



## Challenges to Identifying Binding Martens Clause Rules from the 'Dictates of the Public Conscience' to Protect the Environment in Non-International Armed Conflict

Smith, Tara

### Transnational Legal Theory

DOI:  
[10.1080/20414005.2019.1621737](https://doi.org/10.1080/20414005.2019.1621737)

Published: 01/01/2019

Peer reviewed version

[Cyswllt i'r cyhoeddiad / Link to publication](#)

*Dyfyniad o'r fersiwn a gyhoeddwyd / Citation for published version (APA):*  
Smith, T. (2019). Challenges to Identifying Binding Martens Clause Rules from the 'Dictates of the Public Conscience' to Protect the Environment in Non-International Armed Conflict. *Transnational Legal Theory*, 10(2), 184-201. <https://doi.org/10.1080/20414005.2019.1621737>

#### Hawliau Cyffredinol / General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal ?

#### Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

# **Challenges in Identifying Binding Martens Clause Rules from the ‘Dictates of the Public Conscience’ to Protect the Environment in Non-International Armed Conflict**

## **Abstract**

This article begins to move the debate on the Martens Clause forward by examining issues regarding the identification and verification of Martens Clause rules based on the dictates of the public conscience which protect the environment in non-international armed conflict. The research in this article is a starting point for a new wave of Martens Clause scholarship to enhance the clarity, certainty, breadth and relevance of the laws of non-international armed conflict going forward. As such, this research lays the necessary foundation for future debates to take place on the precise nature and content of specific Martens Clause norms that protect the environment in non-international armed conflict.

## **Keywords**

Martens Clause; laws of armed conflict; environmental protection; non-international armed conflict; dictates of the public conscience; principle of legality

## **Introduction**

In 1899, the Martens Clause introduced into the laws of armed conflict a paradigm-shifting presumption which indicated that conduct on the battlefield would not be permitted *per se* just because of the absence of a specific prohibition. Martens Clause norms are inherently transient in nature, having the power to ‘justify a method of warfare in one age and prohibit it in another.’<sup>1</sup> The Martens Clause continues to be relevant because methods and means of

---

<sup>1</sup> International Court of Justice, ‘Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion’ [1996] I.C.J. Reports 226. This position echoes the oral submission made by Australia during the public sitting of the

warfare evolve all the time, often rapidly, and it is impossible for international law to keep pace with this rate of change.<sup>2</sup> The extent to which the environment is both a cause and casualty of contemporary armed conflict is a good example of changes in the nature of warfare in recent times that are not reflected in the laws that apply.<sup>3</sup> Significantly, there is no provision within the laws of non-international armed conflict – the most prevalent type of armed conflict in the world today – directly protecting the environment or prohibiting environmental damage. As such the Martens Clause is frequently raised as a remedy for this present gap in the law.<sup>4</sup>

---

ICJ Advisory Opinion on the Threat or Use of Nuclear Weapons - ‘Of course, neither the concept of “humanity”, nor the “dictates of public conscience” are static. Conduct which might have been considered acceptable by the international community earlier this century might be condemned as inhumane by the international community today.’ Oral Submission by Australia, Public Sitting of the International Court of Justice, Request for Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, Verbatim Record 30 October 1995, Peace Palace, The Hague, 39. Australia further submitted that ‘In line with such changes in the attitude of the world community, over time the permissible uses of one particular type of weapon may be progressively restricted, until finally prohibited altogether.’ Oral Submission by Australia, Public Sitting of the International Court of Justice, Request for Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, Verbatim Record 30 October 1995, Peace Palace, The Hague, 40

<sup>2</sup> James D Fry, ‘Contextualized Legal Reviews for the Methods and Means of Warfare: Cave Combat and International Humanitarian Law’ (2006) 44 Columbia Journal of Transnational Law 453, 455. Fry aptly surmises that ‘technology advances at breakneck speed. Humanity scrambles to keep up, relying on what some consider “woefully outdated” documents and standards. Is international humanitarian law doomed forever to lag behind on account of its inelasticity? ... Indeed, context-based legal reviews of methods and means of warfare can help close loopholes and ensure that the spirit of these laws prevails’.

<sup>3</sup> Post-Conflict and Disaster Management Branch United Nations Environment Programme, ‘Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law’ (United Nations Environment Programme 2009) 10. ‘Yet internal conflicts are the most strongly linked to the environment, with recent research suggesting that at least forty percent of all intrastate conflicts over the last sixty years have a link to natural resources.’

<sup>4</sup> See United Nations Environment Programme, *supra* n. 3, 46–47. See also Carl E Bruch, ‘All’s Not Fair in (Civil) War: Criminal Liability for Environmental Damage in Internal Armed Conflict’ (2001) 25 Vanderbilt Law Review 695, 793.; Michael Bothe and others, ‘International Law Protecting the Environment During Armed Conflict: Gaps and Opportunities’ (2010) 92 International Review of the Red Cross 569, 589.

The Martens Clause is a *sui generis* source of international law.<sup>5</sup> As Schmitt surmises, “during the evolution of prescriptive norms...[a]s the law proper grapples with how to handle environmental issues, the “laws of humanity” and “dictates of public conscience” will theoretically serve to ensure a modicum of protection.”<sup>6</sup> But identifying specific Martens Clause rules that put belligerent parties on notice that a certain level or certain type of environmental damage is prohibited is extremely difficult – indeed no concrete examples of environmental-Martens Clause norms can be found in the scholarship to date on this subject. If parties to an armed conflict cannot figure out with sufficient foresight, precision and certainty what Martens Clause-based rules apply to them in any given situation, the entire purpose of the Clause is frustrated. Moreover, enforcing rules which are impossible to identify would be Kafkaesque and in breach of the principle of legality under international law.

---

<sup>5</sup> In the International Court of Justice’s Advisory Opinion on the Threat or Use of Nuclear Weapons, Judge Shahabuddeen insisted in his dissenting opinion that the Martens Clause was ‘its own self-sufficient and conclusive authority... in cases in which no relevant rule was provided by conventional law’. Judge Shahabuddeen affirmed that ‘it was not necessary to locate elsewhere the independent existence of such principles of international law; the source of the principles lay in the Clause itself.’ Justice 408.. Judge Shahabuddeen finds that quite a number of the delegates at the 1899 Hague Peace Conference may indeed have intended that the Martens Clause possess this very powerful normative role in the laws of armed conflict. Justice 409.. Judge Shahabuddeen’s position is strengthened and supported by the separate dissenting opinion of Judge Weeramantry in the same Advisory Opinion. Judge Weeramantry clearly suggests that the Martens Clause draws upon a ‘body of principles’ which lies ‘behind such specific rules as had already been formulated’ which ought ‘to be applied to such situations as had not already been dealt with by a specific rule’, International Court of Justice, ‘Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion’ [1996] I.C.J. Reports 226, 484. For further discussion see also Antonio Cassese, ‘The Martens Clause: Half a Loaf or Simply Pie in the Sky’ (2000) 11 European Journal of International Law 187

<sup>6</sup> Michael N Schmitt, ‘The Environmental Law of War: An Invitation to Critical Reexamination’ (1996) 7 United States Air Force Academy Journal of Legal Studies 237, 253.

The principles of humanity and the dictates of the public conscience are the two key sources of regulation from which the Martens Clause identifies stop-gap legally binding rules to govern conduct on the battlefield. Of these two, the dictates of the public conscience is the least explored. Yet it perhaps has the greatest potential in the present day to put limits on the extent to which the environment is damaged in non-international armed conflict, until more specific treaty-based or customary international law rules are developed. Sir David Maxwell-Fyfe, the United Kingdom's prosecutor at Nuremberg, said that '[t]he law is a living thing. It is not rigid and unalterable. Its purpose is to serve mankind, and it must change and grow to meet the changing needs of society.'<sup>7</sup> Sometimes, society can make their collective opinions felt so powerfully that the standards of conduct which are acceptable and unacceptable at any given time are abundantly clear. The Martens Clause serves mankind by allowing those clear expressions to shape the legal obligations of parties engaged in an armed conflict where no international law otherwise exists.

This article moves the debate on the Martens Clause forward by exploring key challenges which impede the widespread recognition of Martens Clause rules based on the dictates of the public conscience which protect the environment in non-international armed conflict. As such, this research lays the necessary foundation for future research and debates to take place on the precise nature and content of specific Martens Clause norms.

Though focused on environmental protection in non-international armed conflict, the analysis of the dictates of the public conscience as a source of binding international law in this article is relevant throughout the laws of armed conflict: for example, the use of fully autonomous

---

<sup>7</sup> Sir David Maxwell-Fyfe, Transcript of the Trial of The Major War Criminals before The International Military Tribunal "Blue Series", Nuremberg 28 August 1946, 172

weapons<sup>8</sup> or cyber warfare may well outpace legal regulation and the dictates of the public conscience may be drawn upon to identify Martens Clause rules to provide interim regulation.<sup>9</sup>

Through this article, an understanding of the internal mechanics of the legal innovation represented by the Martens Clause - elevating the dictates of the public conscience into binding international law - may begin. This could herald a new age for the development of international law in general, one in which the will of states alone is no longer the sole creative force behind legally binding international rules. Martens Clause-style regulation could indeed be adopted in other fields of international law, such as in relation to environmental damage more broadly and in relation to climate change, where the slow development of law simply cannot keep pace with undesirable conduct.<sup>10</sup> Anticipating an expansion in the reach of the Martens Clause as a source of regulation throughout international law, the analysis in this article is a crucial first step towards developing a more detailed understanding of the challenges which have existed thus far in identifying binding rules which are created through the dictates of the public conscience.

## **1 The Dictates of the Public Conscience in the Martens Clause as they Apply to Non-International Armed Conflict**

---

<sup>8</sup> See Tyler D Evans, 'At War with the Robots: Autonomous Weapon Systems and the Martens Clause' 41 Hofstra Law Review 697; Louise Doswald-Beck, 'International Humanitarian Law and New Technology' [2012] American Society of International Law Proceedings of the Annual Meeting 107; Stephen Goose, 'The Case for Banning Killer Robots: Point' (2015) 58 Communications of the ACM 43.

<sup>9</sup> Michael C. Horowitz, 'Public opinion and the politics of the killer robots debate' (2016) 3(1) Research & Politics 1

<sup>10</sup> Dinah Shelton and Alexandre Kiss, 'A Martens Clause for Environmental Protection' (2000) 30 Environmental Policy and Law 285.

Originally inserted into the Preamble of the Hague Convention II on the Laws and Customs of War on Land 1899,<sup>11</sup> it is from its proponent, Russian jurist F.F. de Martens<sup>12</sup>, that the Clause takes its name. The Martens Clause was originally intended ‘to ensure that negotiations were not deadlocked’<sup>13</sup> on an issue over which states could not reach agreement: the legal ‘status of civilians who took up arms against an occupying force’.<sup>14</sup>

It is ubiquitous when discussing the provision at the centre of this article to refer to *the* Martens Clause. However this implies that there is one single provision at play. Nothing could be further from reality. There are multiple versions of the Martens Clause to be found throughout the laws of armed conflict, each containing ever so slight modifications on previous versions. Five versions of the Martens Clause are identified in this section alone and four of these apply exclusively to international armed conflict. Only one version of the Martens Clause, the shortest and least detailed, applies to non-international armed conflict. The absence of references to international law in this version is not an impediment however, but rather, it is argued here, an endorsement that the dictates of the public conscience are indeed a source of binding rules on the battlefield. As the focus of this article is on identifying

---

<sup>11</sup> Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899

<sup>12</sup> For historical background on F.F. de Martens, see Dieter Fleck, ‘Friedrich von Martens: A Great International Lawyer from Pärnu’ 2 *Baltic Defence Review* 19.; TE Holland, ‘Frederic de Martens’ 10 *Journal of the Society of Comparative Legislation* 10.; Vladimir Vasilievich Pustogarov, ‘Fyodor Fyodorovich Martens (1845-1909) - A Humanist of Modern Times’ (1996) 312 *International Review of the Red Cross* 300.

<sup>13</sup> Emily Crawford, ‘The Modern Relevance of the Martens Clause’ (2006) 6 *ISIL Yearbook of International Humanitarian and Refugee Law* 1, 19.

<sup>14</sup> Rupert Ticehurst, ‘The Martens Clause and the Laws of Armed Conflict’ (1997) 317 *International Review of the Red Cross* 125.

Martens Clause rules that apply in non-international armed conflict, the following discussion will explore some of the differences in the nuances between the four versions of the Martens Clause that apply to international armed conflict as they lay the foundation for the development of the version of the Martens Clause that applies in non-international armed conflict.

The versions of the Martens Clause that are most frequently cited are from either the 1899 or 1907 Hague Conventions. Both apply to what we now understand to be international armed conflict. The original version of the Martens Clause was a preambular paragraph to the Hague Convention (II), and it was adopted in 1899 by unanimous vote.<sup>15</sup> It read as follows:

‘Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.’<sup>16</sup>

The second version of the Martens Clause, again applying to international armed conflict, and again in preambular text, was included in the 1907 Hague Convention No. IV.<sup>17</sup> Some elements of the 1907 version of the Clause remain identical or very similar to the 1899

---

<sup>15</sup> Michael Salter, ‘Reinterpreting Competing Interpretations of the Scope and Potential of the Martens Clause’ (2012) 17 *Journal of Conflict & Security Law* 403, 404.

<sup>16</sup> Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899

<sup>17</sup> Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907

version. For example, the ‘laws of humanity’ remains a common term between the 1899 and 1907 versions of the Clause; ‘principles of international law’ in the 1899 version became ‘principles of the laws of nations’ in 1907; and the ‘requirements of the public conscience’ in 1899 became ‘the dictates of the public conscience’ in the 1907 version. However notable changes were nonetheless made in the short period of time between these two treaties. A significant departure occurred in the way that ‘usages established by civilised nations’ in the 1899 version was changed to ‘usages established among civilized people’ by 1907. The effect of this modification is not insignificant, as it is less clear that ‘usages established among civilized people’ refers to customary and treaty-based laws developed by states in the traditional way under international law. Referring to ‘people’ instead of ‘nations’ in 1907 bolsters the assertion made in this article that that popular collective practices across populations rather than representations of these practices by states alone could perhaps indeed be the source of binding rules under international law.<sup>18</sup> Whether negotiators in 1907 fully intended such implications remains an open question.<sup>19</sup>

A third version of the Martens Clause, applying once more to international armed conflict, was subsequently included in each of the four Geneva Conventions of 1949. Many of the key phrases within the common paragraph resemble not the original 1899 version, but the modified 1907 version described immediately above. However the purpose and placement of the Clause had changed between 1907 and 1949. In 1899 and 1907 the Martens Clause was

---

<sup>18</sup> This sentiment has recently been revived at the International Court of Justice in light of Judge Cañado Trindade’s Concurring Opinion to the Order of the Court which decided to grant provisional measures in the Jadhav Case between India and Pakistan. See Concurring Opinion of Judge Cañado Trindade, Jadhav Case (India v Pakistan) 18 May 2017, International Court of Justice.

<sup>19</sup> See, for example the views of Theodor Meron in Theodor Meron ‘The Martens Clause, Principles of Humanity, and Dictates of Public Conscience’ (2000) 94 *American Journal of International Law* 78, 81.

but a preambular paragraph. However in the 1949 Geneva Conventions the Martens Clause was included in the operative paragraphs of each treaty which dealt with denunciation. As a result, denunciation by a state of any one of the four 1949 Conventions would ‘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>20</sup> A literal reading of the Martens Clause in this context appears to suggest that a body of binding regulations exists during armed conflict which states themselves have no role in shaping<sup>21</sup> and which could never be denounced or reserved.

The fourth and fifth versions of the Martens Clause were included in the 1977 Additional Protocols. The fourth version appeared in Additional Protocol I,<sup>22</sup> which applies to international armed conflict. In this treaty, the Clause was included as an operative paragraph within Article 1. In this version of the Clause ‘the usages established among civilized peoples’ which appeared in the 1907 and 1949 versions was changed to ‘established custom’. This new phrase echoed the original sentiment of the 1899 version of the Clause which referred to ‘the usages established by civilized nations’ and perhaps by doing so removed the

---

<sup>20</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31 Art. 63.; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85 Art. 62.; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135 Art. 142.; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) 1949 (75 UNTS 287) Art. 158.

<sup>21</sup> Jeffrey Kahn, ““Protection and Empire”: The Martens Clause, State Sovereignty, and Individual Rights” (2016) 56 Virginia Journal of International Law 1, 27.

<sup>22</sup> 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, 1125 UNTS 3 Art. 1(2).

inference of non-traditional international law-making by popular consensus that could have previously been implied. Also, while ‘dictates of the public conscience’ remained the same, the ‘laws of humanity’ became ‘principles of humanity’ in Additional Protocol I of 1977.

States took a very different approach in 1977 when developing regulations for non-international armed conflict. The fifth version of the clause, the only one to apply to non-international armed conflict, and the main version considered in this article, appears as an ‘emasculated version of the clause’<sup>23</sup> in the preamble to Additional Protocol II. It reads as follows:

‘[I]n cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience’<sup>24</sup>

This twenty-eight word version of the Clause contrasts starkly to the ‘sixty-nine word diplomatic solution’<sup>25</sup> that first appeared in 1899. Of all four paragraphs to appear in the preamble to Additional Protocol II, the final clause – the Martens Clause – was the most controversial. Some states, wishing to minimise international legal regulation of their military

---

<sup>23</sup> Theodor Meron, ‘Comment: Protection of the Environment During Non-International Armed Conflicts’, *Protection of the Environment During Armed Conflict*, Edited by Richard J. Grunawalt, John E. King and Ronald S. McClain, vol 69 (Naval War College 1996), 357.

<sup>24</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, 1125 UNTS 609., Preamble

<sup>25</sup> Emily Crawford, ‘The Modern Relevance of the Martens Clause’ (2006) 6 ISIL Yearbook of International Humanitarian and Refugee Law 1, 19.

conduct in matters they perceived to be internal and domestic<sup>26</sup>, did not want a Martens Clause provision to apply in non-international armed conflict at all.<sup>27</sup> There was considerable debate as to the relevance of the Martens Clause in non-international armed conflict, though the view that ‘the demands of world opinion still have a great role to play as the sources of principles of international law...when written rules proved to be inadequate’<sup>28</sup> ultimately prevailed.

The absence of references to ‘the law of nations’ or international law in general in the Additional Protocol II version of the Martens Clause is notable.<sup>29</sup> The recognition that the dictates of the public conscience provide protection in non-international armed conflict even where there was uncertainty about the applicability of customary international law strongly supports the argument in this article that the dictates of the public conscience are uncontroversial as sources of law on the battlefield and clearly capable of being used to identify binding legal rules in armed conflict.

---

<sup>26</sup> Cassese describes this as ‘the recalcitrance of the States...in extensively regulating internal armed conflicts’ Antonio Cassese, ‘The Martens Clause: Half a Loaf or Simply Pie in the Sky’ (2000) 11 *European Journal of International Law* 187, 210.

<sup>27</sup> For drafting history of the Martens Clause in Additional Protocol II, see *The Law of Non-International Armed Conflict: Protocol II to the 1949 Geneva Conventions* (Martinus Nijhoff 1987).. It appears that of all four paragraphs to appear in the ultimate version of the preamble to Additional Protocol II, the final clause – the Martens Clause – was the most controversial and caused considerable debate as to its relevance in Protocol II, the appropriateness of its wording and the significance of the phrase ‘the dictates of the public conscience’.

<sup>28</sup> See Theodor Meron, ‘The Martens Clause, Principles of Humanity, and Dictates of Public Conscience’ (2000) 94 *American Journal of International Law* 78, 83 at footnote 5 quoting the views of the Italian representative to the Sixth Committee of the UN General Assembly UN Doc. A/C.6/SR.1452 (1973), para 46

<sup>29</sup> William Abresch, ‘A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya’ 16 *European Journal of International Law* 741, 749–750.. It seems that states were deliberately reluctant to refer to customary international law in Additional Protocol II more generally, and the brevity of the Martens Clause in this instrument exemplifies this.

The insertion of a very particular version of the Martens Clause in Additional Protocol II has particular relevance for the protection of the environment in non-international armed conflict. During the negotiation of Additional Protocol II, some delegations felt that ‘destruction of the environment should be prohibited not only in international but also in internal conflicts.’<sup>30</sup> An explicit provision was proposed by the Australian delegation, contained in draft Additional Protocol II as Article 28*bis*, which suggested protecting the environment in non-international armed conflict just as it was in international armed conflict in Articles 35(3) and 55(1) of Additional Protocol I.<sup>31</sup> However other delegations were set against the inclusion of such a provision<sup>32</sup> because of their general opposition to too much ‘foreign interference in internal affairs under cover of humanitarian concern’<sup>33</sup> and because they felt that too many legally binding rules in non-international armed conflict would cause non-state armed groups to perceive the laws of armed conflict to be too difficult to understand and too

---

<sup>30</sup> Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977) Volume XIV, 176

<sup>31</sup> 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, 1125 UNTS 3 Arts. 35(3) and 55(1).

<sup>32</sup> Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977) Volume XIV, 176, 413 para 55

<sup>33</sup> Sylvie S Junod, ‘Additional Protocol II: History and Scope’ (1983) 33 *The American University Law Review* 29, 34; Theodor Meron, ‘Comment: Protection of the Environment During Non-International Armed Conflicts’, *Protection of the Environment During Armed Conflict*, Edited by Richard J. Grunawalt, John E. King and Ronald S. McClain, vol 69 (Naval War College 1996) 353. ‘[t]he sovereignty of States and their traditional insistence on maintaining maximum discretion in dealing with those who threaten their sovereign authority have combined to limit the reach of the law of war to non-international armed conflict.’

onerous to adhere to, ultimately disregarding Additional Protocol II in its entirety<sup>34</sup> and forcing states to do the same.<sup>35</sup>

Support for draft Additional Protocol II as a whole appeared to be floundering at the eleventh hour due to these concerns. To prevent a situation of stalemate which would block the adoption of the treaty, the Pakistani Delegate to the Diplomatic Conference proposed a simplified version of Additional Protocol II with twenty-eight articles replacing the contentious forty-seven.<sup>36</sup> Article 28bis protecting the environment was cut from the final draft. The Martens Clause was then inserted into Additional Protocol II to serve the same purpose in Additional Protocol II as it had in the Hague Convention (II) of 1899: to confirm that the absence of a prohibition on any issue did not mean the issue was unregulated. The dictates of the public conscience and the principles of humanity were used to rebut any future presumption that that unfettered environmental damage in non-international armed conflict was permitted.

## **2 Understanding the ‘Dictates of the Public Conscience’ as a Source of Legally Binding International Law**

---

<sup>34</sup> Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977) Volume XIV, 176, 411 para 48

<sup>35</sup> Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977) Volume XIV, 176, 411 para 48. They felt that ‘authorities in power might use the inability of the insurgents to conform to the detailed provisions of the Protocol as an excuse for not complying with the Protocol’ themselves.

<sup>36</sup> Sylvie S Junod, ‘Additional Protocol II: History and Scope’ (1983) 33 The American University Law Review 29, 33

Public opinion has been ‘so influential in our era’<sup>37</sup> that to propose it as a source of binding legal regulations is not beyond the imagination of many. The value of a source of international law that recognises prevalent moral standards as binding laws of armed conflict is nonetheless at odds with the traditional understanding of how international law is made and what can be considered a source of that law under Article 38 of the Statute of the International Court of Justice. However there is a widely held opinion amongst international scholars and judges that while state practice can convey public opinion, it should not be definitive of it nor the exclusive measure of what should be considered binding law on the battlefield.<sup>38</sup>

The dissenting opinions of Judge Shahabuddeen and Judge Weeramantry International Court of Justice’s Advisory Opinion on the Threat or Use of Nuclear Weapons stand out as being singularly authoritative interpretations on the inner workings of the Martens Clause<sup>39</sup> and particularly strong examples of judicial support for what Judge Weeramantry recognised as ‘the need that strongly held public sentiments in relation to humanitarian conduct be reflected in the law.’<sup>40</sup> Judge Shahabuddeen indicated that while the opinion of states was important, it

---

<sup>37</sup>Theodor Meron, ‘The Martens Clause, Principles of Humanity, and Dictates of Public Conscience’ (2000) 94 *American Journal of International Law* 78, 84.

<sup>38</sup> See Concurring Opinion of Judge Cançado Trindade, *Jadhav Case (India v Pakistan)* 18 May 2017, International Court of Justice.

<sup>39</sup> Judith Gardam, ‘The Contribution of the International Court of Justice to International Humanitarian Law’ (2001) 14 *Leiden Journal of International Law*, 359.

<sup>40</sup> International Court of Justice, ‘Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion’ [1996] I.C.J. Reports 226, 487.

was relevant only to '[indicate] the state of the public conscience'<sup>41</sup> not as conclusive proof of the existence or absence of a Martens Clause rules.

Persuasive scholarly support comes from Ticehurst who argues that '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.'<sup>42</sup> Sean McBride argues that sources of the dictates of the public conscience should not be limited to just state-supported expressions.<sup>43</sup> Indeed Gardam asserts that the arguments before the Court at the time were intended to prove that the Martens Clause 'was a means by which [international humanitarian law] could keep in step with new developments in community values that were not necessarily reflected in the opinion juris of states.'<sup>44</sup> Weston asserts that 'in this burgeoning human rights era especially, respecting an issue that involves potentially the fate of human civilisation itself, it is not only appropriate but mandated that

---

<sup>41</sup> International Court of Justice, 'Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion' [1996] I.C.J. Reports 226, 410.

<sup>42</sup> Rupert Ticehurst, 'The Martens Clause and the Laws of Armed Conflict' (1997) 317 *International Review of the Red Cross* 125

<sup>43</sup> Sean McBride, 'The Legality of Weapons of Social Destruction', *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet, C. Swinarski (ed)* (Martinus Nijhoff 1984) 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 20<sup>th</sup> century, and come within the ambit of the Martens Clause prohibition.'

<sup>44</sup> Judith Gardam, 'The Contribution of the International Court of Justice to International Humanitarian Law' (2001) 14 *Leiden Journal of International Law*, 359

the legal expectations of all members of human society, official and non-official, be duly taken into account'.<sup>45</sup>

In terms of proving the existence and substance of specific Martens Clause rules derived from the dictates of the public conscience, Judge Shahabuddeen stated that 'the Martens Clause was intended to fill gaps left by conventional international law and to do so in a practical way.'<sup>46</sup> He maintained that '[t]he task of determining the effect of a standard may be difficult, but it is not impossible of performance; nor is it one which a court of justice may flinch from undertaking where necessary.'<sup>47</sup> He did stress however that the court 'may [not] go on a roving expedition; it must confine its attention to sources which speak with authority.'<sup>48</sup> Nonetheless, Judge Shahabuddeen stopped short of identifying examples of authoritative sources which clearly prove the dictates of the public conscience with sufficient precision that would allow rules to be derived from them and enforced on the battlefield side by side with other more established laws of armed conflict. Judge Weeramantry felt that the dictates of the public conscience had been expressed with sufficient precision on the issue of nuclear weapons such that no uncertainty existed regarding the Martens Clause prohibition on these

---

<sup>45</sup> Burns H Weston, 'Nuclear Weapons and International Law: Prolegomenon to General Illegality' (1982) 4 New York Law School Journal of International and Comparative Law 252. as quoted by Judge Weeramantry in International Court of Justice, 'Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion' [1996] I.C.J. Reports 226, 489.

<sup>46</sup>International Court of Justice, 'Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion' [1996] I.C.J. Reports 226, 405.

<sup>47</sup> International Court of Justice, 'Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion' [1996] I.C.J. Reports 226, 410

<sup>48</sup> International Court of Justice, 'Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion' [1996] I.C.J. Reports 226, 410

weapons,<sup>49</sup> yet he too failed to provide guidance on the types of authoritative sources that had informed and shaped his view.

Looking to the Advisory Opinion on the Threat or Use of Nuclear Weapons for preliminary guidance on the sources and degree of proof required to identify binding rules from the dictates of the public conscience provides few concrete answers. Could regional differences in Martens Clause norms exist, for example?<sup>50</sup> Is it enough to identify generalised sentiments regarding environmental damage around the world to deduce that certain levels of damage on the battlefield are unacceptable? Or should there be evidence of very specific public sentiments that condemn environmental damage in situations of non-international armed conflict in particular? Do the dictates of the public conscience have to be held unanimously across the populations surveyed? Or would majority views suffice? The dissenting opinions of Judges Shahabuddeen and Weeramantry simply do not go into this level of detail. Moreover the opinion of the Court's majority preferred to simply acknowledge the 'continuing existence and applicability'<sup>51</sup> of the Martens Clause in the laws of armed conflict – a statement which exerted little influence on the overall conclusions reached by the Court in that Advisory Opinion.<sup>52</sup> This acknowledgement falls far short of explaining precisely *how* the Martens Clause remains relevant to the regulation on the threat or use of nuclear weapons

---

<sup>49</sup> International Court of Justice, 'Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion' [1996] I.C.J. Reports 226, 487

<sup>50</sup> Michael N Schmitt, 'The Environmental Law of War: An Invitation to Critical Reexamination' (1996) 7 United States Air Force Academy Journal of Legal Studies 237, 253

<sup>51</sup> International Court of Justice, 'Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion' [1996] I.C.J. Reports 226, 260

<sup>52</sup> Judith Gardam, 'The Contribution of the International Court of Justice to International Humanitarian Law' (2001) 14 Leiden Journal of International Law 358–359

in times of armed conflict and it certainly provides no definitive judicial guidance to support the future identification of specific Martens Clause rules derived from the dictates of the public conscience.

### **3 Reconciling the Dictates of the Public Conscience with the Principle of Legality under International Law**

To validly apply, Martens Clause rules derived from the dictates of the public conscience must adhere to the principle of legality under international law. Crawford cautions against trying to enforce unclear Martens Clause rules, as she maintains that

‘[a]ny law, but especially a law pertaining to armed conflict, should retain a significant measure of predictability in interpretation and application. The battlefield is no place for ambiguous and amorphous rules.’<sup>53</sup>

The laws of armed conflict form part of a sub-set of international law which applies directly to both states and individuals. Individuals that are subjects of international law<sup>54</sup> are not expected to presume to the most logical or illogical conclusion what a rule of international law might require of them. Brownlie maintains that individuals are required to

‘obey the law where it does exist, but [they have] no particular obligation where it does not. It is not up to individual citizens or businessmen to do the lawmakers’ job for them. For example, they have no duty to extend the scope of the law’s constraint (in accordance with common sense, morality, the spirit of the law,

---

<sup>53</sup> Emily Crawford, ‘The Modern Relevance of the Martens Clause’ (2006) 6 ISIL Yearbook of International Humanitarian and Refugee Law 1, 21

<sup>54</sup> Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press 2008) 57–68.

social purposes, or anything else), if the sources of law do not disclose an unambiguous enactment to that effect.’<sup>55</sup>

Waldron argues that ‘[i]n the absence of a clearly stated constraint laid down in a promulgated legal text (like an enacted rule or a well-known precedent), there is a presumption in favor of individual freedom.’<sup>56</sup> To ensure that Martens Clause rules based on the dictates of the public conscience do not violate the principle of legality when applied to individuals and non-state actors, both the principle of *nullum crimen nulla poena sine lege* (no crime or punishment without law) and *lex certa* (legal certainty) need to be fully respected before determining that conduct is prescribed or that punishable acts exist.<sup>57</sup> While some feel that the Martens Clause ‘is not to be nitpicked like a tax statute’,<sup>58</sup> if it is to create legally binding obligations on the battlefield then the substance of any rules identified through it must necessarily be clear.

---

<sup>55</sup> Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press 2008), 16–17.

<sup>56</sup> Jeremy Waldron, ‘The Rule of International Law’ (2006) 30 *Harvard Journal of Law & Public Policy* 15, 17.

<sup>57</sup> Most references to the principle of legality within the literature on the laws of armed conflict relate to criminal conduct and criminal trials. However the principle of legality is not exclusively bound to criminal circumstances. The ICRC have identified elements of state practice underpinning the customary principle of legality which relate to the nature of prohibited conduct and punishable acts more generally. See International Committee of the Red Cross, ‘Practice Relating to Rule 101. The Principle of Legality’ <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule101](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule101)>.

<sup>58</sup> Oral Submission by Samoa, Public Sitting of the International Court of Justice, Request for Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, Verbatim Record 13 November 1995 at 10.35am, Peace Palace, The Hague, 45

The principle of *lex certa* requires that ‘an offense be sufficiently specific [...] to avoid any perception of arbitrariness’<sup>59</sup> and to enable individuals to foresee in concrete terms what conduct is in compliance with and in violation of the law in question. Specificity and foreseeability are crucial in determining legal certainty<sup>60</sup> as they inform subjects of international law where the boundaries of legality lie on the battlefield.

The principle of *nullum crimen nulla poena sine lege* ensures that individuals have the opportunity in advance to shape their conduct to the law as it stands. According to this principle, individuals cannot be punished or held accountable for failing to conform to an ambiguous, or perhaps even unknowable, standard. Although the principles of humanity were used to justify the prosecution of crimes against humanity at Nuremberg,<sup>61</sup> the dictates of the public conscience have never been used as an enforceable standard of conduct in armed conflict. Using Martens Clause rules based on the dictates of the public conscience ‘may be dangerous’<sup>62</sup> if individuals are likely to face some form of punishment for crossing a very difficult-to-determine legal boundary.<sup>63</sup>

---

<sup>59</sup> Marten Zwanenburg and Guido Den Dekker, ‘Prosecutor v Frans van Anraat - Case No. 07/10742.2009 Nederlandse Jurisprudentie 481’ (2010) 104 *American Journal of International Law* 86, 89.

<sup>60</sup> Michel Faure, Morag Goodwin and Franziska Weber, ‘The Lex Certa Principle in Criminal Law: Reconciling Economics and Human Rights?’ European Association of Law & Economics Annual Conference, September 20-22 2012, Stockholm <<http://www.eale.org/conference/eale2012/paper/view/170/68>>

<sup>61</sup> Cameron Charles Russell, ‘The Chapeau of Crimes Against Humanity: The Impact of the Rome Statute of the International Criminal Court’ (2011) 8 *Eyes on the International Criminal Court* 25, 31–32.; Michael Salter and Maggi Eastwood, ‘Post-War Developments of the Martens Clause: The Codification of “Crimes Against Humanity” Applicable to Acts of Genocide’ (2011) 2 *Journal of International Humanitarian Legal Studies* 250.

<sup>62</sup> George Aldrich and Christine Chinkin, ‘A Century of Achievement and Unfinished Work’ 94 *American Journal of International Law* 97.

<sup>63</sup> Antonio Cassese, ‘B.V.A. Röling — A Personal Recollection and Appraisal’ (2010) 8 *Journal of International Criminal Justice* 1141, fn. 22.

For individuals or non-state armed groups to adhere to the law, they need to know what that law might be *before* their conduct has been carried out: Martens Clause rules need to be foreseeable, clear and certain to achieve this. If they are not, Martens Clause rules risk requiring individuals to comply with ambiguous standards, violating the principle of *lex certa* and also imposing penalties and punishments without law, which would violate the principle of *nullum crimen nulla poena sine lege*.

#### **4 Obstacles to the Application of the Dictates of the Public Conscience as Binding Law to Protect the Environment in Non-International Armed Conflict**

There is no doubt about the extent to which ‘the public conscience of the international community has been strengthened and sensitised to a high degree in relation to environmental problems’<sup>64</sup> in recent times. If we draw the widest possible parameters for determining what constitutes the dictates of public conscience, as Crawford does by asserting that “there is some scope to argue that the idea of ‘public conscience’ is akin to notions of ‘world opinion’”,<sup>65</sup> the growing number of declarations, resolutions, and treaties concerning environmental protection at the local, regional and global levels indicate that the global public conscience as represented by states wishes to expand rather than limit the scope of

---

<sup>64</sup> Rosario Dominguez-Mates, ‘New Weaponry Technologies and International Humanitarian Law: Their Consequences on the Human Being and the Environment’, *The New Challenges of Humanitarian Law in Armed Conflicts: In Honour of Professor Juan Antonio Carrillo-Salcedo, Pablo Antonio Fernandez-Sanchez (ed.)* (Martinus Nijhoff 2005) 107.; Alexandre Ch. Kiss and Antonio A. Cancado Trindade, ‘Two Major Challenges of Our Time: Human Rights and the Environment’ in Antonio A. Cancado Trindade (ed), *Derechos Humanos, Desarrollo Sustentable y Medio Ambiente* (2nd edn, 1995), 287 as quoted in Dominguez-Mates 105.

<sup>65</sup> Emily Crawford, ‘The Modern Relevance of the Martens Clause’ (2006) 6 ISIL Yearbook of International Humanitarian and Refugee Law 1, 12

legal measures to protect the environmental.<sup>66</sup> In fact, the growing global ‘environmental conscience’<sup>67</sup> which ‘embraces prevention as opposed to cure’<sup>68</sup> inherently respects the recognition of the ‘environment’s interdependency with the survival of humankind, and ultimately...the inherent value of the environment in and of itself.’<sup>69</sup> Therefore there is strong evidence to indicate that the dictates of the public conscience have evolved in a general manner to embrace greater environmental protection at all times.

Indeed the oral submissions of Australia<sup>70</sup>, Mexico<sup>71</sup>, Malaysia<sup>72</sup>, New Zealand<sup>73</sup>, Samoa<sup>74</sup>, Marshall Islands<sup>75</sup>, Solomon Islands<sup>76</sup>, Costa Rica<sup>77</sup> and Zimbabwe<sup>78</sup> to the International

---

<sup>66</sup> For a general summary of the position of States on this point, see Rupert Ticehurst, ‘The Martens Clause and the Laws of Armed Conflict’ (1997) 2 *International Review of the Red Cross* 125

<sup>67</sup> Karen Hulme, ‘Armed Conflict, Wanton Ecological Devastation and Scorched Earth Policies: How the 1990-91 Gulf Conflict Revealed the Inadequacies of the Current Laws to Ensure Effective Protection and Preservation of the Natural Environment’ (1997) 2 *Journal of Armed Conflict Law* 45, 51

<sup>68</sup> Karen Hulme, ‘Armed Conflict, Wanton Ecological Devastation and Scorched Earth Policies: How the 1990-91 Gulf Conflict Revealed the Inadequacies of the Current Laws to Ensure Effective Protection and Preservation of the Natural Environment’ (1997) 2 *Journal of Armed Conflict Law* 45, 52

<sup>69</sup> Karen Hulme, ‘Armed Conflict, Wanton Ecological Devastation and Scorched Earth Policies: How the 1990-91 Gulf Conflict Revealed the Inadequacies of the Current Laws to Ensure Effective Protection and Preservation of the Natural Environment’ (1997) 2 *Journal of Armed Conflict Law* 45, 51

<sup>70</sup> Oral Submission by Australia, Public Sitting of the International Court of Justice, Request for Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, Verbatim Record 30 October 1995, Peace Palace, The Hague, 39

<sup>71</sup> Oral Submission by Mexico, Public Sitting of the International Court of Justice, Request for Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, Verbatim Record 3 November 1995, Peace Palace, The Hague, 55

<sup>72</sup> Oral Submission by Malaysia, Public Sitting of the International Court of Justice, Request for Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, Verbatim Record 7 November 1995, Peace Palace, The Hague, 59-60

Court of Justice in the context of the Advisory Opinion on the Threat and Use of Nuclear Weapons all recognised the existence of binding Martens Clause rules in general contemplation of the environmental damage caused by such weapons. Of all states to mention the Martens Clause in their submissions to the ICJ, only the USA<sup>79</sup> expressly refuted the ability of the Martens Clause to legally prohibit conduct on the battlefield as such.

Support for the existence of Martens Clause rules that in some way protect the environment in armed conflict is also unequivocal in the scholarly literature on this issue. As a result of the ineffective provisions protecting the environment in Additional Protocol I and the absence of

---

<sup>73</sup> Oral Submission by New Zealand, Public Sitting of the International Court of Justice, Request for Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, Verbatim Record 9 November 1995, Peace Palace, The Hague, 25

<sup>74</sup> Oral Submission by Samoa, Public Sitting of the International Court of Justice, Request for Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, Verbatim Record 13 November 1995 at 10.35am, Peace Palace, The Hague, 45,46,51,52

<sup>75</sup> Oral Submission by Marshall Islands, Public Sitting of the International Court of Justice, Request for Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, Verbatim Record 14 November 1995, 10.00am, Peace Palace, The Hague, 67

<sup>76</sup> Oral Submission by Solomon Islands, Public Sitting of the International Court of Justice, Request for Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, Verbatim Record 14 November 1995, 10.00am, Peace Palace, The Hague, 50

<sup>77</sup> Oral Submission by Costa Rica, Public Sitting of the International Court of Justice, Request for Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, Verbatim Record 14 November 1995, 15.30pm, Peace Palace, The Hague, 27

<sup>78</sup> Oral Submission by Zimbabwe, Public Sitting of the International Court of Justice, Request for Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, Verbatim Record 15 November 1995, 15.30pm, Peace Palace, The Hague, 33

<sup>79</sup> Oral Submission by USA, Public Sitting of the International Court of Justice, Request for Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, Verbatim Record 9 November 1995, 15.30pm, Peace Palace, The Hague, 78

any environment-related provisions in Additional Protocol II, the International Committee of the Red Cross maintain that the ‘validity [of the Martens Clause] in the context of the protection of the environment in time of armed conflict is indisputable.’<sup>80</sup> Other experts acknowledge that while the existence of Martens Clause rules may attract controversy,<sup>81</sup> the growing scholarly support for such rules that protect the environment in armed conflict must point towards their existence.<sup>82</sup> While some scholars are reluctant to recognise Martens Clause-based environmental protection on the battlefield prior to the exponential growth in global environmental awareness characteristic of the late 1970s or early 1980s,<sup>83</sup> many scholars agree that such prohibitions exist now in the present-day. However no scholar has

---

<sup>80</sup> International Committee of the Red Cross, ‘Protection of the Environment in Time of Armed Conflict: Report Submitted by the ICRC to the 48th Session of the United Nations General Assembly.’ (1993) <<https://www.icrc.org/eng/resources/documents/report/5deesv.htm>>.

<sup>81</sup> Post-Conflict and Disaster Management Branch United Nations Environment Programme, ‘Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law’ (United Nations Environment Programme 2009), 46

<sup>82</sup> Post-Conflict and Disaster Management Branch United Nations Environment Programme, ‘Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law’ (United Nations Environment Programme 2009), 47.

<sup>83</sup> See for example: Manoj Kumar Sinha, ‘Protection of the Environment During Armed Conflicts: A Case Study of Kosovo’ (2001) 1 *ISIL Yearbook of International Humanitarian and Refugee Law* 13, 13; Glen Plant, *Environmental Protection and the Law of War: A ‘Fifth Geneva’ Convention on the Protection of the Environment in Time of Armed Conflict* (Belhaven Press 1992) 17; Silja Voneky, ‘Peacetime Environmental Law as a Basis of State Responsibility for Environmental Damage Caused by War’, *The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives*, Jay E. Austin and Carl E. Bruch (eds) (Cambridge University Press 2000) 218; <sup>83</sup> Karen Hulme, ‘Armed Conflict, Wanton Ecological Devastation and Scorched Earth Policies: How the 1990-91 Gulf Conflict Revealed the Inadequacies of the Current Laws to Ensure Effective Protection and Preservation of the Natural Environment’ (1997) 2 *Journal of Armed Conflict Law* 45, 51.; Michael N Schmitt, ‘The Environmental Law of War: An Invitation to Critical Reexamination’ (1996) 7 *United States Air Force Academy Journal of Legal Studies* 237, 252; Sonja Ann Jozef Boelaert-Suominen, *International Environmental Law and Naval War: The Effect of Marine Safety and Pollution Conventions During International Armed Conflict* (The Newport Papers 2000) 54.

yet identified *specific* rules derived from dictates of the public conscience through the Martens Clause which prohibit environmental damage in non-international armed conflict.

Public opinion constantly changes and evolves, and even within the field of international environmental law not all environmental damage is prohibited. Indeed, the laws of armed conflict that apply during international armed conflict do not prohibit all environmental damage either, only damage that is widespread, long-term and severe.<sup>84</sup> Therefore it is difficult to describe clearly how, or indeed whether, the dictates of the public conscience have focused on the specific issue of environmental damage in non-international armed conflict in a way that is sufficiently precise and clear such that parties to a non-international armed conflict could know to shape their behaviour accordingly.

Unlike public opinion on the issue of nuclear weapons, which Judge Weeramantry finds to be very clear, as ‘the conscience of the global community has spoken, and spoken often, in the most unmistakable terms’,<sup>85</sup> there is no globally identifiable objection to environmental damage in non-international armed conflict. Huang, for example, suggests that the attack on the Jiyeh power station in Lebanon during the conflict between Israel and Hezbollah in 2006 ‘[w]hile devastating to the environment [...] probably did not violate the fundamental dictates of the public conscience.’<sup>86</sup> Therefore asserting that the environment is protected in non-international armed conflict by the Martens Clause does not seem to conform to the

---

<sup>84</sup> 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, 1125 UNTS 3 Arts. 35(3) and Art. 55

<sup>85</sup> International Court of Justice, ‘Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion’ [1996] I.C.J. Reports 226, 265

<sup>86</sup> Ling-Yee Huang, ‘2006 Israel-Lebanese Conflict: A Case Study for Protection of the Environment in Times of Armed Conflict’ (2008) 20 Florida Journal of International Law 103, 109–110.

requirements of the principle of legality, including the principle of *lex certa* and *nullum crimen mulla poena sine lege*.

## **Conclusion**

The Martens Clause implies that the dictates of the public conscience may provide provisional but legally binding guidance through uncertain or unsettled legal terrain,<sup>87</sup> ensuring that gaps in positive law are ‘not sufficient excuse for immoral and inhuman acts, even in wartime, and even in the direst military necessity.’<sup>88</sup> While the Martens Clause was initially an innovative ‘diplomatic tool to breach an impasse’,<sup>89</sup> the central position it now occupies in the laws of armed conflict could represent the greatest paradox in the entire field of international law: instead of providing temporary stop-gap regulation, it may now be inhibiting prudent law-making, particularly on the issue of environmental protection in non-international armed conflict.

Unchallenged assertions that the environment in non-international armed conflict remains protected by the Martens Clause creates an illusion of legal regulation. From the analysis in this article, it is clear that confirming the existence of legally binding Martens Clause rules based on the dictates of the public conscience is extremely difficult. Without detailed guidance as to how the dictates of the public conscience can be proved, and to what degree the views need to be widely held, arguments invoking that the Martens Clause provides

---

<sup>87</sup> See Rupert Ticehurst, ‘The Martens Clause and the Laws of Armed Conflict’ (1997) 317 *International Review of the Red Cross* 125

<sup>88</sup> William V O’ Brien, ‘The Meaning of “Military Necessity” in International Law’ 1 *World Polity* 109, 154.

<sup>89</sup> Emily Crawford, ‘The Modern Relevance of the Martens Clause’ (2006) 6 *ISIL Yearbook of International Humanitarian and Refugee Law* 1, 19

protection in the absence of other laws creates a false sense of legal regulation. Beyond the smoke and mirrors of unverifiable claims of Martens Clause protection lies the enormous and difficult task of real law-making.

As Kahn surmises, “history reminds us that the purpose of the clause was not to end debate, but to forestall the worst consequences for civilian populations and belligerents that would result if the parties assumed that a lack of tight-fitting treaty law meant *carte blanche* freedom to act, unconstrained by any law.”<sup>90</sup> The research in this article provides a starting point for a new wave of Martens Clause scholarship that focuses on how to substantiate and, ultimately, operationalize rules derived from the dictates of the public conscience, particularly rules relating to the protection of the environment, in order to enhance the clarity, certainty, breadth and relevance of the laws of non-international armed conflict going forward.

---

<sup>90</sup> Jeffrey Kahn, “‘Protection and Empire’: The Martens Clause, State Sovereignty, and Individual Rights’ (2016) 56 *Virginia Journal of International Law* 1, 5