be found in the ICTY's particular interpretation of the proportionality principle. According to the ordinary reading of this principle, belligerent powers can perform attacks against legitimate military objectives, even if these attacks collaterally jeopardize civilians or civilian objects.¹⁰⁵ However, this military operation would be unlawful if the incidental damages to civilians or civilian objects are "[...] excessive in relation to the concrete and direct military advantage anticipated."¹⁰⁶ The importance of this principle is unquestionable, since "[r]espect for civilian persons and objects and protecting them against the effects of hostilities is an important *raison d'être* of international humanitarian law."¹⁰⁷ Hence, given its relevance, its breach constitutes a war crime under the International Criminal Court's Rome Statute.¹⁰⁸

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.* at 127.

¹⁰² *Ibid.*

¹⁰³ Cassese, *supra* note 11 at 189-190.

¹⁰⁴ *Ibid.*

¹⁰⁵ *I-PA*, *supra* note 3 at arts.51(5)(b) and 57(2)(b); Henckaerts & Doswald-Beck, *supra* note 8 at Rule 14.

¹⁰⁶ *Ibid.*

¹⁰⁷ Jean-François Quéguiner, "Precautions under the law governing the conduct of hostilities", *IRRC*, Volume 88 Number 864 December 2006, 793-821 at 793.

¹⁰⁸ *Rome Statute*, *supra* note 8 at art.8(2)(b)(iv).

Along the same line, the conduct of military operations demands constant care to avoid or minimize harm to the civilian population and civilian objects.¹⁰⁹ Belligerents have to take all feasible precautions to achieve this end.¹¹⁰ These due measures include, beyond several others: the confirmation before attack if the targets are really military objectives;¹¹¹ the choice of means and methods of warfare that would cause minimal civilian collateral harm;¹¹² the control of the attacks during their execution;¹¹³ and the effective advance warning of hostilities which may affect the civilian population, unless circumstances *in casu* do not allow.¹¹⁴

In the *Kupreškic Case*, the ICTY went further and ruled that repeated attacks with dubious lawfulness, given their incidental injuries to the civilian population, entail that the whole military operation is contrary to the proportionality principle.¹¹⁵

In other words, it may happen that single attacks on military objectives causing incidental damage to civilians, although they may raise doubts as to their lawfulness, nevertheless do not appear on their face to fall foul per se of the loose prescriptions of Articles 57 and 58 (or of the corresponding customary rules). However, in case of repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law. Indeed, this pattern of military conduct may turn out to jeopardise excessively the lives and assets of civilians, contrary to the demands of humanity.¹¹⁶

Hence, the ICTY suggested an overall analysis of the military operation as a whole, rather than an individualized legal assessment of the attacks, under which each attack would be independently and separately evaluated by the competent judicial authority. The Tribunal clarified that such interpretation of the proportionality principle is a direct demand of mankind, provided by the Martens Clause.¹¹⁷ This is because,

¹⁰⁹ *I-PA*, *supra* note 3 at art.57(1); Henckaerts & Doswald-Beck, *supra* note 8 at Rule 15.

¹¹⁰ *I-PA*, *ibid.* at art.57(2)(a)(ii); Henckaerts & Doswald-Beck, *ibid.*; *Convention (IX) concerning Bombardment by Naval Forces in Time of War*. The Hague, 18 October 1907 at art.2(3).

¹¹¹ *I-PA*, *ibid.* at art.57(2)(a); Henckaerts & Doswald-Beck, *ibid.* at Rule 16.

¹¹² *I-PA*, *ibid.* at art.57(2)(a)(ii); Henckaerts & Doswald-Beck, *ibid.* at Rule 17.

¹¹³ *I-PA*, *ibid.* at art.57(2)(b); Henckaerts & Doswald-Beck, *ibid.* at Rule 19.

¹¹⁴ *I-PA*, *ibid.* at art.57(2)(c); Henckaerts & Doswald-Beck, *ibid.* at Rule 20.

¹¹⁵ *Kupreškic case*, *supra* note 22 at para.526.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

attacks which excessively jeopardize civilians and civilian assets are contrary to elementary considerations of humanity and, thus, are legally intolerable.¹¹⁸

Nonetheless, the binding nature of the ICTY's rationale is not undisputed.¹¹⁹ Considerations regarding this interpretation of the proportionality principle can be found in academic works discussing the legality of the North Atlantic Treaty Organization (NATO) bombardment of the Federal Republic of Yugoslavia, in 1999, the so called Operation Allied Force. During the ninety separate incidents of the Operation, as few as 489 and as many as 528 civilians were killed.¹²⁰ Some of these attacks were: the bombing of the Istok Penitentiary, in which at least 19 prisoners were killed;¹²¹ the destruction of the Radio Television of Serbia (*Radio Televizije Srbije*), in Belgrade, resulting in 16 civilians deaths;¹²² and the killing of 87 civilians on the Kosovar refugee camp of Korisa Woods.¹²³ Besides, NATO aircraft repeatedly bombarded refugees over the Djakovica-Decane Road, in Kosovo, resulting in 70 civilian casualties.¹²⁴ NATO insisted that these attacks were performed against legitimate military targets and that the incidental damages to the civilian population were proportional.

Civilian casualties were not the only problematic aspect of the Operation Allied Force. During the bombing, power stations, chemical plants, factories, bridges, roads, railroads and oil installations were targeted by NATO, who aimed to constrain the movement and supplies of the Serbian military forces.¹²⁵ As a result, the destruction of Serbia's infrastructure and industrial park produced catastrophic consequences to its gross domestic product. Economists estimate that the 1999 aerial strike had much

¹¹⁸ *Ibid.*

¹¹⁹ Carolin Wuerzner, "Mission impossible? Bringing charges for the crime of attacking civilians or civilian objects before international criminal tribunals", *International Review of Red Cross*, Vol.90, No.872, 907-930 at 921.

¹²⁰ Human Rights Watch, "The Crisis in Kosovo", online: <<http://www.hrw.org/reports/2000/nato/Natbm200-01.htm>>.

¹²¹ *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, ICTY, 13 June 2000 at para.9, online: <<http://www.icty.org/sid/10052>>[*Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing*].

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*, at para.74.

greater impact on the Serbian national economy than the Nazi and then the Allied bombing of the region during the Second World War combined.¹²⁶

If the ICTY's interpretation of the proportionality principle was applied to the Operation Allied Force, its illegality becomes clear, given the overall unnecessary civilian damages it produced. However, the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia¹²⁷ disagreed with this conclusion. After its quotation of the *Kupreškic case*, it categorically opposed to the ICTY:

This formulation in *Kupreškic* can be regarded as a progressive statement of the applicable law with regard to the obligation to protect civilians. Its practical import, however, is somewhat ambiguous and its application far from clear. It is the committee's view that where individual (and legitimate) attacks on military objectives are concerned, the mere *cumulation* of such instances, all of which are deemed to have been lawful, cannot *ipso facto* be said to amount to a crime. The committee understands the above formulation, instead, to refer to an *overall* assessment of the totality of civilian victims as against the goals of the military campaign.¹²⁸

Nevertheless, the Review Committee's minimalist interpretation cannot prevail.¹²⁹ First of all, it is not under its prerogative to question the law as applied by the

¹²⁶ Steven Erlanger, "Economy: Serbs face bleak future after war", *The Guardian*, 4 May 1999, online: <<http://www.theguardian.com/world/1999/may/04/2>>

¹²⁷ After the beginning of NATO bombing against the former-Yugoslavia, the ICTY Prosecutor received a series of requests for investigation and indictments of political and military authorities from NATO State members for alleged grave violations of International Humanitarian Law during the campaign, including crimes against humanity and genocide. Given that, on 14 May 1999, the Prosecutor appointed the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia to assess such requests and the material accompanying them, and advise the Prosecutor and Deputy Prosecutor whether or not there is a sufficient basis to begin an investigation into the allegations or even into other incidents related to the NATO bombing found by the committee. After its review, "[o]n the basis of information available, the committee recommend[ed] that no investigation be commenced by the [Office of the Prosecutor] in relation to the NATO bombing campaign or incidents occurring during the campaign." Cf. *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing*, *supra* note 121 at paras.1-3 and 91.

¹²⁸ *Ibid.* at para.52.

¹²⁹ Paulo Benvenuti, "The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia", *European Journal of International Law*, vol. 12, No.3, 2001, 503-529 at 517[Benvenuti]; Anne-Sophie Massa, "NATO's Intervention in Kosovo and the Decision of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia Not to Investigate: An Abusive Exercise of Prosecutorial Discretion", *Berkeley Journal of International Law*, vol. 24, issue 2, 610-649 at 637; Andreas Laursen, "NATO, the

Court. By doing so it is clearly acting *ultra vires*.¹³⁰ Furthermore, it is very untraditional for a prosecutorial authority to undercut the court that may subsequently adjudicate the case.¹³¹ "If a court has adopted a broad interpretation that works to the detriment of the accused, prosecutors will rarely fail to follow through. One possible explanation is, of course, that the prosecutorial authority is looking for reasons not to prosecute."¹³²

Secondly, the Review Committee "[...] completely misconstrues the [ICTY]'s *dictum* by concluding that it meant to compare the total number of casualties with the overall goals of the military action."¹³³ It wrongly applied the *Kupreskic* precedent to cover attacks that are deemed to have been lawful.¹³⁴ This is not the purpose of the ICTY, since its interpretation of the proportionality principle is limited to "[...] repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness [...]."¹³⁵ Hence, this understanding cannot be used to adjudicate a series of lawful attacks, even when it harms civilians or civilian properties within the limits of the proportionality.¹³⁶ An overall analyze, in the terms of the *Kupreskic case*, can only happen in circumstances of dubious lawfulness.¹³⁷

Still according to the school of thought that defines the Martens Clause as a hermeneutic guidance to interpret humanitarian rules, the Clause can be applied as to allow the application of the Common Article 3 in any armed conflict, whether international or non-international. International Law determines "[...] that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised groups or between such groups within a State."¹³⁸ The existence of an armed conflict under these terms is the *conditio sine qua non* for the application of International Humanitarian Law.¹³⁹

War over Kosovo, and the ICTY Investigation", *American University International Law Review*, Vol.17, issue 4, 2002, 765-814 at 793.

¹³⁰ Benvenuti, *ibid.* at 517.

¹³¹ Andreas Laursen, "NATO, the War over Kosovo, and the ICTY Investigation", *American University International Law Review*, Vol.17, issue 4, 2002, 765-814 at 794.

¹³² *Ibid.*

¹³³ *Ibid.* at 793.

¹³⁴ Benvenuti, *supra* note 129 at 517.

¹³⁵ *Kupreskic case*, *supra* note 22 at para.526.

¹³⁶ Benvenuti, *supra* note 129 at 517-518.

¹³⁷ *Ibid.*

¹³⁸ *Rome Statute*, *supra* note 22 at art.8(2)(f); *Akayesu Case*, *supra* note 22 at para.619; *Kupreskic Case*, *supra* note 22 at para.545; *Furundzija Case*, *supra* note 22 at para.59; *Martić*

However, the humanitarian norms applicable differ if the conflict is international or if it is non-international.¹⁴⁰ Most of the normative body of the International Humanitarian Law was designed to govern conflicts of international character and only the 1977 Second Additional Protocol and the Common Article 3 can be applied to internal armed conflicts.¹⁴¹

Nevertheless, the case-law of the ICTY gave a very singular enhancement to the scope of application of the legal duties within the Article 3. In the *Čelebići case*, this Court affirmed that:

It is indisputable that common Article 3, which sets forth a minimum core of mandatory rules, reflects the fundamental humanitarian principles which underlie international humanitarian law as a whole, and upon which the Geneva Conventions in their entirety are based. These principles, the object of which is the respect for the dignity of the human person, developed as a result of centuries of warfare and had already become customary law at the time of the adoption of the Geneva Conventions because they reflect the most universally recognised humanitarian principles. These principles were codified in common Article 3 to constitute the minimum core applicable to internal conflicts, but are so fundamental that they are regarded as governing both internal and international conflicts.¹⁴²

Hence, elementary considerations of humanity prevent the use of means and methods of warfare prohibited in armed conflicts between States in circumstances when States try to put down rebellions on their own territory.¹⁴³ "What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and

Case, supra note 74 at para.41; *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion on Jurisdiction, Trial Chamber, Case No. IT-94-1-T, 10 August 1995 at para.70[*Tadic Case*]; *Prosecutor v. Kordic and Cerkez*, Judgment, Appeals Chamber, Case No. IT-95-14/2-A, 17 December 2004 at para.336; *Prosecutor v. Sefer Halilović*, Trial Chamber I, Section A, Case No. IT-01-48-T, 16 November 2005 at para.24[*Halilović Case*]; *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Case no. ICC-01/04-01/06, 14 March 2012 at para.533; *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, Case no. ICC-02/05-01/09, 4 March 2009 at para.59; *Prosecutor v. Jean-Pierre Bemba Bembo*, Warrant of Arrest for Jean-Pierre Bemba Gombo, Pre-Trial Chamber III, Case no. ICC-01/05-01/08, 23 May 2008 at para.9.

¹³⁹ *I-GC, supra* note 3 at art.2; *II-GC, supra* note 3 at art.2; *III-GC, supra* note 3 at art.2; *IV-GC, supra* note 3 at art.2; *I-PA, supra* note 3 at art.2; *Salmón, supra* note 5 at 25; *Sassòli, Bouvier & Quintin, supra* note 5, Chapter 14 at 3.

¹⁴⁰ *Akayesu Case, supra* note 22 at para.601; *Salmón, ibid.* at 27.

¹⁴¹ *Akayesu Case, ibid.*; *Salmón, ibid.*; *Tadic Case, supra* note 138 at para.67.

¹⁴² *Prosecutor v Delalic at all ("Čelebići Case")*, Appeals Chamber, Case No. IT-96-21-A, 20 February 2001 at para.143[*Čelebići Case*].

¹⁴³ *Tadic Case, supra* note 138 at para.119.

inadmissible in civil strife."¹⁴⁴ That is because "[t]he provisions of Common Article 3 and the universal and regional human rights instruments share a common 'core' of fundamental standards which are applicable at all times, in all circumstances and to all parties, and from which no derogation is permitted."¹⁴⁵ In the end, Article 3's role is not barred by the nature of the conflict in question, but rather it is applicable as a minimum of humanity and civility demanded in the context of the hostilities.¹⁴⁶

The application of Common Article 3 to any armed conflict is a direct reflex of elementary considerations of humanity that permeate the whole international normative system.¹⁴⁷ Although the text of the Geneva Conventions is very clear when it limits this provision to "[...] armed conflict[s] not of an international character [...],"¹⁴⁸ the ICTY concludes that the Martens Clause is the source that makes this enhancement of Article 3 legally possible, since it guarantees a minimum of human dignity in armed conflicts, that cannot be derogated by the belligerents.¹⁴⁹

A similar *dicta* was delivered by the ICJ, in the *Case concerning the Military and Paramilitary Activities in and against Nicaragua*:

Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity'.¹⁵⁰

Conclusively, the Martens Clause can be applied to guide the interpretation of humanitarian rules, as to improve their protective role. This feature of the Clause reflects the *pro homine* principle, a general legal principle¹⁵¹ that can be found in

¹⁴⁴ *Ibid.*

¹⁴⁵ *Halilović Case*, supra note 138 at para.24; *Juan Carlos Abella v. Argentina (La Tablada)*, Case 11.137, Report N° 55/97, 18 November 1997 at para.158[*Juan Carlos Abella v. Argentina*].

¹⁴⁶ *Čelebići Case*, supra note 138 at paras.149-150; *Tadić Case*, supra note 138 at para.137.

¹⁴⁷ *Čelebići Case*, *ibid.* at para.140; *Tadić Case*, *ibid.* at para.102; *Halilović Case*, supra note 138 at para.25.

¹⁴⁸ *I-GC*, supra note 3 at art.3.

¹⁴⁹ *Čelebići Case*, supra note 138 at footnote 187.

¹⁵⁰ *Nicaragua Case*, supra note 22 at para.218.

¹⁵¹ *Case of Raxcacó Reyes v. Guatemala*, IACtHR, Judgment of 15 September 2005, Separate Opinion of Judge García Ramírez at para.12; *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, IACtHR, Judgment of 31 August 2001, Separate Opinion of Judge

international case-law,¹⁵² domestic laws¹⁵³ and several treaties.¹⁵⁴ The function of the *pro homine* principle is to determine that among several possible interpretations for a same rule, the interpretation that shall prevail is the one that more enhance the human protection. Likewise, when an adjudicator faces himself/herself with two or more conflicting legal norms, the rule to be chosen is the one that more improve the protection of human beings. Therefore, under the *pro homine* maxim, the prevailing

García Ramírez at para.2; *Case of Bámaca Velásquez v. Guatemala*, IACtHR, Judgment of 25 November 2000, Separate Opinion of Judge García Ramírez at para.3; Amaya Villareal, "El principio pro homine: interpretación extensiva vs. el consentimiento del estado", *Revista Colombiana de Derecho Internacional*, Vol.5, 2005 at 337-380.

¹⁵² *Juan Carlos Abella v. Argentina*, *supra* note 145 at paras.164-165; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, IACtHR, Judgment of 29 March 2006, para.140; *Case of the "Mapiripán Massacre" v. Colombia*, IACtHR, Judgment of 15 September 2005 at para.106[*Mapiripán Massacre Case*]; *Case of Atala Riffo and Daughters v. Chile*, IACtHR, Judgment of 24 February 2012 at para.80[*Atala Riffo and Daughters v. Chile*]; *Coard et al. v. United States*, IAComHR, Case 10.951, Report No. 109/99, 29 September 1999 at para.42; *Andres Aylwin Azocar et al. v. Chile*, IAComHR, Case 11.863, Report n° 137/99, 27 December 1999 at para.146[*Andres Aylwin Azocar v. Chile*]; *19 Tradesmen v. Colombia*, IACtHR, Judgment of 5 July 2004 at para.173; *Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights)*, IACtHR, Advisory Opinion OC-13/93 of 16 July 1993 at para.50 and 54; *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*, IACtHR, Advisory Opinion OC-5/85 of 13 November 1985 at para.52[*Compulsory Membership in an Association for the Practice of Journalism*].

¹⁵³ *Constitución Política del Perú*, 1994 at art.3; *Constitución de la República del Ecuador*, 2008 at art.417; *Constitución de la República Dominicana*, 2010 at art.74(4); *Constitución Política de los Estados Unidos Mexicanos*, Diario Oficial de la Federación, 1917 at art.1; *Constitución de la República Bolivariana de Venezuela*, Gaceta Oficial de la República de Venezuela, 1999 at art.23; *Constitución política del Estado Plurinacional de Bolivia*, 2009 at art.256; *Constituição da República Federativa do Brasil*, 1988 at art.4(II).

¹⁵⁴ *I-PA*, *supra* note 3 at art.75(8); *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969 at art.29.b; *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, 16 December 1966 at art.5.2; *International Covenant on Economic, Social and Cultural Rights*, 993 UNTS 3, 16 December 1966 at art.5(2); *European Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS 5, 4 November 1950 at art.60; *European Social Charter*, ETS n.035, 18 October 1961 at art.32; *Convention on the Elimination of All Forms of Discrimination against Women*, New York, 18 December 1979 at art.23; *Convention against Discrimination in Education*, Paris, 14 December 1960 at art.10; *Convention on the Rights of the Child*, New York, 20 November 1989 at art.41; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, New York, 26 June 1987 at arts.1(2) e 16.

interpretation or rule always will be the one which is less intrusive in the exercise of human rights.¹⁵⁵

The main goal of such principle is to prevent States from invoking a specific norm with the purpose of limiting the effects of other rules more favorable to the human protection.¹⁵⁶ Hence, considering that treaties on human rights have an inherently humanitarian purpose,¹⁵⁷ "[i]n case of doubt, the ambiguity should be interpreted in favor of the victims' rights".¹⁵⁸

3.5 The Martens Clause as the acknowledgment of the legal autonomy of the principles of humanity and the dictates of public conscience

According to Mohamed Shahabuddeen and Antônio Augusto Cançado Trindade, the Martens Clause is much more than a moral obligation or a bond between custom and conventions or at least a source to create custom. It provides the juridical binding authority for treating the principles of humanity and the dictates of public conscience as sources of International Humanitarian Law.¹⁵⁹ That is what ICJ meant when it affirmed,

¹⁵⁵ *Compulsory Membership in an Association for the Practice of Journalism*, *supra* note 152 at para.52; *Mapiripán Massacre Case*, *supra* note 152 at para.106; *Atala Riffo and Daughters v. Chile*, *supra* note 152 at para.84; *Case of Cabrera García and Montiel Flores v. Mexico*, IACtHR, Judgment of 26 November 2010, Concurring Opinion of the *Ad Hoc* Judge Eduardo Ferrer Mac-Gregor Poisot at para.38; Antônio Augusto Cançado Trindade. *Co-Existence and Co-Ordination of mechanisms of International Protection of Human Rights*, (The Hague: Martinus Nijhoff, 1987) at 113-122.

¹⁵⁶ *Juan Carlos Abella v. Argentina*, *supra* note 145 at para.164.

¹⁵⁷ Alexander Orakhelashvili, "Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights", *European Journal of International Law*, vol.14, No.3, 2003, 529-568 at 535.

¹⁵⁸ *Andres Aylwin Azocar v. Chile*, *supra* note 152 at para.146.

¹⁵⁹ Shahabuddeen, *supra* note 23 at 406; ICRC, "A Guide to the Legal Review of New Weapons, Means and Methods of Warfare. Measures to Implement Article 36 of Additional Protocol I of 1977", *International Review of Red Cross*, Vol. 88, No. 864, 2006, 931-956 at 945 [ICRC]; Antônio Augusto Cançado Trindade. "Desafios e Conquistas do Direito Internacional dos Direitos Humanos no Início do Século XXI", *XXXIIIth Course on International Law*, Inter-American Juridical Commission, Rio de Janeiro, 2006, 407-490 at 477; Monica Teresa Costa Sousa, *Direito Internacional Humanitário*, 2nd ed. (Curitiba: Juruá, 2007) at 62-64. James Crawford sustained the same conclusion in his speech on behalf of Samoa, the Marshall Islands and Solomon Islands, during the oral proceedings before the ICJ in the *Nuclear Weapons case*. Cf. *Public sitting in the case in Legality of the Threat or Use of Nuclear Weapons (Request for Advisory Opinion Submitted by the General Assembly of the United Nations)*, ICJ, Peace Palace, 14 November 1995 at 67-68 [*Public sitting in the Nuclear Weapons case on 14 November 1995*].

in the *Corfu Channel case*, that Albania's international duties were based on "elementary considerations of humanity".¹⁶⁰ Again, the same *dicta* was performed in the *Nicaragua* case, concerning the humanitarian obligations of the United States.¹⁶¹

The Clause establishes that the "dictates of public conscience" and the "laws of humanity" are *per se* the legal source that outlaws non-regulated inhumane means and methods of warfare,¹⁶² binding all States.¹⁶³ Appealing to the vagueness of these terms is an obsolete and misplaced positivist defense.¹⁶⁴

There are indeed scholars that vigorously argue against the legal autonomy of the principles of humanity and dictates of public conscience as legal sources. Theodor Meron affirms that "[...] the Martens Clause does not allow one to build castles of sand. Except in extreme cases, its references to principles of humanity and dictates of public conscience cannot, alone, delegitimize weapons and methods of war, especially in contested cases."¹⁶⁵ The American jurist concludes that "[g]overnments are not yet ready to transform broad principles of humanity and dictates of public conscience into binding law."¹⁶⁶

Antonio Cassese also asserts that the Martens Clause does not create new sources of legal duties.¹⁶⁷ The Italian author emphasizes that there are dissenting interpretations of the Clause among States and case-law of judicial bodies that make it impossible to defend the legal autonomy of the principles of humanity and dictates of

¹⁶⁰ *Corfu Channel (United Kingdom v. Albania)*, ICJ Rep.1949 at 22. In this case, the Court delivered the following conclusion: "The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." An accurate interpretation of this quotation can be found in: Shahabuddeen, *supra* note 23 at 407.

¹⁶¹ Shahabuddeen, *ibid.*; *Nicaragua case*, *supra* 22 note at paras.215 and 218.

¹⁶² Shahabuddeen, *ibid.* at 406-408; ICRC *supra* 159 note at 945.

¹⁶³ *Public sitting in the Nuclear Weapons case on 14 November 1995*, *supra* note 159 at 68.

¹⁶⁴ Pustogarov, *supra* note 13 at 132.

¹⁶⁵ Meron (2006), *supra* note 52 at 28. The same conclusion can be found in: Dinstein, *supra* note 5 at 57.

¹⁶⁶ Meron (2006), *ibid.*

¹⁶⁷ Cassese, *supra* note 11 at 211.

public conscience.¹⁶⁸ Also, the ICJ has already had opportunities to deliver a conclusive *obiter dictum* on the matter, but it refused to do so.¹⁶⁹ Taking these remarks into account, he concludes that "[s]urely the clause does not envisage - nor has it brought about the birth of - two autonomous sources of international law, distinct from the customary process."¹⁷⁰

Nevertheless, Meron and Cassese fail to perform an articulate and precise appraisal of International Law.

The International Law Commission itself recognized that the Martens Clause grants the legal self-sufficiency to the principles of humanity and the dictates of public conscience. When it was discussing the topic "The Law of the Non-navigational uses of International Watercourses", it concluded that international watercourses shall enjoy the protection accorded by International Humanitarian Law.¹⁷¹ On the commentaries to this statement, the Commission adopted a definition of the Martens Clause beyond only custom, assuming that it provides protection also from the principles of humanity and from the dictates of public conscience.¹⁷² To support the normative value of these two concepts, it also affirms that a conflict between uses of an international watercourse shall be settled "[w]ith special regard being given to the requirements of vital human needs."¹⁷³ This norm is not derived from customary law, but directly from needs of mankind, because "[a]s a matter of logic, principles not covered by the law in force derive from unwritten rules inherent to existing law. Principles of humanity are inherent to international humanitarian law and human rights law."¹⁷⁴

In addition, the written and oral statements, delivered by several States in the Peace Palace, during the debates for the ICJ's advisory opinion on nuclear weapons, also supported the normative value of these two elements of the Clause. Numerous State

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ ILC. "Draft articles on the law of the non-navigational uses of international watercourses and commentaries thereto and resolution on transboundary confined groundwater", *Yearbook of the International Law Commission*, 1994, vol. II, Part Two, 89-135 at 131.

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

¹⁷⁴ Kleffner, *supra* note 24 at 619.

delegations, as Solomon Islands',¹⁷⁵ Samoa's,¹⁷⁶ Marshall Islands',¹⁷⁷ Australia's,¹⁷⁸ Mexico's,¹⁷⁹ Indonesia's,¹⁸⁰ Iran's,¹⁸¹ Nauru's,¹⁸² Malaysia's,¹⁸³ New Zealand's,¹⁸⁴ and Zimbabwe's,¹⁸⁵ stated that elementary considerations of humanity or the public conscience are legal sources to control the legality of weaponry, including to provide the prohibition of nuclear weapons. However, the United States¹⁸⁶ and United Kingdom¹⁸⁷ opposed to the normative value of these Martens Clause's elements,

¹⁷⁵ *Public sitting in the Nuclear Weapons case on 14 November 1995*, *supra* note 159 at 53-54 and 49-50.

¹⁷⁶ *Ibid.* at 53-54.

¹⁷⁷ *Ibid.* at 18.

¹⁷⁸ *Public sitting in the case in Legality of the Threat or Use of Nuclear Weapons (Request for Advisory Opinion Submitted by the General Assembly of the United Nations)*, ICJ, Peace Palace, 30 October 1995 at 38-39.

¹⁷⁹ *Public sitting in the case in Legality of the Threat or Use of Nuclear Weapons (Request for Advisory Opinion Submitted by the General Assembly of the United Nations)*, ICJ, Peace Palace, 3 November 1995 at 55-56.

¹⁸⁰ *Ibid.* at 25.

¹⁸¹ *Public sitting in the case in Legality of the Threat or Use of Nuclear Weapons (Request for Advisory Opinion Submitted by the General Assembly of the United Nations)*, ICJ, Peace Palace, 6 November 1995 at 32 and 36.

¹⁸² *Written Statement of the Government of Nauru*, September 1994 at 33.

¹⁸³ *Public sitting in the case in Legality of the Threat or Use of Nuclear Weapons (Request for Advisory Opinion Submitted by the General Assembly of the United Nations)*, ICJ, Peace Palace, 7 November 1995 at 60.

¹⁸⁴ *Public sitting in the case in Legality of the Threat or Use of Nuclear Weapons (Request for Advisory Opinion Submitted by the General Assembly of the United Nations)*, ICJ, Peace Palace, 9 November 1995 at 25-26.

¹⁸⁵ *Public sitting in the case in Legality of the Threat or Use of Nuclear Weapons (Request for Advisory Opinion Submitted by the General Assembly of the United Nations)*, ICJ, Peace Palace, 15 November 1995 at 33 [*Public sitting in the Nuclear Weapons case on 15 November 1995*].

¹⁸⁶ *Public sitting in the Nuclear Weapons case on 15 November 1995*, *ibid.* at 78. Mr. John McNeill, the American lawyer, affirmed: "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 lawful. 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."

¹⁸⁷ *Written Statement of United Kingdom*, 16 June 1995 at 48. Sir Franklin Berman, the British Legal Adviser, affirmed: "While the Martens Clause makes clear that the absence of a specific treaty provision on the use of nuclear weapons is not, in itself, sufficient to establish that such weapons are capable of lawful use, the Clause does not, on its own establish their illegality. The terms of the Martens Clause themselves make it necessary to point to a rule of customary

limiting the control of legality to customary and conventional rules. The Russian Federation presented the far more conservative view¹⁸⁸ and received disapproval by other States.¹⁸⁹ Mr. Leonid Skotnikov, Russian Ambassador and current judge before the ICJ, affirmed that the Clause is no longer necessary nowadays, since the development and complexity of humanitarian conventions are sufficient to regulate all means and methods of warfare.¹⁹⁰ Unfortunately, the ICJ did not follow the prevailing understanding of the majority of the delegations in its advisory opinion and provided a very vague understanding of the Martens Clause.¹⁹¹

Antonio Cassese's paper on the Martens Clause¹⁹² does not offer a satisfactory analysis of these statements. The Italian scholar mentions that ICJ faced different interpretations of the Clause and did not take sides on its advisory opinion.¹⁹³ The absence of a conclusion in the ICJ's judgment was used by the author as evidence that the autonomy of the elements of the Martens Clause does not reflex the current International Law, since the Court did not upheld this view.¹⁹⁴ However, his conclusion

international law which might outlaw the use of nuclear weapons. Since it is the existence of such a rule which is in question, reference to the Martens Clause adds little."

¹⁸⁸ Cassese, *supra* note 11 at 211.

¹⁸⁹ Mr. James Crawford was one that criticized the Russian statement. The Australian Professor stated: "The Russian Federation may have disowned M. Martens [...], a distinguished civil servant of the Tsar, but, I am pleased to say, his clause has been embraced by much of the rest of the world, ourselves included." Cf. *Public sitting in the Nuclear Weapons case on 14 November 1995*, *supra* note 159 at 67-68.

¹⁹⁰ *Written Comments of the Government of the Russian Federation*, 19 June 1995 at 13. Mr. Leonid Skotnikov affirmed: "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."

¹⁹¹ Regarding the Martens Clause, the Court concluded that it "[...] has proved to be an effective means of addressing the rapid evolution of military technology." Besides, "[i]t is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' as the Court put it in its Judgment of 9 April 1949 in the Corfu Channel case [...], that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law." In the end, the Court affirms that, as result of the Martens Clause, the use or threat of nuclear weapons are under the role of the international humanitarian rules. Cf. *Nuclear Weapons case*, *supra* note 20 at paras.78-79 and 87. For commentaries on the ICJ's analyses of the Martens Clause: Ticehurst, *supra* note 12.

¹⁹² Cassese, *supra* note 11.

¹⁹³ *Ibid.* at 211.

¹⁹⁴ *Ibid.* at 211.

is contradictory, since his own interpretation of the Clause was not adopted by the Court either and, thus, his previous argument could be used against himself. This *rationale* demonstrates how illogical is this author's argumentation.

Thus, we cannot concur with Antonio Cassese and use the failure of the ICJ to deliver the only reasonable decision possible as an evidence of the inexistence of relevant norms to protect human interests, as he did. The ICJ, through its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, has not ended the discussion about the significance of the Martens Clause. It made sure to preserve the debate open to development in the legal literature and State practice. In the end, this advisory opinion cannot be used to overrule any interpretation of the Clause that recognizes its application.¹⁹⁵

Conclusively, the Martens Clause must be taken as a channel where fundamental considerations of humanity flow across the international legal sphere, preventing the enforcement of dehumanizing actions not covered by Law,¹⁹⁶ whether customary or conventional. As well put by Shahabuddeen,

[...] the Martens Clause provided its own self-sufficient and conclusive authority for the proposition that there were already in existence principles of international law under which considerations of humanity could themselves exert legal force to govern military conduct in cases in which no relevant rule was provided by conventional law. Accordingly, it was not necessary to locate elsewhere the independent existence of such principles of international law; the source of the principles lay in the Clause itself.¹⁹⁷

Therefore, the Martens Clause must be read as the legal element that acknowledges the binding nature and autonomy of the elementary considerations of humanity and public conscience as general minimum standards to be fulfilled. It must be clear that we are not affirming here that the Martens Clause is the legal basis ensuring the character of source of law to its elements. The Clause can never be applied as the creator of normative autonomy and obligatory nature of the elementary

¹⁹⁵ We believe the ICJ's advisory opinion on nuclear weapons can be the authority to overrule the Russian position, because this tribunal applied the Clause and also recognized its relevance to the ongoing development of International Humanitarian Law. Hence, argue that the Martens Clause is no longer necessary nowadays is definitely not accurate.

¹⁹⁶ Schmitt, *supra* note 5 at 800.

¹⁹⁷ Shahabuddeen, *supra* note 23 at 408. Similar point of view was defended by Judge Weeramantry, cf. Weeramantry, *supra* note 12 at 493.

considerations of humanity and public conscience. The principle of humanity would bind the International Community as a whole even if no treaty provided a phrasing like the Martens Clause. This Clause just recognizes and reaffirms the existence, relevance and binding authority of these elements. As a result, States that did not ratify any treaties which include the Martens Clause are, in the same way, compelled to the elements stated by it.

4 CONCLUSION

The Martens Clause reinforces that the human being is the focus of International Humanitarian Law.¹⁹⁸ It exists to ensure protection even against circumstances that are out of the legal domain. Consequently, the Clause demonstrates that belligerents are not free to apply the means and methods of warfare that they want, since the simple lack of an express humanitarian norm does not necessarily justify an action on the basis of military necessity.¹⁹⁹ The hostilities must equally respect the minimal considerations of humanity.²⁰⁰

However, the international doctrine is unable to find a common *rationale* on how the Clause fills these gaps or clarifies obscurities in the legal system. We believe the most accurate interpretation is the one in which the Martens Clause recognizes the normative nature and autonomy for the considerations of humanity and the public conscience. The Clause acknowledges the existence of these two as sources of law.²⁰¹ Other dissenting interpretations that can be found in the legal literature, even if sustained by renowned jurists, are not persuasive. The Clause cannot be read as a moral obligation (or a bridge between positive and natural law) or as a tie between customary and conventional law in the silence or inapplicability of the latter or at least as a source to replace the elements of the custom. The Martens Clause's elements have a strong deontological value and must be independently applied from other sources of International Law.

¹⁹⁸ Meron (2006), *supra* note 52 at 28.

¹⁹⁹ Schmitt, *supra* note 5 at 800.

²⁰⁰ *Ibid.*

²⁰¹ Meron (2000), *supra* note 12 at 88.

Given the fact that the international legal system of our days is essentially homocentric, the normative elements that safeguard the interests of humankind and circumscribe the arbitrary behavior of States must by logic enjoy legal self-sufficiency. Consequently, the prohibition of non-regulated dehumanizing means and methods of warfare comes from the principle of humanity and the universal juridical conscience themselves, whose existence is merely reaffirmed (not created) by the Martens Clause.

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