The Martens Clause and the Laws of Armed Conflict

by Rupert Ticehurst

The Martens Clause has formed a part of the laws of armed conflict since its first appearance in the preamble to the 1899 Hague Convention (II) with respect to the laws and customs of war on land:

> "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."

The Clause was based upon and took its name from a declaration read by Professor von Martens, the Russian delegate at the Hague Peace Conferences 1899.[1] Martens introduced the declaration after delegates at the Peace Conference failed to agree on the issue of the status of civilians who took up arms against an occupying force. Large military powers argued that they should be treated as *francs-tireurs* and subject to execution, while smaller states contended that they should be treated as lawful combatants.[2] Although the clause was originally formulated to resolve this

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[1] The life and works of Martens are detailed by V. Pustogarov, "Fyodor Fyodorovich Martens (1845-1909) — A Humanist of Modern Times", *International Review of the Red Cross (IRRC)*, No. 312, May-June 1996, pp. 300-314.

[2] See F. Kalshoven, *Constraints on the Waging of War*, Martinus Nijhoff, Dordrecht, 1987, p. 14.

particular dispute, it has subsequently reappeared in various but similar versions in later treaties regulating armed conflicts.[3]

The problem faced by humanitarian lawyers is that there is no accepted interpretation of the Martens Clause. It is therefore subject to a variety of interpretations, both narrow and expansive. At its most restricted, the Clause serves as a reminder that customary international law continues to apply after the adoption of a treaty norm.[4] A wider interpretation is that, as few international treaties relating to the laws of armed conflict are ever complete, the Clause provides that something which is not explicitly prohibited by a treaty is not *ipso facto* permitted.[5] The widest interpretation is that conduct in armed conflicts is not only judged according to treaties and custom but also to the principles of international law referred to by the Clause.

The Advisory Opinion of the International Court of Justice (ICJ) on the legality of the threat or use of nuclear weapons issued on 8 July 1996, involved an extensive analysis of the laws of armed conflict.[6] Although this analysis was specific to nuclear weapons, the Opinion required general consideration of the laws of armed conflict. Inevitably, the oral and written submissions to the ICJ and the resulting Opinion made considerable reference to the Martens Clause, revealing a number of possible interpretations. The Opinion itself did not provide a clear understanding of the Clause. However, State submissions and some of the dissenting opinions provided very interesting insight into its meaning.

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[3] Preamble, 1907 Hague Convention (IV) respecting the laws and customs of war on land, reprinted in A. Roberts and R. Guelf, *Documents on the Laws of War*, 2nd ed., Clarendon Press, Oxford, 1989, p. 45; the four 1949 Geneva Conventions for the protection of war victims (GC I: Art. 63; GC II: Art. 62; GC III: Art. 142; GC IV: Art. 158), *op. cit.*, pp. 169-337; 1977 Additional Protocol I, Art. 1(2), *op. cit.*, p. 390, and 1977 Additional Protocol II, Preamble, *op. cit.*, p. 449; 1980 Weapons Convention, Preamble, *op. cit.*, p. 473.

[4] 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).

[5] 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.

[6] International Court of Justice, *Legality of the threat or use of nuclear weapons*, of 8 July 1996 (hereinafter referred to as "Opinion"). — See R. Ticehurst, "The Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons", *War Studies Journal*, Autumn 2(1), 1996, pp. 107-118.

In its submission, the Russian Federation argued that, as a complete code of the laws of war was formulated in 1949 and 1977, the Martens Clause is now redundant.[7] Both the Geneva Conventions of 1949 and the two Protocols additional thereto of 1977 restated the Martens Clause.[8] Furthermore, the 1977 Diplomatic Conference which led to the drafting of Additional Protocol I underlined the continuing importance of the Martens Clause by moving it from the preamble, where it first appeared in the 1973 draft, to a substantive provision of the Protocol. Undoubtedly, therefore, the Martens Clause is still relevant. This was confirmed by Nauru, stating that "... the Martens Clause was not an historical aberration. Numerous modern-day conventions on the laws of war have ensured its continuing vitality."[9]

The UK argued that the Martens Clause makes clear that the absence of a specific treaty prohibition on the use of nuclear weapons does not in itself mean that the weapons are capable of lawful use. However, they argued that the Martens Clause does not itself establish their illegality — it is necessary to point to a rule of customary international law for a prohibition. The UK then stated that "it is ... axiomatic that, in the absence of a prohibitive rule applicable to a particular state, the conduct of the state in question must be permissible ..."[10] It is clear that the UK adopted a narrow interpretation of the Clause, reducing the Martens Clause to the status of a reminder of the existence of positive customary norms of international law not included in specific treaties.

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."[11] This gives little guidance as to how the Clause should be interpreted in practice. Some of the dissenting opinions were more revealing. Judge Koroma, in his dissent, challenged the whole notion of searching for specific bans on the use of weapons, stating that "the futile quest for specific legal prohibition can only be attributable to an extreme form of positivism."[12]

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[7] Russian Federation, written submission on the Opinion requested by the General Assembly, p. 13.

[8] See footnote 2 above.

[9] Nauru, written submission on the Opinion requested by the World Health Organization, p. 46.

[10] United Kingdom, Written Submission on the Opinion requested by the General Assembly, p. 21.

[11] Opinion, para. 78.

[12] Dissenting Opinion of Judge Koroma, p. 14.

Judge Shahabuddeen, in his dissent, provides a very thorough analysis of the Martens Clause. He commences by referring to the ICJ's Advisory Opinion, paragraphs 78 and 84, where the Court determined that the Martens Clause is a customary rule and is therefore of normative status. In other words, the Clause itself contains norms regulating State conduct. With reference to submissions made by states such as the UK, noted above, he stated that "[i]t is difficult to see what norm of State conduct it lays down if all it does is to remind States of norms of conduct which exist wholly *dehors* the Clause."[13] Judge Shahabuddeen is clearly of the opinion that the Martens Clause is not simply a reminder of the existence of other norms of international law not contained in a specific treaty — it has a normative status in its own right and therefore works independently of other norms.

In support of this contention, Judge Shahabuddeen referred to the Hague Peace Conference of 1899 at which the delegate for Belgium objected to certain draft provisions being included in the final Convention. However once the declaration of Professor Martens was adopted by the Conference, the delegate was able to vote in favour of the disputed provisions. Judge Shahabuddeen concludes that this change in position arose because the delegate took the view, not dissented from by other delegates, that the Martens Clause provided the protection that the disputed provisions failed to provide and was therefore of normative status.

Judge Shahabuddeen stated that the principles of international law referred to in the Clause are derived from one or more of three different sources: usages established between civilized nations (referred to as "established custom" in Article 1[2] of Additional Protocol I), the laws of humanity (referred to as the "principles of humanity" in Article 1[2]) and the requirements of the public conscience (referred to as the "dictates of public conscience" in Article 1[2]). It appears that, when determining the full extent of the laws of armed conflict, the Martens Clause provides authority for looking beyond treaty law and custom to consider principles of humanity and the dictates of the public conscience.

This position is supported by the International Law Commission, which has stated that "[the Martens Clause] ... provides that even in cases not covered by specific international agreements, civilians and combatants remain under the protection and authority of the principles of international

[13] Dissenting Opinion of Judge Shahabuddeen, p. 21.

law derived from established custom, from the principles of humanity and from the dictates of public conscience."[14]

The Martens Clause is important because, through its reference to customary law, it stresses the importance of customary norms in the regulation of armed conflicts. In addition, it refers to "the principles of humanity" and "the dictates of the public conscience". It is important to understand the meaning of these terms. The expression "principles of humanity" is synonymous with "laws of humanity"; the earlier version of the Martens Clause (Preamble, 1899 Hague Convention II) refers to "laws of humanity"; the later version (Additional Protocol I) refers to "principles of humanity". The principles of humanity are interpreted as prohibiting means and methods of war which are not necessary for the attainment of a definite military advantage.[15] Jean Pictet interpreted humanity to mean that "... capture is preferable to wounding an enemy, and wounding him better than killing him; that non-combatants shall be spared as far as possible; that wounds inflicted be as light as possible, so that the injured can be treated and cured; that wounds cause the least possible pain; that captivity be made as endurable as possible."[16]

This part of the Martens Clause does not add a great deal to the existing laws of armed conflict as the protection extended by the principles of humanity appears to mirror the protection provided by the doctrine of military necessity. This doctrine requires that no more force than is strictly necessary be used to attain legitimate military objectives.[17] The doctrine is already well established in treaties such as the Hague Regulations of 1907, which were expressly recognised as declaratory of custom by the International Military Tribunal at Nuremberg in 1946.

In relation to "the dictates of the public conscience", Nauru argued in its submission before the ICJ that the Martens Clause authorizes the Court, when attempting to determine the scope of the humanitarian rules of armed conflict, to look to legal communications expressed by, or in the name of, the dictates of the public conscience. It referred to a "host of

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[14] UN Report of the International Law Commission on the Work of its Forty-sixth Session, 2 May - 22 July 1994, GAOR A/49/10, p. 317.

[15] E. Kwakwa, *The International Law of Armed Conflict: Personal and Material Fields of Application*, Kluwer Academic, Dordrecht, 1992, p. 36.

[16] J. Pictet, *Development and Principles of International Humanitarian Law*, Martinus Nijhoff and Henry Dunant Institute, Dordrecht/Geneva, 1985, p. 62.

[17] See E. Kwakwa, *op. cit.* (note 15), pp. 34-38.

draft rules, declarations, resolutions, and other communications expressed by persons and institutions highly qualified to assess the laws of war although having no governmental affiliations." It cited, for example, the 1989 Hague Declaration on the "Illegality of Nuclear Weapons" by the International Association of Lawyers Against Nuclear Arms (IALANA). This was unanimously declared by lawyers from East and West, "affirming that the use and threat of use of nuclear weapons is a war crime and a crime against humanity, as well as a gross violation of other norms of international customary and treaty law..."[18]

Judge Shahabuddeen determined that the Court must confine itself to sources which speak with authority. He referred, in particular, to United Nations General Assembly (UNGA) resolutions. There have been a whole series of UNGA resolutions condemning the use of nuclear weapons. For example, UNGA resolution 38/75 (15 December 1983) states that the General Assembly "resolutely, unconditionally and for all time condemns nuclear war as being contrary to human conscience and reason..." Neither this nor other resolutions were adopted unanimously and so are unlikely to reflect the existence of a customary norm *de lege lata*. However, such resolutions do provide evidence of the public conscience.[19] Judge Shahabuddeen concluded that the public conscience, as found for example in UNGA resolutions, could be viewed to oppose the use of nuclear weapons as unacceptable in all circumstances.

This position was supported by the state's submissions. For example, Australia wrote that "[t]he question is not whether the threat or use of nuclear weapons is consistent with any of these instruments, but whether the threat or use of nuclear weapons is *per se* inconsistent with the general principles of humanity. All these instruments ... provide cumulative evidence that weapons having such potentially disastrous effects on the environment, and on civilians and civilian targets, are no longer compatible with the dictates of public conscience."[20] Japan also stated that

[18] Nauru, written submission on the advisory opinion requested by the World Health Organization, p. 68.

[19] See also Sean McBride, "The Legality of Weapons of Social Destruction", in C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, Martinus Nijhoff, Dordrecht, 1984, p. 406: "Many resolutions adopted by the General Assembly of the United Nations have, either directly or by inference, condemned completely the use, stockpiling, deployment, proliferation and manufacture of nuclear weapons. While such resolutions may have no formal binding effect in themselves, they certainly do represent 'the dictates of public conscience' in the 20th century, and come within the ambit of the 'Martens Clause' prohibition."

[20] Australia, oral statement before the ICJ, p. 57.

"... because of their immense power to cause destruction, death and injury to human beings, the use of nuclear weapons is clearly contrary to the spirit of humanity that gives international law its philosophical foundation."[21] In contrast, Professor Greenwood argues that this interpretation "... 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."[22]

The positions advocated by States in their submissions to the ICJ on the issue of nuclear weapons and the differing opinions the judges gave in response reflect the continuing divide in international law between positive and natural law. States advocating the legality of the use of nuclear weapons argued that in the absence of a prohibitive positive norm of international law, whether conventional or customary, nuclear weapons remain lawful.

By the end of the nineteenth century, concepts of legal positivism and State sovereignty had become dominant in international legal thinking. This led to an extensive codification of the laws of war — the first field of international law to be codified. Positive international law is determined by the contractual will of the State, either through its consent to treaty provisions or through State practice leading to or preventing the development of a customary rule[23]. Through a positivist interpretation of international law, States which do not consent to being bound by treaty norms or to the development of customary rules remain outside the regime governed by those norms: subjugation to a positive norm is dependent on the will of the State. It is therefore consensual law. If that will is absent, the State is not bound by that norm and so is not responsible to the international community for non-observance of it. According to Professor Brownlie, States can "contract out" of the development of a customary rule: "... a State may contract out of custom in the process of formation. Evidence of objection must be clear and there is probably a presumption

[21] Japan, oral statement before the ICJ, p. 18. This position is similar to arguments submitted by the plaintiffs in the *Shimoda Case*, see Judicial Decisions, "Tokyo District Court, December 7, 1963", *Japanese Annual of International Law*, vol. 8, Tokyo, 1964, p. 216, where it was argued that if the rules of positive international law did not prohibit the use of nuclear weapons then they were unlawful on the basis of "natural or logical international law" derived from the spirit of those rules.

[22] *Op. cit.* (note 4), p. 28 (para. 129).

[23] According to R. Ago, "Positive Law and International Law", *American Journal of International Law*, vol. 51, 1957, p. 693, "positive international law is that part of law which is laid down by the tacit and expressed consent of the different states".

of acceptance which is to be rebutted. Whatever the theoretical underpinnings of the principle, it is well recognised by international tribunals, and in the practice of states."[24]

In addition to contracting out of the development of a customary rule, the opposition of States most affected by the development of a norm can prevent a norm *de lege ferenda* crystallizing into a norm *de lege lata*. Consequently, the practice of the nuclear States is most important in the development of a customary rule regulating or prohibiting nuclear weapons. In their submission to the ICJ on the legal status of nuclear weapons, the United States argued that "... with respect to the use of nuclear weapons, customs could not be created over the objection of the nuclear States whose interests are most affected". So not only is positive law dependent on the will of States, it can also be dependent on the will of the States most affected by the developing norm. In the laws of armed conflict, this means that States which possess weapons the rest of the world may wish to be rid of can prevent the development of a prohibition of those weapons. This also means that the strongest military powers have the greatest influence in the development of the laws of armed conflict.

In contrast to positive law, natural law is universal, binding all people and all States. It is therefore a non-consensual law based upon the notion of the prevalence of right and justice. Natural law was to a great extent displaced by the rise of positivist interpretations of international law. According to Schachter, "[i]t had become evident to international lawyers as it had to others that the States that made and applied law were not governed by morality or 'natural reason'; they acted for reasons of power and interest. It followed that law could only be ascertained and determined through the actual methods used by the States to give effect to their 'political wills'".[25] However, the judgment of the Nuremberg Tribunal, which to a great extent relied on natural law to determine the culpability of the Nazi high command, confirmed the continuing validity of natural law as a basis for international law in the twentieth century.

Proponents of the illegality of nuclear weapons emphasized the importance of natural law, urging the ICJ to look beyond the positive norms of international law. The Martens Clause supports this position as it

[24] See I. Brownlie, *Principles of Public International Law*, 4th ed., Clarendon Press, Oxford, 1990, p. 10.

[25] O. Schachter, *International Law in Theory and Practice*, Martinus Nijhoff, Dordrecht, 1991, p. 36.

indicates that the laws of armed conflict do not simply provide a positive legal code, they also provide a moral code. This ensures that the views of smaller States and individual members of the international community can influence the development of the laws of armed conflict. This body of international law should not reflect the views of the powerful military States alone. It is extremely important that the development of the laws of armed conflict reflect the views of the world community at large.

In addition, the international legal system is distinct from municipal legal systems in that it does not have a central law-making body. International law is decentralized because its development is dependent upon the widespread consensus of States either in the ratification of a treaty or in the development of international customary rules. As a consequence, there can be a significant delay between the formation of moral standards and the development of positive legal norms reflecting those moral standards. Equally, there can be a delay between 'advances' in military technology and the development of normative standards to control or prohibit the use of those military advances. For this reason, positive law can be inefficacious in protecting people from the excesses of armed conflict. It is therefore important to recognize the existence of a moral code as an element of the laws of armed conflict in addition to the positive legal code.

Conclusion

The dominant philosophy of international law is positivist. Obligations to the international community are therefore regulated through a combination of treaty and customary law. With regard to the laws of armed conflict, this has important implications. By refusing to ratify treaties or to consent to the development of corresponding customary norms, the powerful military States can control the content of the laws of armed conflict. Other States are helpless to prohibit certain technology possessed by the powerful military States. They can pass UNGA resolutions indicating disapproval but, in the presence of negative votes and abstentions, these resolutions are not, from a strictly positivist perspective, normative.

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 on the laws of armed conflict even though these same States relied on natural law for the prosecutions at Nuremberg. The ICJ in its Advisory Opinion did not clarify the extent to which the Martens Clause permits notions of natural law to influence the development of the laws of armed conflict. Consequently, its correct interpretation remains unclear. The Opinion has, however, facilitated an important debate on this significant and frequently overlooked clause of the laws of armed conflict.