

# AN ANALYSIS OF MARTENS CLAUSE WITH RESPECT TO INTERNATIONAL HUMANITARIAN LAW

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## ABSTRACT

Martens clause is an expression of natural law theory of International law. This was introduced in the preamble of Hague Convention of 1899 to resolve the differences of opinion between powerful states and weak states. This clause went on to become one of the most discussed principles of international law owing to its unique characteristics. This paper aims at explaining the clause and breaking it down in order to interpret and understand its components. Case laws in relation to the same has also been discussed wherein the said clause was applied. At the end the author has summed up his opinion and thoughts but the most appropriate style of interpretation and application of the clauses is left as an open ended question.

**Keywords;** Martens Clause, International Law, Law of Armed Conflict, Interpretation of Martens Clause

## INTRODUCTION

Martens Clause was first introduced in the preamble of Hague Convention (2) of 1899 and formed a part of its preamble. It reads as follows, " Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience."<sup>1</sup> Martens clause was used in relation to Law of Armed Conflict. On plain reading of clause it is understood that if a particular situation or event is not covered under the laws pertaining to armed conflict then high contracting parties should cater to the same in accordance of principles enshrined in International law, law recognized by civilized nations and laws of humanity and public conscience. The clause gets its name from Russian delegate Prof Von Martens who introduced it at the Hague Peace Conference of 1899 when there was confusion about the status of non-combatants who had picked up arms against the forces. This was one of the many disagreements that small states had with large-occupying states. Small states were under the impression that they would not be able to attain the status of large-occupying states and to resolve such conflict of interests, Prof Marten inserted a clause that went on to bear his name forever.<sup>2</sup>

## INTERPRETATION OF THE CLAUSE

It stipulates that in cases not covered under International Humanitarian Law, conduct of belligerents will be governed by principles of international law resulting from usage of such principles by civilized nations, from the law of humanity and dictates of public conscience. Interpretation of the clause has always been in question. It has acquired a customary character in international law but humanitarian lawyers also argue that it imposes separate set of obligations on a state and should not be merely construed as a custom.<sup>3</sup> Another interpretation is that something which is not prohibited under International law is not something which is

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<sup>1</sup> Rupert Ticehurst, Martens Clause and Law of Armed Conflict, ICRC, 30<sup>th</sup> of April 1994

<sup>2</sup> Vaios Koutroulis, Martens Clause, Oxfordbibliographies.com, 24<sup>th</sup> of July 2013

<sup>3</sup> C. Greenwood, " Historical Development and Legal Basis " , in Dieter Fleck (ed.) , *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford/New York, 1995, p. 28 (Para. 129).

permitted.<sup>4</sup> Martens Clause however can have three interpretations namely Narrow, Broad and Moderate<sup>5</sup>. Narrow interpretation shall bind signatories of a treaty and martens clause shall serve the purpose of an international customary law. Broad interpretation shall advocate for the clause to be a separate source of law on its own which is capable of being utilized independently as a basis of an argument. Moderate interpretation shall treat the clause as a means to understand and interpret treaty provisions.<sup>6</sup> If one were to break down the clause, it talks about principles of international law as a result of usage by civilized nations, law of humanity and dictates of public conscience. Principles of international law as a result of usage by civilized nations at its most basic interpretation would mean customs followed by such nations which would ensure civilized treatment of persons protected under law of armed conflict in case an event is not covered under existing laws. Dictate of public conscience means opinion and degree of acceptance of general populace in relation to a practice. The biggest challenge in this regard is to ascertain a method to understand and measure public conscience. One way to do it is to ask for people's opinion on a particular issue but finding a perfect sample that represents global citizens is a tedious task because conscience can never be general and may differ owing to its subjectivity. One such exercise was conducted when public was asked to express their opinion on use of autonomous weapons system in United States of America and 3 out of every 10 Americans was in support of the same. The following survey was conducted in 25 countries and results are available for download.<sup>7</sup> Again, some people found the idea of AWS very disturbing while some did not have sufficient knowledge on the subject. Public deliberations and Expert opinion on the subject are also effective ways to gather enough information on what constitutes dictate of public conscience.

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<sup>4</sup> Y. Sandoz, C. Swinarski, B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff, Geneva, 1987, p. 39 (Para. 55); N.Singh and E. McWhinney, *Nuclear Weapons and Contemporary International Law*, 2nd ed., Martinus Nijhoff, Dordrecht, 1989, pp. 46-47.

<sup>5</sup> Rob Sparow, Ethics as a source of law; Martens clause and autonomous weapons, Humanitarian Law and Policy Blog, 14<sup>th</sup> of November 2017

<sup>6</sup> Rob Sparow, Ethics as a source of law; Martens clause and autonomous weapons, Humanitarian Law and Policy Blog, 14<sup>th</sup> of November 2017

<sup>7</sup> <https://www.ipsos.com/en-us/news-polls/three-ten-americans-support-using-autonomous-weapon>

## PRINCIPLE OF HUMANITY

Principle of Humanity is one of the most basic facets of International Humanitarian Law. It is one of the pillars on which jurisprudence of laws in relation to armed conflict is based. Absence of notion of humanity during the battle of Solferino in 1859 is what led Henry Durant to form International Committee of Red Cross.<sup>8</sup> Principle of Humanity puts a moral obligation on warring parties not to use unlimited or unrestricted force. Means and methods for warfare should be restricted and governed in accordance of just war theory, jus contra bellum and in accordance of Hague Conventions which are 12 in number specifically dedicated to limit use of force and means and methods of war. In the opinion of the author principle of humanity is the backbone of martens clause. The principle of humanity forbids the infliction of all suffering, injury or destruction not necessary for achieving the legitimate purpose of a conflict<sup>9</sup>. If persons find themselves in a situation not protected under law of armed conflict, it is the moral duty of belligerents and armed forces to treat such persons with highest standards of dignity and respect in order to maintain and preserve humanity even at times of war. The essence of Principle of Humanity is captured in the following quote, “*War is no way a relationship of man with man but a relationship between States, in which individuals are enemies only by accident; not as men, nor even as soldiers...Since the object of war is to destroy the enemy State, it is legitimate to kill the latter’s defenders as long as they are carrying arms; but as soon as they lay them down and surrender, they cease to be enemies or agents of the enemy, and again become mere men...lives*<sup>10</sup>”

Martens Clause was also discussed at length by International Court of Justice in its advisory opinion on legality of use of threat of nuclear weapons.

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<sup>8</sup> Basic Principles of IHL, <https://www.diakonia.se/en/ihl/the-law/international-humanitarian-law-1/introduction-to-ihl/principles-of-international-law/>

<sup>9</sup> What is IHL, <https://www.icrc.org/en/document/what-ihl>

<sup>10</sup> Rousseau, 1762

## INTERNATIONAL COURT OF JUSTICE, INTERNATIONAL CASES AND MARTENS CLAUSE

In December 1994, a resolution was passed by General Assembly asking the court to render its advice on the following question, **“Is the threat or use of nuclear weapons in any circumstance permitted under international law?”**, and the court took up the matter.<sup>11</sup> Close to 28 states made oral and written submissions. The following observations and discussions unfolded on Martens clause and its interpretation. The Russian Federation was of the opinion that Martens Clause had no importance because comprehensive code in relation to law of war is already in existence. This argument in itself was flawed because martens clause was reinserted in Geneva Convention of 1949 and Additional Protocols of 1977 which bears the testimony of its relevance. United Kingdom stated that the objective of the clause was to highlight the fact that something which is not prohibited in international law is not permitted which happens to be a narrow interpretation of the clause as discussed earlier. In its Opinion, the ICJ merely referred to the Martens Clause stating that “it has proved to be an effective means of addressing the rapid evolution of military technology. According to the dissenting opinion of Justice Koroma and Shahabuddeen, Martens clause was normative in nature which can be used to regulate the conduct of the states. Justice Koroma was of the opinion that the whole exercise of questioning the legality of use of nuclear weapons was futile as it exhibited extreme form of positivism.<sup>12</sup>

Martens clause was used for the very first time in **Klinge’s case**<sup>13</sup>. It was decided by the Supreme Court of Norway in the year 1946. Defendant was charged with maltreatment and torture of Norwegian patriots under the Norwegian Criminal Civil code of 1902 jointly with a royal decree dated 1945 in accordance to which he was given death penalty. On appeal his contention was that his acts were committed before such royal decree passed and according to the constitution of the country no laws were to have retrospective effect. Article 97 of the Norwegian Constitution states as follows, “No Law shall have retrospective effect”<sup>14</sup>, the appeal was dismissed by the Judges stating that acts committed by Klinge was against principles of humanity and dictates of public conscience under martens clause. In the case of

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<sup>11</sup> Legality of use of threat of nuclear weapons, <https://www.icj-cij.org/en/case/95>

<sup>12</sup> Rupert Ticehurst, Martens Clause and Law of Armed Conflict, ICRC, 30<sup>th</sup> of April 1994

<sup>13</sup> Norway vs. Klinge, Case number 11 at Supreme Court of Norway dated 26<sup>th</sup> February 1945

<sup>14</sup> Article 97 of Constitution of Kingdom of Norway, 1818

**Krupp**<sup>15</sup>, United States Military tribunal at Nuremberg stated that German forces had exploited the territory occupied by it in a ruthless manner far beyond the needs of military occupation showing utter disregard to articles 46 to 56 of the Hague Convention on belligerent occupation which was not only binding on them as a treaty law but also as a matter of customary international law (hinting at Martens clause), stating that preamble of Hague Convention is a pious document which talks about principles followed by civilized nations as a result of usage enshrined in international law, law of humanity and dictate of public conscience.<sup>16</sup> In **Rauters Case**<sup>17</sup> the Dutch special Court stated that German forces that had occupied Netherlands had no right to give collective punishment which was prohibited under the Hague convention, according to the convention, “No general penalty, pecuniary or otherwise, can be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible”<sup>18</sup>, and such behaviour was at variance with Martens clause. In **Martic Trail**<sup>19</sup>, when the President of Self-proclaimed Republic of Serbian Krajina ordered shelling at Zagerb in May 1995, the tribunal held that killing of innocent civilians was a violation of Martens clause.

## CONCLUSION AND AUTHORS NOTE

Martens Clause finds a place in various treaties. The only problem and challenge which is faced by humanitarian advocates is that of its interpretation. Martens Clause is dynamic in nature and aims to protect persons with respect to abnormalities of warfare. The dominant nature of International Law is positivist. Powerful nations with strong militia can refuse to ratify a treaty and can always object to a custom that does not favour them. This can lead to oppression of small states at the time of war or armed conflict. This is where Martens clause steps in and serves as a link between natural law theory and positivist law theory of international law. Martens clause through “dictate of public conscience” has made natural law more acceptable as the only reason for rejecting natural law theory was its vagueness and objectivity. As stated

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<sup>15</sup> United States vs. Alfred Krupp, the United Nations War Crime Commission *Law Reports of Trials of War Criminals*, vol. X, 1949, pp. 130 – 159.

<sup>16</sup> See Trial of War Criminals, at 1141

<sup>17</sup> Antonio Cassese, Martens Clause, Half a loaf or simply pie in the sky, page 205

<sup>18</sup> Article 50 of the Hague Convention 1889

<sup>19</sup> See Martić Trial, ICTY, case no IT-95-11-R61 Para 13

earlier, according to the author the essence and crux of the clause is in its reference to principle of humanity. Principle of humanity and military necessity are very foundation of international humanitarian law and under no circumstances can a high contracting party justify its inhumane treatment to persons whether or not protected under law of armed conflict owing to martens clause. It should be noted that the very reason as to why martens clause was introduced in the preamble of Hague Convention was to protect the interests of weak states for acceding into irrational demands of powerful parties at the peace conference. When it comes to the nature of the clause, it has been accepted as international custom and just to avoid confusion in case of conflict between treaty and customs it has been mentioned in various treaties as well. No matter how comprehensive code of wars nations along with international institutions come up with, owing to the technological advancements in warfare and dynamic nature of law in itself there shall always exists a void which shall be filled by martens clause. It is an empowering provision but still in dire need of clarity with regards to its interpretation. No single interpretation can be adopted and what style of interpretation should be followed shall be dependent on the facts and circumstances of each case.