

## The Martens Clause and Environmental Protection in Relation to Armed Conflicts

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## Abstract

The existing treaty law on the protection of the natural environment during armed conflicts is less than adequate. Treaty provisions relating to *international* armed conflicts are limited to the prohibition of damage of an extreme kind and scale that has not occurred so far and may hardly be expected from the conduct of hostilities unless nuclear weapons would be used. Even in such a scenario, States possessing nuclear weapons have explicitly objected to the applicability of that treaty law. For *internal* wars, no pertinent treaty provisions exist in the law of armed conflict. Yet multilateral environmental agreements concluded in peacetime stand as an alternative approach to enhance environmental protection during war. As a civilian object, the environment may not be targeted nor attacked in an armed conflict, but this does not exclude collateral damage, nor does this principle as such offer specific standards for proportionality in attacks.

In an effort to close these apparent gaps of treaty law, the present contribution looks into other sources of international law that could be used. In this context, the author revisits the role of the famous Martens Clause in the interplay of international humanitarian law, international environmental law, and human rights law. The role of the Clause in closing gaps caused by the indeterminacy of treaty law is reviewed and customary rules, general principles, and best practices are considered to this effect. For the protection of the natural environment during armed conflicts, the Martens Clause may, indeed, be used as a door opener to facilitate the creation and application of uncodified principles and rules. Particular standards for proportionality in attacks can be derived from the Martens Clause. Pertinent soft law instruments need to be developed in international practical cooperation and by academia. Yet it deserves further study to explore whether, and to what extent, the Martens Clause, which was adopted in the law of armed conflict, may also apply in post-conflict peacebuilding as a case of interaction between the *jus in bello* and the *jus post bellum*, at least as far as the protection of the natural environment is concerned.

## A. Introduction

The applicable treaty law<sup>1</sup> relating to the protection of the natural environment during international armed conflicts is limited to the prohibition of damage of an extreme kind and scale that has not occurred so far<sup>2</sup> and may hardly be expected in the conduct of hostilities, unless nuclear weapons would be used.<sup>3</sup> But for such case, nuclear-weapon States have explicitly objected to the applicability of that treaty law.<sup>4</sup> Specific treaty law on the protection of the environment in non-international armed conflicts is altogether lacking. On the other hand, multilateral environmental agreements concluded in peacetime “[...] stand as an alternative approach [...]”<sup>5</sup> to enhance environmental protection during all armed conflicts.

- <sup>1</sup> *Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques*, 18 May 1977, Art. I (1), 1108 UNTS 151, 152 [ENMOD]; *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, Arts. 35 (3) and 55, 1125 UNTS 3, 21, 28 [AP I]; *Rome Statute of the International Criminal Court*, 17 July 1998, Art. 8 (2) (b) (iv), 2187 UNTS 3, 94 [ICC Statute].
- <sup>2</sup> J.-M. Henckaerts & D. Constantin, ‘Protection of the Natural Environment’, in A. Clapham & P. Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (2014), 468, 470.
- <sup>3</sup> See the discussion by D. Fleck, ‘Legal Protection of the Environment: The Double Challenge of Non-International Armed Conflict and Post-Conflict Peacebuilding’, in C. Stahn *et al.* (eds), *Environmental Protection and Transitions From Conflict to Peace* (2017), 203, 203-204; by M. Gillett, ‘Eco-Struggles. Using International Criminal Law to Protect the Environment During and After Non-International Armed Conflict’, in C. Stahn *et al.* (eds), *Environmental Protection and Transitions from Conflict to Peace* (2017), 220, 228-231; and by M. Lawry-White, ‘Victims of Environmental Harm During Conflict. The Potential for “Justice”’, in C. Stahn *et al.* (eds), *Environmental Protection and Transitions from Conflict to Peace* (2017), 367, 372-375.
- <sup>4</sup> See the UK’s *nuclear weapons clause*, an interpretive statement that has never been contested by any other State, Great Britain, *The Manual of the Law of Armed Conflict*, (2004), para. 6.17. See also the letter from Department of State Legal Adviser, John B. Bellinger III, and Department of Defense General Counsel, William J. Haynes II, to the President of the International Committee of the Red Cross (ICRC) Dr. Jakob Kellenberger, J. B. Bellinger III & W. J. Haynes II, ‘A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law’, 89 *International Review of the Red Cross* (2007) 866, 443.
- <sup>5</sup> B. Sjöstedt, *Protecting the Environment in Relation to Armed Conflict. The Role of Multilateral Environmental Agreements* (2016), 309. This convincing approach is supported by specific treaty obligations for occupying powers, (*Convention (IV) Respecting the Laws and Customs of War on Land and its Annexes: Regulations Concerning the Laws and Customs of War on*

Persons participating in hostilities are subject to more than one branch of international law: international environmental law and human rights law are as relevant for the conduct of wartime military operations as international humanitarian law.<sup>6</sup> The interaction among these different branches of international law becomes evident if one realizes, as the International Court of Justice (ICJ) has done in *Nuclear Weapons*, that human rights do not cease to apply in times of war and “[...] States must take environmental considerations into account when assessing what is necessary and proportionate in pursuit of legitimate military objectives”.<sup>7</sup> While this underlines that the environment, as a civilian object, may not be targeted or attacked,<sup>8</sup> it does not limit the collateral damage of the environment when attacks against military objectives are carried out. Customary rules, general principles of law, and *soft law* might pave the way

*Land*, 18 October 1907, TS 539, 1 Bevans 631, 36 Stat. 2277, Arts. 43 and 55 [The Hague Convention (IV)].

<sup>6</sup> Henckaerts & Constantin, ‘Protection of the Natural Environment’, *supra* note 2, 482-484; D. Murray (ed.), *Practitioners’ Guide to Human Rights Law in Armed Conflict*, 2nd ed. (2016).

<sup>7</sup> *Legality of the Use or Threat of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, 240, paras. 25, 30 [Nuclear Weapons].

<sup>8</sup> See Henckaerts & Constantin, ‘Protection of the Natural Environment’, *supra* note 2, 474. It is, indeed, to be considered that under Art. 52 (2) AP I, a provision that reaffirms existing customary law, “[...] military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”. The natural environment would barely meet this classical definition in any realistic scenario of professional warfighting.

for cooperative solutions,<sup>9</sup> yet the relevant instruments that have been developed so far remain less than sufficient.<sup>10</sup>

In an effort to close the apparent gaps of pertinent treaty law, this contribution focuses on such uncodified sources of international law. Looking for a guide to using them the author revisits the role of the famous Martens Clause in this context, which – as highlighted in the Introductory Note to this *Special Issue* – will also be emphasized in the work of the International Law Commission (ILC) on protection of the environment in relation to armed conflicts.<sup>11</sup>

After a brief overview on the origins of the Martens Clause and its revival in current treaties (Section B), the potential of the Clause for solving issues of indeterminacy of treaty law will be discussed (Section C). Where no solution can be found by treaty interpretation, uncodified principles and rules, i.e. customary law, general principles and *soft law*, including best practices, will become relevant, although the role of the Clause in this respect has often been unclear and disputed (Sections D-F). The author aims at enlarging consensus on these issues, considering their practical relevance for international cooperation to protect the environment in relation to armed conflicts. In this spirit, some practical consequences of the Martens Clause will be highlighted (Section G). Finally, proposals for international cooperation and further research will be

<sup>9</sup> *Report of the United Nations Conference on the Human Environment, Declaration of the United Nations Conference on the Human Environment*, UN Doc A/CONF.48/14/REV.1, 5-16 June 1972 (Stockholm Declaration, 1972), Principle 21: “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.” This Principle was confirmed *verbatim* in Principle 2 of the *Report of the United Nations Conference on Environment and Development, Rio Declaration on Environment and Development*, UN Doc A/CONF.151/26 (Vol. I), 3-14 June 1992. Furthermore, see Rio Declaration, Principle 24: “Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict, and cooperate in its further development, as necessary” and Principle 25: “Peace, development and environmental protection are interdependent and indivisible”.

<sup>10</sup> See A. Kiss, ‘Perspectives on Compliance with Non-Binding Norms: Commentary and Conclusions’, in D. Shelton (ed.), *Commitment and Compliance. The Role of Non-Binding Norms in the International Legal System* (2000), 223.

<sup>11</sup> This issue, M. Jacobsson & M. Lehto, ‘Protection of the Environment in Relation to Armed Conflicts – An Overview of the International Law Commission’s Ongoing Work’, 10 *Goettingen Journal of International Law* (2020) 1, 32-45.

made (Section H). While focusing on environmental protection, the main issues and findings discussed here may affect the use of the Martens Clause in general and, thus, potentially also help to solve other cases of indeterminacy of the *jus in bello*.

## B. The Martens Clause and its Revival in International Treaty Law

The Martens Clause was coined at the First Hague Peace Conference (1899), confirmed at the Second Peace Conference (1907),<sup>12</sup> reformed in the denunciation clauses of the four 1949 Geneva Conventions (I 63, II 62, III 142, IV 158),<sup>13</sup> reaffirmed in a more general context both in Article 1 (2) AP I<sup>14</sup> as

<sup>12</sup> For the original text of the Martens Clause, see the Preamble, para. 9 of the Hague Convention (II), *Convention (II) With Respect to the Laws and Customs of War on Land and its Annexes: Regulations Concerning the Laws and Customs of War on Land*, 29 July 1899, TS 403, 1 Bevans 241, 32 Stat. 1803 [The Hague Convention (II)] (which was only slightly adapted in the Preamble, para. 8, of the Hague Convention (IV), *supra* note 5, those adaptations are shown here in brackets): “Until [Pending the preparation of] a more complete code of the laws of war is issued, the High Contracting Parties think it right [deem it opportune] to declare [to state] that[,] in [the] cases not included [provided for] in the Regulations [rules] adopted by them, populations [the inhabitants] and [the] belligerents [shall] remain under the protection [of] and [subject to] empire of the principles of international law [the law of nations], as they result from [established by] the usages established between [prevailing among] civilized nations, from [by] the laws of humanity, and the requirements [by the demands] of the public conscience”, cf. D. Schindler, J. Toman & Henry-Dunant Institute, *The Laws of Armed Conflicts. A Collection of Conventions, Resolutions and Other Documents* (1973), 64.

<sup>13</sup> *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, Art. 63 (4), 75 UNTS 31, 68; *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, Art. 62 (4), 75 UNTS 85, 120; *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, Art. 142 (4), 75 UNTS 135, 242; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, Art. 158 (4), 75 UNTS 287, 392: “The denunciation shall have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.”

<sup>14</sup> Art. 1(2) AP I: “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 dictates of public conscience.”

well as in the Preamble (para. 4) of AP II,<sup>15</sup> and again used in the Inhumane Weapons Convention (Preamble, para. 5),<sup>16</sup> the Anti-personnel Land Mines Convention (Preamble, para. 8),<sup>17</sup> and the Convention on Cluster Munitions (Preamble, para. 11).<sup>18</sup> Elements of the Martens Clause can also be found in the Geneva Gas Protocol (Preamble, paras. 1-3),<sup>19</sup> the Biological Weapons Convention (Preamble, para. 10),<sup>20</sup> and the ICC Statute (Preamble, para. 1).<sup>21</sup> The ICJ has held that the Martens Clause itself, as reaffirmed in Article 1 (2) AP I, is now part of customary law.<sup>22</sup>

These various treaty provisions seem to convey a general conviction that the Martens Clause provides residual protection in cases not covered by a specific treaty rule, yet experts are skeptical as to the meaning of the Clause and its practical consequences.<sup>23</sup> Fjodor F. Martens, Legal Advisor of the Russian

<sup>15</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, Preamble, para. 4, 1125 UNTS 609, 611 [AP II]: “Recalling that, in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of public conscience”.

<sup>16</sup> *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*, 10 October 1980, Preamble, para. 5, 1342 UNTS 137, 164 [Inhumane Weapons Convention].

<sup>17</sup> *Ottawa Convention on the Prohibition of the Use, Stockpiling Production, and Transfer of Anti-personnel Mines and on Their Destruction*, 3 December 1997, Preamble, para. 8, 2056 UNTS 211, 241 [Anti-personnel Land Mines Convention].

<sup>18</sup> *Convention on Cluster Munitions*, 30 May 2008, Preamble, para. 11, 2688 UNTS 39, 93.

<sup>19</sup> *Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare*, 17 June 1925, Preamble, paras. 1-3, 25 American Journal of International Law (1931) 2, Supplement, 94, 94 [Geneva Gas Protocol].

<sup>20</sup> *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, 10 April 1972, Preamble, para. 10, 1015 UNTS 163, 166 [Biological Weapons Convention].

<sup>21</sup> ICC Statute, *supra* note 1, Preamble, para. 1, 91.

<sup>22</sup> ICJ, *Nuclear Weapons*, *supra* note 7, 259 para. 84.

<sup>23</sup> See *inter alia* J. von Bernstorff, ‘Martens Clause’ (2009), in *Max Planck Encyclopedia of Public International Law online*, available at <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e327> (last visited 23 February 2020), para. 4, argues that “[F]or Martens and his contemporaries the clause did not seem to have any significance beyond this diplomatic compromise in the context of international rules on belligerent occupation [...]”. R. Giladi ‘The Enactment of Irony: Reflections on the Origins of the Martens Clause’, 25 *European Journal of International Law* (2014) 3, 847, 868, even advocates for a “[...] departure from normative inquiries about the clause [...]”. Such critical comments, however, need to be reconsidered in the context of the relevant treaty, State practice, and jurisprudence, as will be shown below.

Ministry of Foreign Affairs and a prominent participant of the 1899 and 1907 Hague Peace Conferences who had developed the Clause in a successful diplomatic mediation 120 years ago, was discreet enough not to refer to it himself in any of his many writings. By letting States take the credit for developing it, Martens has in fact contributed to the acknowledgement of the principles of humanity and dictates of public conscience worldwide.

As shown above, in 1899 and 1907, the relevance of the Martens Clause for the development of international humanitarian law was explicitly related to Articles 1 and 2 of the Regulations annexed to the Hague Convention, i.e. to rights and duties of militia, volunteer groups, and the *levée en masse*, an issue that was contested among smaller and bigger powers at the Hague Peace Conferences. The 1949 Geneva Conventions refer to the Martens Clause in the specific context of denunciations (which never became operable and are rather unlikely to occur in future). It was not before the 1977 Additional Protocols that the Martens Clause was linked to the protection of victims of armed conflicts in general, following a proposal by government experts that had first been made at the Red Cross Conference in Teheran (1973).

For a convincing evaluation of the Martens Clause and the functions it serves or could serve in contemporary international law, one should consider that it has been codified in the law of armed conflict.<sup>24</sup> The Clause thus does not automatically extend to peacetime and post-conflict situations, whenever a need arises. The *principles of humanity* and *dictates of public conscience* have been invoked to remedy wartime atrocities; they cannot be taken as a convenient arbiter for solving any difficulty in the interpretation and application of international law. This should be acknowledged even though the ICJ has concluded that elementary considerations of humanity are “[...] more exacting in peace than in war [...]”.<sup>25</sup> The question whether and to what extent the dominating role of *opinio juris* may also apply in peacetime and in post-conflict situations, at least as far as the protection of the environment is concerned, would deserve a special study and cannot be assessed here in all its aspects.

Furthermore, the interplay between international humanitarian law, international environmental law, and human rights law in armed conflicts have to be taken into account. These three branches of international law, particularly

<sup>24</sup> T. Meron & The Hague Academy of International Law, *The Humanization of International Law* (2006), 9, appears to accept a wider influence of the Martens Clause on such other branches, in particular, human rights law. But it should be noted that the text of the Clause in the relevant treaties is more limited.

<sup>25</sup> *Corfu Channel Case (United Kingdom v. Albania)*, Judgment, ICJ Reports 1949, 4, 22.

the first one,<sup>26</sup> are important fields of application of rules not codified in treaty law, i.e. customary law, general principles, and even *soft law*. The Martens Clause has, indeed, repeatedly been referred to in the context of enhancing the protection of the environment in armed conflict,<sup>27</sup> although generally accepted understandings on the applicability, procedural requirements, and practical consequences of the Clause could not be developed so far. The protection of the natural environment during armed conflicts is clearly part of the goals of international humanitarian law.<sup>28</sup> A nexus between human rights and international humanitarian law has been recognized by States.<sup>29</sup> The terms “established custom” and “principles of humanity” used in Article 1 (2) AP I are too vague to be meaningful for reaching this goal; yet the “dictates of public conscience” are more to the point here, as they entail a responsibility for future generations that includes environmental concerns in armed conflicts.

Finally, the function of the Martens Clause needs to be explored. Is it simply a reminder of the continued validity of uncodified principles and rules beside treaty law? Or could it provide additional guidance for the interpretation of legal sources in cases of doubt? Does it, more specifically, have a role in

<sup>26</sup> See T. Meron, ‘The Martens Clause, Principles of Humanity, and Dictates of Public Conscience’, 94 *American Journal of International Law* (2000) 1, 78.

<sup>27</sup> M. Bothe *et al.*, ‘International Law Protecting the Environment During Armed Conflict: Gaps and Opportunities’, 92 *International Review of the Red Cross* (2010) 879, 569, 588–589; C. Droegge & M. L. Tougas, ‘The Protection of the Natural Environment in Armed Conflict: Existing Rules and Need for Further Legal Protection’, 82 *Nordic Journal of International Law* (2013) 1, 21, 39–40; P. Sands *et al.*, *Principles of International Environmental Law*, 4th ed. (2018), 198; D. Shelton & A. Kiss, ‘Martens Clause for Environmental Protection’, 30 *Environmental Policy and Law* (2000) 6, 285, 286; see also *World Conservation Congress Resolution 2.97, A Martens Clause for Environmental Protection*, available at [https://portals.iucn.org/library/sites/library/files/resrecfiles/WCC\\_2000\\_REC\\_97\\_EN.pdf](https://portals.iucn.org/library/sites/library/files/resrecfiles/WCC_2000_REC_97_EN.pdf) (last visited 24. April 2020): “A Martens Clause for environmental protection. Until a more complete international code of environmental protection has been adopted, in cases not covered by international agreements and regulations, the biosphere and all its constituent elements and processes remain under the protection and authority of the principles of international law derived from established custom, from dictates of the public conscience, and from the principles and fundamental values of humanity acting as steward for present and future generations.”.

<sup>28</sup> Like the Stockholm Declaration, *supra* note 9, this latter text does not specifically refer to armed conflict but may be meant to include it. ICJ, *Nuclear Weapons*, *supra* note 7, para. 33; E. B. Weiss, ‘Opening the Door to the Environment and to Future Generations’, in L. Boisson de Chazournes & P. Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (1999), 338, 344–349.

<sup>29</sup> *Final Act of the International Conference on Human Rights*, UN Doc A/Conf.32/41, 22 April – 23 May 1968, 18.

the creation of customary law, general principles of law or *soft law* and thus influence the contents of new rules? To explore these questions, one must try to understand what is meant by *cases not covered by* the various treaties.

### C. Issues of Indeterminacy in the Law of Armed Conflict

In a recent scholarly contribution on problems of indeterminacy in the law of armed conflict, Adil Hamed Haque usefully distinguishes between various instances in which clear treaty regulation may be lacking, i.e. ambiguity, vagueness, incompleteness, and inconsistency:<sup>30</sup> *Ambiguous* treaty provisions may carry multiple meanings in ordinary language. Even when a provision has a single meaning, it may still be *vague* in that it admits borderline cases. In the event such cases are not explicitly referred to, the provision may still be *incomplete* from what it leaves unsaid. Theoretically, there may even be an *inconsistency* between applicable legal rules.

There are, indeed, important examples in international humanitarian law for indeterminacy: there is no treaty definition of the term *armed conflict*<sup>31</sup> and there is *ambiguity* in the interaction between international humanitarian law and human rights law with primary and secondary frameworks to be balanced to rule out conflicting situations. To cite some examples, the important proportionality rule remains *vague* in that it does not strictly define what collateral civilian damage would be excessive, the prohibition of widespread, long-term, and severe damage to the natural environment is *incomplete* as it applies to damage that will hardly occur in an armed conflict and it is silent on the many other environmental devastations that, given the fragility of today's natural environment, are quite unacceptable in the conduct of military operations.

In all such cases, an existing gap in legal regulation may be difficult to close, irrespective of whether the negotiators of the pertinent treaty law have sleepwalked into it or even left it by intention. It is true that general rules of treaty interpretation<sup>32</sup> may and should be used to rectify indeterminacies so that certain gaps in the text of a treaty provision can be closed within treaty law

<sup>30</sup> A. A. Haque, 'Indeterminacy in the Law of Armed Conflict', 95 *International Law Studies* (2019), 118, 120.

<sup>31</sup> See discussion in ILC Committee on the Use of Force, Final Report on the Meaning of Armed Conflict in International Law (74th Conference, The Hague, 2010), 676; *ILC Draft Articles on Effects of Armed Conflicts on Treaties, with Commentaries, Yearbook of the International Law Commission* (2011), Vol. II, Part Two, 108, Art. 2 (b), 109.

<sup>32</sup> See in particular Arts. 31-33 of the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, 332, 340 [VCLT].

itself. But this will not always help, and it definitively would not suffice to solve the problems of *ambiguity*, *vagueness*, and *incompleteness* in the aforementioned examples. Rather, progressively developing new, non-treaty law or best practice will be the option to pursue.

Haque concludes that the law governing the conduct of hostilities lacks “[...] a deliberate and well-defended interpretive theory”.<sup>33</sup> He mentions the Martens Clause in AP I and AP II,<sup>34</sup> but does not discuss the very practical question as to what specific purpose the Clause serves and how it should be implemented. Thus, his general proposition – that “[...] the law governing the conduct of hostilities cannot have an interpretive theory of its own but must share one with general international law, the law of inter-State force, and human rights law”<sup>35</sup> – regrettably ignores the specific role of the Martens Clause in international humanitarian law and the effect it may have for the interpretation and further development of its rules. The Clause, indeed, deserves to be reconsidered and used today, as it may help to find solutions in uncodified sources of that law for *cases not covered* by existing treaties. Such solutions will be discussed in the following three Sections.

#### D. Customary Law

The text of the Martens Clause in the various treaties cited previously<sup>36</sup> speaks for a certain relevance of the Clause for customary international humanitarian law and its progressive development. This goes beyond the customary status of the Clause as such, as it raises the question of its law-making effect for closing gaps of these various treaties. As the declared purpose of the Clause is to influence the behavior of States, the question is valid as to whether such behavior is then based on an evolving customary norm.

It may be noted that Article 38 (1) (b) of the ICJ Statute refers to “[...] international custom, as evidence of a general practice accepted as law [...]”. Practice is, indeed, essential, not only to confirm the existence of a rule as part of customary international law, but also to ensure compliance with and respect for applicable rules. The recent study on the *Identification of Customary International*

<sup>33</sup> Haque, ‘Indeterminacy in the Law of Armed Conflict’, *supra* note 30, 159, with reference to S. Watts, ‘Present and Further Conceptions of the Status of Government Forces in Non-International Armed Conflict’, 88 *International Law Studies* (2012), 145, 165.

<sup>34</sup> Haque, ‘Indeterminacy in the Law of Armed Conflict’, *supra* note 30, 148.

<sup>35</sup> *Ibid.*, 160.

<sup>36</sup> See *supra* notes 12-18.

*Law* undertaken by the ILC<sup>37</sup> considers general practice of States plus *opinio juris* as constituent elements, thus emphasizing a “two-elements approach” from which no exemption was accepted for identifying the customary nature of any rule of international law. It has already been criticized that no flexibility was allowed to accommodate the *speciality* of human rights and international humanitarian law in the creation of customary law.<sup>38</sup>

While the ILC, as confirmed by its Special Rapporteur Sir Michael Wood, was fully aware of the role of customary law, in particular in relation to non-international armed conflicts,<sup>39</sup> the Martens Clause and the question of its particular impact on customary international humanitarian law was not discussed in the ILC Study. The Clause was briefly mentioned in the Special Rapporteur’s First Report as a provision confirming the prevailing importance of customary international law.<sup>40</sup> His Second Report raised the question whether “[...] in [...] human rights law, international humanitarian law and international criminal law, among others, one element may suffice in constituting customary international law, namely *opinio juris*” (as distinct from State practice), but stated, in a rather apodictic manner, that “[...] the better view is that this is not the case”.<sup>41</sup> A firm position was taken by the ILC not to accept special rules for the identification of customary law in different branches of international law. In academic discussions, in turn, the argument was made that a more flexible approach in the ascertainment of customary law is used already, particularly in international humanitarian law,<sup>42</sup> an issue to be discussed below.

It may appear understandable that the ILC, limiting itself to more technical issues of *identifying existing customary law*, did not go into details of *the process of its creation*. But the Martens Clause is relevant for both these

<sup>37</sup> ILC Draft Conclusions on Identification of Customary International Law, With Commentaries, *Yearbook of the International Law Commission* (2018), Vol. II, Part Two, 122.

<sup>38</sup> L. Chiussi, ‘Remarks on the ILC Work on the Identification of Customary Law and Human Rights: Curbing ‘Droit de l’Homme’?’, 27 *The Italian Yearbook of International Law* (2018) 1, 163.

<sup>39</sup> M. Wood, ‘The Evolution and Identification of the Customary International Law of Armed Conflict’, 51 *Vanderbilt Journal of Transnational Law* (2018), 727, 735.

<sup>40</sup> See M. Wood, *First Report on Formation and Evidence of Customary International Law*, UN Doc. A/CN.4/663, 17 May 2013, 15, para. 35, note 76: “The Martens clause was an early example of the continuing importance of customary international law, notwithstanding a treaty [...]”

<sup>41</sup> See M. Wood, *Second Report on Identification of Customary International Law*, UN Doc. A/CN.4/672, 22 May 2014, para. 28, notes 49, 50.

<sup>42</sup> M. La Manna, ‘The Standards for the Identification of Exceptions to Customary Law’, 27 *The Italian Yearbook of International Law* (2018) 1, 151, 151-154.

aspects. Its declared purpose is to influence the behavior of States in filling gaps of existing international law, thus influencing interpretation and also serving the progressive development of international law rather than merely identifying already existing rules. Moreover, it has been considered as a consequence of the Clause that, in international humanitarian law,

“[...] when it comes to proof of the emergence of a principle or general rule reflecting the laws of humanity (or the dictates of public conscience), as a result of the clause the requirement of *usus* (*les usages établis entre nations civilisées*) may be less stringent than in other cases where the principle or rule may have emerged instead as a result of economic, political, or military demands”.

*Opinio juris sive necessitates* may thus take on a special prominence in international humanitarian law, so that

“[...] the expression of legal views by a number of states and other international subjects concerning the binding value of a principle or a rule, or the social or moral need for its observance by states, may be held to be conducive to the formation of a principle or a customary rule, even when those legal views are not backed up by widespread and consistent state practice, or even by no practice at all”<sup>43</sup>.

<sup>43</sup> A. Cassese, ‘The Martens Clause: Half a Loaf or Simply Pie in the Sky?’, 11 *European Journal of International Law* (2000) 1, 187, 193-202; A. Cassese, *International Law*, 2nd ed. (2005), 161. The underlying idea is supported by the ICJ in *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Judgment, ICJ Reports 1986, 14, 98, para. 186: “In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.” See also J. d’Aspremont, ‘An Autonomous Regime of Identification of Customary Humanitarian International Law: Do Not Say What You Do or Do Not Do What You Say?’, in R. van Steenberghe (ed.), *Droit International Humanitaire: un Régime Spécial de Droit International?* (2013), 67.

The late Antonio Cassese has developed this argument in due consideration of the impact of the laws of humanity and dictates of public conscience. He has done so rather tentatively, both in his article in the *European Journal of International Law* and later in his textbook, thus leaving room for second thoughts. His consideration has also turned out to be less than conclusive, as we now know from the ILC draft principles 6 (1) and 10 (2) that verbal practice of States could well represent *usus*, and acceptance as law (*opinio juris*) may be conveyed through public statements. Nevertheless, Cassese's idea does deserve to be explored further, the more so as, in the development of customary law, the two elements will not both be present from the outset and, in international humanitarian law, often omissions are at stake which are much more difficult to be identified as an expression of general practice of the State.

There is a body of national and international jurisprudence which is relevant in this context. In 1948, a United States Military Tribunal at Nuremberg referred to the Martens Clause in Hague Convention IV and stated as an *obiter dictum* that this Clause is “[...] much more than a pious declaration [...] [but] the legal yardstick to be applied if and when the specific provisions of the [...] Regulations [...] do not cover specific cases occurring in warfare, or concomitant to warfare”. The Tribunal then went on to declare that “[...] it will hardly be necessary to refer to these more general rules”.<sup>44</sup>

The International Criminal Tribunal on the former Yugoslavia (ICTY), bound by its Statute to prosecute grave breaches of the Geneva Conventions and crimes against humanity (not, however, grave breaches of AP I),<sup>45</sup> has used the Martens Clause in *Martić* to support the customary status of the prohibition against attacking the civilian population as such, as well as individual civilians, and the general principle limiting the means and methods of warfare.<sup>46</sup> In

<sup>44</sup> United States Military Tribunal III, ‘United States of America v. Alfred Krupp von Bohlen und Halbach et al.’, in Nuernberg Military Tribunals, *Trials of War Criminals before the Nuernberg Military Tribunals* (1950), Vol. 9, 1341, erroneously referring to a “Mertens Clause” that had been formulated by a “Belgian” delegate at the Hague Peace Conferences. Incidentally, decades later, G. Best, ‘Peace Conferences and the Century of Total War’, 75 *International Affairs* (1999) 3, 619, 627, has also colportated that although the Clause is named after F. F. Martens, “[...] it was actually the bright idea of a Belgian [...]”.

<sup>45</sup> *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, 25 May 1993, Arts. 2 and 5, S/Res/1966 (2010) [ICTY Statute].

<sup>46</sup> *Prosecutor v. Martić*, Judgment, IT-95-11-XR61, 8 March 1996, 5, para. 11 (“There exists, at present, a corpus of customary international law applicable to all armed conflicts irrespective of their characterisation as international or non-international armed conflicts.

*Kupreskić*, the Tribunal had to decide whether the prohibition of reprisals against civilians in combat zones (prohibited by Art. 51, para. 6, AP I), assuming that it was not declaratory of customary international law, has subsequently been transformed into a general rule of international law.<sup>47</sup> The Tribunal confirmed that “[...] a customary rule of international law has emerged on the matter under discussion” and also stated that the Martens Clause, in light

“[...] of the way States and courts have implemented it, [...] 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*, crystallising 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”.<sup>48</sup>

The Constitutional Court of the Republic of Colombia has based the constitutionality of AP II on the Martens Clause, arguing that while AP II, like Common Article 3 of the Geneva Conventions, does not contain detailed provisions governing legitimate means of warfare and the conduct of hostilities, it is due to the Clause that AP II must not be interpreted in isolation but must be viewed at all times within the context of the entire body of humanitarian principles which are applicable to internal armed conflicts, so that the absence of specific rules in AP II relating to the protection of the civilian population and to the conduct of hostilities “[...] in no way signifies that the Protocol authorizes behavior contrary to those rules by the parties in conflict”.<sup>49</sup>

This corpus includes general rules or principles designed to protect the civilian population as well as rules governing means and methods of warfare.”) and 6, para. 13 (“[...] the prohibition against attacking the civilian population as such, as well as individual civilians, and the general principle limiting the means and methods of warfare also derive from the ‘Martens clause’”).

<sup>47</sup> *Prosecutor v. Kupreskić*, Judgment, IT-95-16-T, 14 January 2000, 207, paras. 527-536.

<sup>48</sup> *Ibid.*, paras. 527 and 532. *Prosecutor v. Kupreskić*, Appeals Chamber Judgment, IT-95-16-A, 23 October 2001, 95, para. 245, decided that the Trial Chamber had erred in relying upon the evidence of Witness H, and concluded that a miscarriage of justice has occurred in the present case, but did not question the interpretation of legal rules by the Trial Chamber.

<sup>49</sup> Constitutional Court of the Republic of Colombia, Ruling No. C-225/95, Re: File No. L.A.T.-040, 18 May 1995; original in Spanish, unofficial translation, footnotes partially

The ICJ has emphasized the “[...] continuing existence and applicability [...]” of the Martens Clause “[...] as an effective means of addressing the rapid evolution of military technology” and “[...] an affirmation that the principles and rules of humanitarian law apply to nuclear weapons”.<sup>50</sup> This dictum clearly confirms that there are limits to the use of weapons in armed conflict, even if treaty law does not explicitly prohibit them. While two judges had criticized the Court, insofar acting in line with many other voices in international humanitarian law,<sup>51</sup> for not deriving an explicit prohibition on nuclear weapons from the Martens Clause,<sup>52</sup> it may at least be stated that the Advisory Opinion has “[...] facilitated an important debate on this significant and frequently overlooked clause of the laws of armed conflict”.<sup>53</sup>

The 2005 ICRC Study on *Customary International Humanitarian Law* (CIHL) has mentioned the Martens Clause as a topic that “[...] could not be developed in sufficient detail for inclusion in this edition, but [...] might be included in a future update”.<sup>54</sup> Meanwhile, the database updates of the Study have referred to the Clause in Rules 18 (Assessment of the Effects of Attacks),

omitted available at [https://casebook.icrc.org/case-study/colombia-constitutional-conformity-protocol-ii#para\\_22](https://casebook.icrc.org/case-study/colombia-constitutional-conformity-protocol-ii#para_22) (last visited 04 January 2020), para. 23.

<sup>50</sup> ICJ, *Nuclear Weapons*, *supra* note 7, 257 para. 78, 260, para. 87.

<sup>51</sup> See Meron, *supra* note 24, 88: “Except in extreme cases, its references to the principles of humanity and dictates of public conscience cannot, alone, delegitimize weapons and methods of war [...]”; W. Boothby, *Weapons and the Law of Armed Conflict*, 2nd ed. (2016), 14; Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 3rd ed. (2016), 14: “General revulsion in the face of a particular conduct during hostilities (even if it goes beyond habitual fluctuations of public opinion) does not create ‘an independent legal criterion regulating weaponry’ or methods of warfare”.

<sup>52</sup> Judge Weeramantry, in his Dissenting Opinion, concluded from the Martens Clause that nuclear weapons are illegal under general principles of customary law, arguing that whilst the Clause is “[...] sufficiently general to pose difficulties in certain cases [...]”, there is no such uncertainty in regard to the use or threat of use of nuclear weapons, Dissenting Opinion of Judge Weeramantry, *Legality of Use or Threat of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 429, 482-490. Judge Shahabuddeen, in his Dissenting Opinion, stated that the Martens Clause, which was intended to fill gaps left by conventional international law, could not be confined to principles waiting, uncertainly, to be born in future; based on the available material the Court would have been able to hold that the Clause operates to prohibit the use of nuclear weapons in all circumstances, Dissenting Opinion of Judge Shahabuddeen, *Legality of Use or Threat of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 375, 405-411.

<sup>53</sup> R. Ticehurst, ‘The Martens Clause and the Laws of Armed Conflict’, 37 *International Review of the Red Cross* (1997) 317, 125, 134.

<sup>54</sup> J.-M. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law* (2005), Vol. I, xxxvi. On the protection of the natural environment in armed conflict see Rules

19 (Control during the Execution of Attacks), 43 (Application of General Principles on the Conduct of Hostilities to the Natural Environment), and 149 (Responsibility for Violations of International Humanitarian Law),<sup>55</sup> without, however, making specific comments. The updated ICRC Commentaries on the 1949 Geneva Conventions provide a more comprehensive interpretation of the Martens Clause, explaining that, as a minimum, the Clause “[...] should [...] be regarded as expressly preventing the *argumentum e contrario* that what is not explicitly prohibited by treaty law is necessarily permitted” and

“[...] as underlining the dynamic factor of international humanitarian law, confirming the application of the principles and rules of humanitarian law to new situations or to developments in technology, also when those are not, or not specifically, addressed in treaty law”.<sup>56</sup>

The new Oxford Commentary on the Geneva Conventions describes the Martens Clause as a “[...] (substantive) principle of interpretation of IHL” that may be dubbed as an “emergency exit from voluntarist positivism”.<sup>57</sup>

While there is a certain reluctance among experts to fully accept Antonio Cassese’s view of the dominating role of *opinio juris* for identifying customary international humanitarian law,<sup>58</sup> this is what substantially happened in reality:

43-45. See also Henckaerts & Constantin, ‘Protection of the Natural Environment’, *supra* note 2, 469-491.

<sup>55</sup> CIHL, database update 2019, available at <https://ihl-databases.icrc.org/applic/ihl/ihl-search.nsf/results.xsp?lang=EN> (last visited 04 January 2020).

<sup>56</sup> S. Michel & C. Schenker, ‘Article 63: Denunciation’, in ICRC, *Commentary on the First Geneva Convention* (2016), 3297, 3298, with reference to ICJ, *Nuclear Weapons*, *supra* note 7, 260, para. 87: “Finally, the Court points to the Martens Clause, whose continuing existence and applicability is not to be doubted, as an affirmation that the principles and rules of humanitarian law apply to nuclear weapons.”

<sup>57</sup> G. Distefano & E. Henry, in A. Clapham *et al.* (eds), *The 1949 Geneva Conventions. A Commentary* (2015), 179, 187-188.

<sup>58</sup> Yet there are less reluctant comments as well: C. Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century. General Course of Public International Law* (1999), 357, calls Cassese’s careful and critical assessment of the Clause as “[...] much too pessimistic”. In C. Tomuschat, *Human Rights Between Idealism and Realism*, 3rd ed. (2014), 42, Tomuschat convincingly explains that emphasis is to be placed on the question “to what extent states present their practices as fully corresponding to the international rule of law or whether they simply deny charges brought against them”, making the argument that “[e]ven massive abuses do not militate against assuming a customary rule as long as the responsible author State seeks to hide and conceal its objectionable conduct

the rules governing the conduct of hostilities in international armed conflict are generally applicable also in non-international armed conflict even in the absence of specific treaty law.<sup>59</sup> This derives from *opinio juris*, although it cannot be firmly based on the practice of States and armed opposition fighters.<sup>60</sup> Deviating practice is normally (and rightly so) taken as an example of breaches, but not considered relevant for limiting or denying the existence of a customary rule of international humanitarian law.

Likewise, in critical reviews of the ICRC Study on CIHL, all contributors have focused on the question whether and to what extent a certain rule is based on *opinio juris*, rather than trying to match the seminal work undertaken by the ICRC to collect and evaluate relevant practice.<sup>61</sup> This clearly underlines the dominating role of *opinio juris*. At the same time, an examination of the Martens Clause as “[...] a dynamic element peculiar to the development of the law of armed conflict [...]” was specifically missed.<sup>62</sup>

A realistic assessment thus supports Cassese’s arguments in that it leads to recognition of the decisive importance of *opinio juris* as opposed to State practice for the creation of customary international humanitarian law. This does not, of course, exclude States from the process of creating customary law. Rather, it challenges States to fully accept their obligations under Article 1 (2) AP I, a provision that has been accepted as customary law by the ICJ and also fully applies to the protection of the natural environment during armed conflict. States are the decisive actors in developing *opinio juris*. Their verbal acts, like physical acts, constitute practice that contributes to the creation of a customary norm. It remains their responsibility to implement the law in practice. It may be noted in this context that rules on the conduct of hostilities do not always entail

instead of justifying it by invoking legal reasons”. According to A. A. Cançado Trindade, *The Construction of a Humanized International Law. A Collection of Individual Opinions (1991-2013)* (2014), 1353, para. 137, the Martens Clause “[...] impedes the *non liquet* and exerts an important role in the hermeneutics and the application of humanitarian norms”.

<sup>59</sup> See D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd ed. (2013), 601, Section 1212, with further references.

<sup>60</sup> See also F. L. Kirgis, ‘Custom on a Sliding Scale’, 81 *American Journal of International Law* (1987) 1, 146, 149: “The more destabilizing or morally distasteful the activity – for example, the offensive use of force or the deprivation of fundamental human rights – the more readily international decision makers will substitute one element [State practice] for the other [*opinio juris*], provided that the asserted restrictive rule seems reasonable.”

<sup>61</sup> See, e.g. E. Wilmschurst & S. Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (2007).

<sup>62</sup> *Ibid.*, 19.

a criminalization of breaches, and that individual criminal responsibility is not necessarily the same in international and non-international armed conflicts, but as far as the protection of the natural environment is concerned, this issue can be neglected.<sup>63</sup>

## E. General Principles of Law

If the Martens Clause has significance for the creation of customary international law, this is all the more the case in respect of general principles of law, which are referred to in Article 38 (1) (c) of the ICJ Statute as “[...] recognized by civilized nations [...]”, acknowledged by States as applying to their international relations, and applied with this understanding in the jurisprudence of the ICJ.<sup>64</sup> The Martens Clause may gain particular relevance for understanding general principles of international humanitarian law, as humanity and dictates of public conscience are important for the implementation and further development of that law.

A general responsibility of States not to cause damage to the environment of other States was first stated in the 1972 Stockholm Declaration, Principle 21, and confirmed in the 1992 Rio Declaration on Environment and Development, Principle 2.<sup>65</sup> While both instruments, due to their affirmative character and global support, may be accepted as reflecting general principles of law, the content of the Stockholm Principle 21 is too vague for the present context in that its applicability in wartime is left unclear. This is not the case, however, for the Rio Principles 24 and 25, specifically addressing the need to protect the environment in times of armed conflict and emphasizing the interdependence between peace, development, and environmental protection. General as they

<sup>63</sup> Certain attacks against the natural environment are penalized under Art. 8 (2) (b) (iv) of the ICC Statute, a provision that applies to international armed conflicts. An extension to non-international armed conflicts, comparable to Art. 8 (2) (e) (xiii-xv) on poison or poisoned weapons; asphyxiating gases, liquids, materials or devices; and expanding bullets adopted at the 2010 Kampala Review Conference, would serve a symbolic function, but as long as penalization is limited to “[...] widespread, long-term and severe [...]” damage and the “[...] military advantage anticipated [...]” is to be assessed from the perspective of the perpetrator on the basis of information available at the time of launching the attack, this will hardly become practically relevant.

<sup>64</sup> See generally J. Crawford, *Brownlie's Principle of Public International Law*, 8th ed. (2012), 34; G. Gaja, ‘General Principles of Law’, in *Max Planck Encyclopedia of Public International Law*; B. Cheng, *General Principles of Law: As Applied by International Courts and Tribunals* (2006); J. Gardam, *Necessity, Proportionality and the Use of Force by States* (2011).

<sup>65</sup> See *supra* note 9.

are, these Rio Principles may clearly become relevant for the conduct of military operations in relation to armed conflicts, as they affect military planning and the use of weapons. The Martens Clause can be of help to ensure their application in line with requirements of humanity and dictates of public conscience.

It may be noted that there is a special relevance of the Martens Clause for taking measures of prevention and precaution that are particularly important for the protection of the environment in relation to armed conflicts.<sup>66</sup> This does not only apply to issues of proportionality in attacks, but also to necessary measures to be taken in planning and conducting military operations: damages to the natural environment must be minimized as long as the latter is a civilian object. The Martens Clause may and should be used to interpret and apply such principles. Proportionality standards are not clearly defined in treaty law and there may be a variety of precautions to be taken in an attack. The role of prevention and precaution will be better understood and hence it may be better applied if requirements of humanity and dictates of public conscience are duly considered. Military planners and commanders using the Martens Clause will thus be better prepared to take responsible action.

As previously explained (Section D), the *Kupreskić* judgment of the ICTY confirmed the prohibition of reprisals against civilians in combat zones as a rule of customary international law. Alexandre Skander Galand, in his critical assessment of this particular finding, convincingly argues that a recognition as a general principle of international law would have sufficed under the ICTY Statute, as general principles are also recognized to establish criminal responsibility.<sup>67</sup> This essentially underlines the role of the Martens Clause in the law of armed conflict, and it demonstrates that this role is not limited to the creation of a customary norm but likewise applies to the application of other sources of international law that are not codified as treaty law.

<sup>66</sup> See M. Bothe, 'Principle of Prevention in International Environmental Law and Principle of Precaution in the Law of Armed Conflict', in this *Special Issue*.

<sup>67</sup> A. S. Galand, 'Approaching Custom Identification as a Conflict Avoidance Technique: *Tadić* and *Kupreskić* Revisited', 31 *Leiden Journal of International Law* (2018) 2, 403,427, with reference to C. Bassiouni, *Crimes Against Humanity* (2011), 469. Indeed, Art. 15 (2) of the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, 177, like Art. 7(2), of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221, 230, both provide that the principle of *nulla poena sine lege* does not prejudice the "[...] trial and punishment of any act or omission which, at any time when it was committed was criminal according to the general principles of law recognized by the community of nations".

## F. Soft Law and Best Practices

Whilst it remains important to draw a distinction between legally binding rules on the one hand and *soft law* on the other, and to clearly explain whether a certain rule *shall* or *should* be observed, the important practical role of *soft law* for the development of international humanitarian law and environmental law cannot be underestimated. Where binding legal rules are not at hand, *soft law* instruments may influence practice and policy alike. They may help to reaffirm and further develop existing principles and rules. They may also assist in better implementing existing law.

The current work of the ILC on Protection of the Environment in Relation to Armed Conflicts offers an excellent example for this. It includes a set of draft principles, provisionally adopted in 2019,<sup>68</sup> that are largely derived from general principles and provisions of international humanitarian law, environmental law, and human rights law as well as from important environmental aspects of the 1954 Hague Convention for the Protection of Cultural Property,<sup>69</sup> the 1968 Nuclear Non-Proliferation Treaty,<sup>70</sup> the 1972 Biological Weapons Convention, the 1993 Chemical Weapons Convention,<sup>71</sup> the 1997 Anti-personnel Landmines Convention, and the 2008 Convention on Cluster Munitions. New, more innovative rules draw from *requirements of the public conscience* and articulate a specific responsibility to preserve the natural environment for future generations. Indeed, an *environmental Martens Clause* was added as Draft Principle 12<sup>72</sup> with a commentary, after both Special Rapporteurs had addressed the issue

<sup>68</sup> See ILC, *Report of the International Law Commission on the Work of the Seventieth Session*, UN Doc. A/73/10, 30 April–1 June and 2 July–10 August 2018, 239, para. 165.

<sup>69</sup> *Convention for the Protection of Cultural Property in the Event of Armed Conflict with Protocol (1)*, 14 May 1954, 249 UNTS 240, and Protocol (2), 26 May 1999, 38 ILM (1999), 769 [Convention for the Protection of Cultural Property].

<sup>70</sup> *Treaty on the Non-Proliferation of Nuclear Weapons*, 1 July 1968, 729 UNTS 161 [Nuclear Non-Proliferation Treaty].

<sup>71</sup> See A.-M. Böhringer & T. Maruhn, 'Environmental Implications of Disarmament. The CWC Case', in C. Stahn *et al.* (eds), *Environmental Protection and Transitions from Conflict to Peace* (2017), 192.

<sup>72</sup> ILC, *Report of the International Law Commission on the Work of the Seventy-First Session*, UN Doc. A/74/10, 20 August 2019, 247: "Part Three Principles applicable during armed conflict Principle 12 Martens Clause with respect to the protection of the environment in relation to armed conflict In cases not covered by international agreements, the environment remains under the protection and authority of the principles of international law derived from established custom, the principles of humanity and the dictates of public conscience."

before.<sup>73</sup> The commentary explains that Draft Principle 12 applies during armed conflicts and in situations of occupation, and that “[t]he view was [...] expressed that the term ‘public conscience’ could be seen to encompass the notion of intergenerational equity as an important part of the ethical basis of international environmental law”.<sup>74</sup> As emphasized in the commentary, the ILC is not taking a position on the various possible interpretations regarding the legal consequences of the Martens Clause.

It may be hoped that this Draft Principle will revive discussions of the topic, encourage dynamic interpretations, and – most importantly – lead to appropriate action by States to overcome situations of indeterminacy in existing law.

## G. Some Practical Consequences of the Martens Clause

A successful application of the Martens Clause will help close gaps of treaty law without, however, creating new treaty obligations. It should not be forgotten that military planners, commanders, and simple soldiers are all addressees of the Clause. It is for these individuals to omit, or to take adequate precautions to avoid, acts that would be against the principles of humanity and the dictates of public conscience. The omission or act so achieved will be in fulfilment of an uncodified obligation to honor these principles. The Martens Clause may be an expression of customary law, a general principle of law, or of *soft law*. Yet the source of law on which the act or omission is based will not be of primary importance here. Even the legally binding – or, in the case of *soft law*, politically binding – nature of the obligation is of lesser relevance, as it will be decisive to see a clear consequence of principles of humanity and/or dictates of public conscience in practice. Admittedly, uncodified principles and rules may sometimes suffer from an even higher degree of indeterminacy than treaty law, but there will be no way to escape this in situations where clear rules do not exist. The appropriate solution must be found under any circumstances, often under time pressure and with serious consequences.

Three practical examples may be highlighted in this context to illustrate the specific task of protecting the environment during armed conflict:

<sup>73</sup> *Second Report of the Special Rapporteur on the Protection of the Environment in Relation to Armed Conflicts* by M. G. Jacobsson, UN Doc. A/CN.4/685, 28 May 2015, 47, para. 146; *Second Report of the Special Rapporteur on Protection of the Environment in Relation to Armed Conflicts* by Marja Lehto, UN Doc. A/CN.4/728, 27 March 2019, 76, paras. 173-184.

<sup>74</sup> *Report of the International Law Commission on the Work of the Seventy-First Session*, *supra* note 72, 250, para. 8.

(1) Methods and means of combat must be employed with due regard to the protection and preservation of the natural environment.<sup>75</sup> What *due regard* exactly means here must be interpreted and implemented. This task may be facilitated by the Martens Clause with its emphasis on *the dictates of the public conscience*.

(2) In the conduct of military operations, all feasible precautions must be taken to avoid, and in any event to minimize, incidental damage to the environment.<sup>76</sup> While this customary rule does not specify what is “[...] feasible [...] to avoid, and in any event to minimize [...]”<sup>77</sup> incidental environmental damage, the Martens Clause may help to develop appropriate standards in practice.

(3) Launching an attack against a military objective which may be expected to cause excessive damage in relation to the direct military advantage anticipated is prohibited.<sup>78</sup> An application of the Martens Clause in light of its relevance to strengthening the responsibility towards future generations may offer appropriate standards of behavior in such cases.

In each of these cases, specific military conduct will be required that goes beyond the more general principles of proportionality and avoidance of civilian collateral damage. The Martens Clause may facilitate appropriate planning and implementation. It should also be considered that, in case of doubt whether a legal obligation already exists, the application of the Clause may result in a voluntary practice to achieve such a goal.<sup>79</sup>

## H. Conclusions

The Martens Clause may and should be used to solve issues of indeterminacy in the law pertaining to military operations of States and non-State actors during armed conflicts. As reaffirmed in the 1977 Additional Protocols, the Clause is

<sup>75</sup> See Rule 44, 1st sentence, Henckaerts & Doswald-Beck, *Customary International Humanitarian Law*, *supra* note 54, 147. As explained in the ICRC Study, the customary rule formulated here “[...] has been motivated by a recognition of the dangerous degradation of the natural environment caused by mankind”.

<sup>76</sup> See *ibid.*, Rule 44, 2nd sentence.

<sup>77</sup> See *ibid.*, 51.

<sup>78</sup> See *ibid.*, 143, Rule 43 (C). The 1st sentence of Rule 43 suggests that this customary rule derives from the general principles on the conduct of hostilities. Yet the implementation of this rule requires specific considerations that may even be different from those aiming at the avoidance of collateral damage of other civilian objects.

<sup>79</sup> See M. Bothe in D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 4th rev. ed. (forthcoming in 2020), Chapter 10.

no longer confined, as in the 1907 Hague Convention IV, to issues related to the rights and duties of militia, volunteer groups, and the *levée en masse* but applies to all rights and obligations under international humanitarian law. The Martens Clause is also relevant for the interpretation and implementation of existing weapons prohibitions. It challenges all parties to an armed conflict to close gaps of the law resulting from the indeterminacy of applicable treaty law. This task not only requires reconsidering relevant treaty provisions and customary rules but also to look into general principles of law and develop best practices in military operations. The following conclusions may be drawn:

(1) The Martens Clause may assist in the implementation of existing principles and rules of, and the assessment of new developments in, international humanitarian law. It applies in all cases of ambiguity, vagueness, incompleteness, or inconsistency of existing treaty law in this field. The words *established custom*, *principles of humanity*, and *dictates of public conscience* should not be confined to customary law, but include general principles of law and even *soft law* and best practice.

(2) The Martens Clause is fully relevant for the respect for and protection of the environment during the conduct of hostilities.

(3) The law relating to the protection of the environment during armed conflict is not exclusively derived from international humanitarian law, but also from other branches of law. It is not so much based on treaty law but particularly – to use the language of Article 38 of the ICJ Statute – on international custom, general principles of law, and subsidiary means for the determination of rules of law.

(4) The Martens Clause helps to identify and further develop existing rules on the protection of the environment during armed conflict and support their implementation. Effective protection of the environment in light of the responsibility towards future generations is part of a modern understanding of the *dictates of public conscience*.

(5) The problem of collateral damage and particular standards for proportionality remain the focus of any rules on the protection of the environment during armed conflict.

(6) Pertinent *soft law* instruments should be developed in international academic and practical cooperation.

(7) It merits further study to explore the role of the Martens Clause as a case of interaction between the *jus in bello* and the *jus post bellum*, at least as far as the protection of the natural environment is concerned.