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The Martens Clause and Military Necessity

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Introduction

International humanitarian law is described as a series of rules and principles to balance the two opposing interests, namely, humanitarian concerns and military considerations. This balancing is often represented by the Martens clause and military necessity, in both practical instruments and academic writings.[1] The historical examination shows that their role and significance have not remained the same over time. Thus, the first purpose of the chapter is to determine the contemporary functions attributed to the Martens clause and military necessity, respectively, and confirm their roles in contemporary international humanitarian law. Both military necessity and the Martens clause, however, also possess highly controversial aspects. It is also a purpose of this chapter to make an enquiry into these controversial aspects and their implications.

In the first part, the period around the 1899 Peace Conference in The Hague is examined. On one hand, the Martens clause was formulated and adopted in this Conference as an integral part of the Hague Convention with Respect to the Laws and Customs of War on Land.[2] Therefore, even though the function of the Martens clause in the preamble of this Convention appeared to have raised little controversy at that point, the choice of this particular historical period for the examination of the Martens clause is justified. On the other hand, the choice of this particular historical period is also convenient for the examination of military necessity for the following reasons. First, in the preamble of the same Convention, the idea of military necessity is spelled out as a reason for this codification of the law of war: "to diminish the evils of war so far as military necessities permit." Second, the academic debate aroused by military necessity expressed in the Hague Convention supplies questions that have bearings on a contemporary examination. Third, most importantly, the highly controversial aspect of military necessity practically as an unlimited justification was a central topic of debate in this period.

In the second part, contemporary jurisprudence concerning military necessity and the Martens clause, respectively, are examined. The controversial aspect of the Martens clause appears in this part. Criticisms are addressed, and how these criticisms or challenges are tackled by international courts are examined. Since abundant literature exists for jurisprudence of national and international trials immediately after the Second World War, the examination focuses on more recent jurisprudence – mainly from 1990s onwards – of international courts, mostly of the International Court of Justice (hereinafter the ICJ) and the International Criminal Tribunal for the Former Yugoslavia (hereinafter the ICTY).

1899 Peace Conference

The Modest Origin of the Martens Clause

The historical description of the Martens clause can be brief since it did not raise any immediate problems or debate in the 1899 Peace Conference. The Martens clause in the Hague Convention provided "the protection and the rule of the principles of the law of

nations, as they result from the usages established among civilized peoples, from the laws of humanity and dictates of public conscience" . Because of the reference to the idea of military necessity in the same preamble, the protection professed in the Martens clause was seen to offer a counterbalance to the excess of violence to which military necessity might lead. As a result, a number of subsequent authors do describe the preamble of the Hague Convention as an expression, by way of these two terms, of the balancing of the humanitarian ideas and military considerations of the law of war.[3] The modest origin of the Martens clause, however, does not indicate that this clause was supposed to play such a counterbalancing role. Both legal literature and historical writings confirm that the Martens clause was intended to have a limited scope in a particular context,[4] and that it was not created as a carrier of general humanitarian values pitted against general excess of violence.

The clause was inserted to resolve the deadlock in a negotiation during the 1899 Peace Conference. What led to the adoption of the clause was one of the most divisive issues in the codification of the law of war in this Conference. The matter concerned the "combatant status"[5] of the local population which would take arms against invading armies. In the 1899 Peace Conference some delegations thought that such local population should not be criminally punished by the occupying power merely because they were patriotic and behaved accordingly. These were the delegations of small states, which were likely to find themselves occupied rather than in the occupying position. Military powers such as Germany and Russia naturally disagreed. As a result, instead of a clear formulation of the status and protection of such local population, all those concerned were placed under the "protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience" by the Martens clause. It was clearly this question of combatant status and the two related articles of the Hague Regulations that constituted the scope of the Martens clause in its origin.[6] De Martens himself – a member of the Russian delegation and an international lawyer after whom the clause is named – does not indicate any further implications of the clause, either.[7] He is also often portrayed by historians as a practical diplomat serving imperialist Russia rather than as a man of humanitarian vision.[8]

Military Necessity as an Unlimited Justification

In contrast, the references to military necessity in the Hague Convention immediately raised a debate about the nature of these references and the law of war at large. To understand the significance of this debate in relation to military necessity expressed in the Hague Convention, it is necessary to look into what was known as *Kriegsraison*.[9] The idea preceded the Hague Convention. Briefly put, the idea advocated that when certain means were necessary to secure the surrender of the enemy, they were justified. Though the idea nominally required the assessment of necessary means against the end sought, it easily led to the argument that "the end justifies all means" . It was as if each state was given license to get rid of the rules and restrictions in the law of war when they were inconvenient in the light of the purposes they pursued. Military necessity in this sense would thus operate effectively as an unlimited justification.

The unconditional acceptance of military necessity in this sense was a plain challenge to this branch of law. Given this challenge, how the Hague Convention – with its explicit references to military necessity – theoretically operated against, or possibly supported, military necessity as an unlimited justification was a considerable concern.[10] In this

regard, the Hague Convention adopted two types of explicit reference to military necessity. First, as has previously been mentioned, the preamble declared that the states were inspired by their desire to reduce "the evils of war so far as military necessities permit" . Second, there was a provision in the Hague Regulations attached to the Convention[11] that explicitly referred to the idea of military necessity. Article 23(g) of the Hague Regulations stipulated that "in addition to the prohibitions provided by special Conventions, it is especially forbidden to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war." Neither reference appears to have been controversial *per se* in the first Peace Conference in 1899. Both were maintained in spite of the amendment of the Convention in the second Conference in 1907.

Some authors of this period saw the codification of the law of war in the Hague Conferences as an important step towards moving away from the logic of military necessity as an unlimited justification.[12] According to them, since the preamble of the Hague Convention explicitly claimed that military necessity had been taken into account in this codification, it could no longer be invoked to justify breaches of the codified rules. On the other hand, there were also authors who continued to emphasize the legitimizing role of military necessity in the Hague Convention: military necessity expressed in the preamble was a clear and general statement that when there was military necessity, violence was permitted.[13] However, from this perspective the second reference to military necessity in Article 23(g) of the Hague Regulations required an explanation. It appeared to restrict the scope of the application of military necessity to this particular provision and to strictly selected circumstances described by the provision. This would not constitute a logical consequence of what the preamble claimed, according to this view. Thus there was an effort to stress the expression of military necessity in the preamble, which led to a contention that the seemingly restrictive Article 23(g) "would not undermine the freedom of action of belligerents in certain extreme situations" .[14] There were also contentions to escape the perceived dilemma of the two types of military necessity by introducing a third type of necessity into the argument, which was to be found outside the Hague Convention. According to these, regardless of the intended effect of the preamble and of the scope and purpose of Article 23(g), necessity argument external to the Convention might still justify a violation of this and other articles.[15]

This academic debate raised by the references to military necessity in the Hague Convention had two bearings on the following examination of contemporary jurisprudence. First, those who saw a limiting effect in military necessity codified in the preamble of the Hague Convention also faced an issue that required an answer. In this vision, too, the second reference in the Hague Convention to military necessity, namely, Article 23(g) of the Hague Regulations, was problematic. It appeared to compromise the effort to exclude military necessity as an unlimited justification and possibly restore a right of completely subjective appreciation in this provision. It totally contradicted the purpose of the Convention, which was supposed to be an effort to restrain this kind of unlimited and subjective right.[16] Therefore, the reference to military necessity in Article 23(g) was criticized as a backward step. This criticism is to be repeated almost word for word by contemporary authors with respect to this type of provisions, found in abundance in subsequent treaties. This will therefore be retained as a point of reference for the examination of "Military Necessity in Treaty Provisions" below.

Second, the practical result of the views that did not see a definite limiting factor in the references to military necessity in the Hague Convention was, if not identical, very

close to the argument of military necessity as an unlimited justification.[17] As with military necessity as an unlimited justification, those who subscribed to these views practically admitted that the ends justified all the means.[18] The views effectively meant that the needs of states expressed as military necessity, determined by states themselves, could remove the law of war.[19] States were ultimate masters of the law of war in this vision, in spite of the rules and restrictions imposed by the Hague Convention. The spectre of military necessity as an unlimited justification and the vision of international law in which states are ultimate masters will be revisited in the contemporary debate over the nuclear weapons. This will be discussed in the examination of "Military Necessity as a Principle" below.

Military Necessity in Contemporary Jurisprudence

Military Necessity in Treaty Provisions

Examples and Criticisms Article 23(g) of the Hague Regulations, previously reviewed, is not the only example of an explicit reference to military necessity in treaty provisions. On the contrary, the four Geneva Conventions, its Additional Protocols and other treaties[20] continue to provide military necessity in several formulations. They provide that when there is military necessity, or when there are military considerations, actions not in conformity with the obligations stipulated are nonetheless permitted. The examples are abundant and the short survey below is in no way a comprehensive one.

Concerning provisions for civilian population, a well-known example of military necessity is found in Additional Protocol I.[21] It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population.[22] However, a derogation from these prohibitions is possible for a party to the conflict "in the defence of its national territory against invasion" , when this derogation within such territory under its own control is "required by imperative military necessity" .[23] Well-known examples in the Fourth Geneva Convention concern the obligations in occupied territories. The population in occupied territories is not supposed to be transferred or evacuated, but this is nonetheless rendered possible when "imperative military necessity so demands".[24] Extensive destruction and appropriation of property in occupied territories are equally unlawful, except when they are rendered "absolutely necessary by military operations".[25]

Military medical establishments are protected by the First and the Second Geneva Conventions, and the civilian hospitals are protected by the Fourth Geneva Convention. However, all the relevant provisions allow exceptions under military necessity: "urgent military necessity" permits the use of the medical establishment of the armed forces for non-medical purposes;[26] if fighting occurs on board a warship, the sickbays and their equipment are placed under a similar rule of permission by "urgent military necessity";[27] the medical units and establishments of the armed forces must be indicated by distinctive emblems, but only "in so far as military considerations permit it";[28] the same obligation for civilian hospitals has to be complied with only "in so far as military considerations permit it".[29] Concerning prisoners of war, "imperative military necessity" may be invoked to prohibit the visits carried out by protecting powers.[30] The visits to civilian internees by protecting powers may also be restricted for "reasons of imperative military necessity" .[31] In a more general manner, all four Conventions provide that military necessity is a legitimate reason to restrict the activities of protecting powers.[32]

The meaning of different qualifiers included in the description of military necessity, such as "imperative" and "absolute" , is not obvious. For some commentators, terms such

as "imperative" in treaty provisions are superfluous, in the sense that these are inherent characteristics of military necessity in any case, no matter how it is described by the qualifiers.[33] Yet others maintain that the choice from a variety of terms cannot be completely accidental[34] and has consequences: the "addition of the adverb/adjective indicates that when military necessity is weighed, this has to be done with great care" .[35] Where this great care leads to, however, is not clarified.[36] Apart from this uncertainty, most provisions leave the provided military necessity to be assessed by those in need of this justification themselves. In other words, there is no objective scrutiny of this evaluation of necessity when the provisions are implemented.[37] For example, when a state engaged in an armed conflict decides to restrict activities of the protecting power on the basis of military necessity according to the relevant provisions, inevitably it is this state and not the protecting power who determines military necessity.[38] This is also the case in occupied territories: the occupying power is the sole administrator who is in a position to judge its own military necessity.

Because of these problematical aspects of military necessity in treaty provisions in contemporary international humanitarian law, these provisions are criticized. This criticism is identical to that formulated vis-à-vis Article 23(g) of the Hague Regulations at the time of the 1899 Hague Conference: international humanitarian law tries to limit the violence, but military necessity in specific provisions reintroduces into the operation of the law what it tries to exclude;[39] the practical effect of this kind of military necessity is that the law defers to violence, in spite of the professed purpose of this body of law to do the contrary.[40]

Jurisprudence How these treaty provisions with military necessity are applied to concrete cases by courts today has to be assessed against this background. Three cases related to armed conflict in recent years dealt with one of the provisions of military necessity referred to previously: Article 53 of the Fourth Geneva Convention. The article reads as follows.

> Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.[41]

The provision was referred to by the Eritrea Ethiopia Claims Commission in one of its awards in 2004.[42] During the armed conflict between Eritrea and Ethiopia, an Ethiopian town called Zalambessa was occupied by Eritrea for approximately two years. The recapturing of this town by the Ethiopian armed forces in May 2000 revealed that "scarcely a single building remained intact" .[43] Citing Article 53 of the Fourth Geneva Convention, the Commission ruled that Eritrea was liable for property destruction in this town and gave two reasons why this case could not be justified by military necessity.[44] First, Eritrea itself made no sign that it considered the situation to fall under this article and military necessity. Second, the majority of the destruction took place in the period after Ethiopia's military advances. No evidence was advanced to the effect that military operations against Ethiopia rendered the destruction in the town necessary.

In the *Armed Activities on the Territory of the Congo* case[45] in the ICJ in 2005, a claim concerning the destruction of property by an occupying power was also upheld in the light of Article 53 of the Fourth Geneva Convention. The case concerned a protracted armed conflict in the Democratic Republic of the Congo in 1990s, in which the armed forces of several neighbouring states were involved. Uganda was one of them and was the

respondent in this case. The Democratic Republic of the Congo asserted that the Ugandan armed forces had destroyed villages and houses of civilians in the Eastern part of the Congolese territory. The ICJ found that Uganda was indeed an occupying power, at least in a part of the indicated territory, and that it had violated Article 53 of the Fourth Geneva Convention.[46]

In the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* in 2004,[47] the Court cited Article 53 of the Fourth Geneva Convention and declared that Israel was responsible as an occupying power for its destruction of property under this article. Specifically, the Court was of the view that "the construction of the wall has led to the destruction or requisition of properties under conditions which contravene the requirements of Articles 46 and 52 of the Hague Regulations of 1907 and of Article 53 of the Fourth Geneva Convention" .[48] Though the Court was well aware of the exception of military necessity that could be invoked under Article 53, it was "not convinced that the destructions carried out contrary to the prohibition in Article 53 of the Fourth Geneva Convention were rendered absolutely necessary by military operations" .[49]

Assessment of Jurisprudence The three cases that applied Article 53 of the Fourth Geneva Convention in recent jurisprudence call for two observations. First, they partly vindicate the criticism that highlights the ambiguity in this provision. Despite the application of Article 53, the cases do not clarify the criteria of military necessity in detail. In particular, the two cases discussed in the ICJ do not offer any clue as to the factors that led the Court to reject the consideration of military necessity of Article 53, or what would have constituted military necessity in the given situations. In neither cases was an examination of concrete property destruction carried out. One can only conjecture the reasons for this omission. In the *Armed Activities on the Territory of the Congo* case there was admittedly a reason not to explore military necessity in any detail: Uganda did not plead military necessity under this particular article, since it did not consider itself as the occupying power of the region in question.[50] In addition, the Court's examination indicated that in some cases civilians also suffered from indiscriminate shelling by the Ugandan forces.[51] Where the destruction of houses and villages was a result of indiscriminate attack, military necessity was irrelevant to the legal assessment: indiscriminate attack is prohibited absolutely.

In comparison to the *Armed Activities on the Territory of the Congo* case, the absence of explanation concerning the criteria of military necessity is more difficult to defend in the *Wall Advisory Opinion.*[52] Israel did advance various kinds of arguments related to military and security considerations. Even though this was not a contentious case brought against Israel and the Court was only responding to a request for an advisory opinion by the General Assembly, the advisory opinions customarily address the points of law raised by states in defence of their actions. This care does not appear to have been sufficiently taken in the *Wall Advisory Opinion*. The Court could have looked, for example, at the actual property destruction that took place, then could have proceeded to examine whether the location and route of the wall that produced such property destruction was absolutely needed by the Israeli army in its military operations under this article.[53] While the conclusion is likely to have been the same, such a care could have provided a better justification of the conclusion. There is also a visible gap between the Court's laconic treatment of military necessity and its clear statement of a condition concerning state of necessity in the regime of state responsibility. Without a definite confirmation of the

applicability of state of necessity to the situation in question, the Court did affirm one of the criteria in invoking state of necessity: the action taken must be "the only way for the State to safeguard an essential interest against a grave and imminent peril" .[54] There is no parallel explanation concerning the criteria for military necessity of Article 53 of the Fourth Geneva Convention in the Opinion.

In the *Wall Advisory Opinion* it may also be the very fact of years of occupation by Israel that reduced the urgency of the examination of military necessity. Though the Fourth Geneva Convention ceases to apply one year after the general close of military operations, some of the provisions continue to bind the occupying power beyond that timeframe, for the duration of the occupation.[55] Article 53 is one of these provisions. Nevertheless, invoking military necessity by this provision is likely to become incrementally difficult as the time passes after the general close of military operations.[56] Consequently, this might have been one of the reasons why there was no detailed discussion of military necessity of Article 53 in the *Wall Advisory Opinion*.

The second observation concerning these cases is that the vindication of the criticism of military necessity in a treaty provision is only partial. A concern that treaty provisions with military necessity constitute an open invitation for the subjective appreciation and unlimited justification finds no support in these cases. On the contrary, the cases examined above showed that Article 53 of the Fourth Geneva Convention could hold an occupying power responsible for its violations, in spite of its criticized loophole of military necessity. The explicit possibility of justification by military necessity provided in the article did not, in these cases, mean the unconditional and unlimited acceptance of property destruction that had been carried out. Moreover, the assessment of military necessity is apparently subject to a posterior legal scrutiny, and none of the parties to the above-mentioned cases contested this point. Neither the parties nor the courts adopt the view that military necessity in a treaty provision has to remain a matter of subjective appreciation of those who might invoke it. The alleged destructive power of military necessity over international humanitarian law is not in these specific treaty provisions with military necessity.

Military Necessity as a Principle

In contrast to the continued acceptance of military necessity provided in treaty provisions and its affirmed role in jurisprudence, military necessity as an unlimited justification is completely rejected in the contemporary literature. It is rejected because of its practical endorsement of the argument that "the end justifies all means" , which contradicts the very purpose of this branch of law. Military necessity as a principle continues to be a valid principle, but today it is understood as the idea that renders the military actions legitimate *unless the actions in question are otherwise prohibited by the law of armed conflict*.[57] In other words, military necessity as a principle of this body of law is understood as a limited justification. Understood this way, military necessity can also be described as a restraining factor of violence and not as an encouraging factor: it prohibits violence which is unnecessary.[58] It is also military necessity in this sense that serves as an underlying criterion of a series of rules and principles in international humanitarian law. It represents the side of military concerns in determining the balance between military considerations and other types of considerations when certain rules and principles are applied to concrete cases. For example, the principle of proportionality is a matter of assessing military necessity in this sense.[59] The principle that prohibits the

unnecessary suffering as means and methods of warfare also involves the assessment of military necessity as a balancing factor.[60]

One case that resuscitated the spectre of military necessity as an unlimited justification was the 1996 Advisory Opinion, in which the ICJ tackled the question of the use of nuclear weapons.[61] The Opinion provides no explicit mention, let alone endorsement, of military necessity as an unlimited justification. Nonetheless, because of the notoriously ambiguous conclusion that the Court drew concerning the legality of the use of nuclear weapons, one cannot avoid discussing military necessity in this context.[62] The relevant part of the well-known conclusion of this Advisory Opinion was twofold. First, the use of nuclear weapons would generally be contrary to the principles and laws of humanitarian law. Second, however, "the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake" . [63]

Admittedly, the Court could have implied by this twofold conclusion that there may be cases where the use of nuclear weapons does not produce breaches of humanitarian law, even though "generally" it tends to.[64] However, the Court also stated that it is "in view of the current state of international law" that it is unable to decide.[65] This particular formulation leaves room to argue that the Court implied something different. One possible interpretation of this formulation is that the use of nuclear weapons is "generally" unlawful under international humanitarian law unless there is a special justification for this unlawful action. This interpretation inevitably leads to the question: what could this macabre justification be? Given the first half of the formulation of the Court, this argument of exception would have to be a valid exception in this particular branch of law, namely, international humanitarian law.[66]

Along this line, two further possibilities are debated. They both implicitly rely on the argument that "the end justifies the means", a recurrent but problematic theme of military necessity. First, a number of judges of the Court either supported, or pointed out the possibility of, the reading of this conclusion as pointing to the self-defence that would exceptionally justify the breaches of international humanitarian law. [67] If this interpretation were correct, the question would indeed be that of means and end. The correctness of the end, namely, self-defence, is used to mend the breaches of international humanitarian law in this unusual and much criticized blending of *jus ad bellum* and *jus in bello*.[68] Second, one could also argue that the justification does not purely come from the lawfulness of self-defence, because of the special place given to "the very survival of a State" at stake in the formulation of the Court.[69] If this were the justification for breaches of international humanitarian law by the use of nuclear weapons, one would still be left with the argument that "the end justifies the means" . The end to be weighed in the formulation of the Opinion is the survival of the state and the means to be measured against this end is the use of nuclear weapons. What is problematic in these interpretations is their practical admission that states are given a power to put aside the rules of international humanitarian law when they do not suit their actions with a justified end.

The purpose of the present analysis is not to determine the most satisfactory explanation of the conclusion of the Court concerning the use of nuclear weapons. In fact, all the possible implications explored above are unsatisfactory in one way or the other. The analysis is meant to provide an example where military necessity as an unlimited justification and the archaic vision of international law, in which states are masters of law, are not totally irrelevant in a contemporary context. This vision of international law glimpsed in the *Legality of Nuclear Weapons* case is discussed as that of the *Lotus*

principle.[70] Whether it is called the *Lotus* principle or military necessity is not the point. What has to be realized is a tremendous tension this vision creates for international humanitarian law.

Martens Clause in Contemporary Jurisprudence

Doctrinal Background

Despite its modest origin, over time the Martens clause came to represent one of the foundational ideas of international humanitarian law. Today, it is commonly employed for matters other than combatant status, such as the protection of civilian populations or the restriction concerning new technologies, as the following examination of recent jurisprudence shows. The contemporary significance of the functions attributed to the Martens clause in jurisprudence is best understood in the light of the doctrinal debate about customary international law.

The Martens clause has also been taken from the Hague Convention and incorporated into subsequent treaties. The modern version of the Martens clause thus appears in the so-called denunciation clauses of the four Geneva Conventions.[71] It is also found in a number of treaties regulating specific weapons.[72] Additional Protocol I[73] and Additional Protocol II[74] to the Geneva Conventions have also incorporated the Martens clause. However, the formulation adopted in the two Protocols are not identical. This difference in the formulations of the Martens clause adopted in the two instruments offers a convenient introduction to the examination of this clause in recent jurisprudence. The Martens clause of Additional Protocol II omits the reference to "the principles derived from established custom" . Thus, unlike the Martens clause in Additional Protocol I or any other instruments mentioned above, it just states 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 the public conscience" . The omission occurred because "[I]t was apparently felt that the regulation of non-international armed conflicts was too recent a matter for State practice to have sufficiently developed in this field"[75] in the Diplomatic Conference that adopted the two protocols. This record is indicative of two issues for international humanitarian law arising out of the source doctrine of international law.[76] They are directly related to the ways in which the Martens clause is used by courts today.

The first doctrinal issue concerns the two-element theory of customary international law. According to this orthodox theory of customary international law, *opinio juris* and state practice are needed in its identification.[77] The requirement of state practice is that there is sufficiently constant and widespread practice that conforms to the proposed rule. Identifying customary rules according to this criterion of state practice, however, can be a difficult task in international humanitarian law for the following reasons. For one thing, as the anecdote above suggested, it is only with a very modern perspective that one is able to speak of state practice in non-international armed conflict.[78] Historically, the law of war was the law between states and was not conceived as regulations applicable to fighting between a government and rebels, or a conflict among warring factions within the same state. This is the background of the above anecdote. Moreover, if state practice for the purpose of customary law is narrowly construed as meaning the actual compliance with the proposed rule on a very constant basis, the notorious compliance record in international armed conflict could be an immense obstacle in the identification of customary rules.[79] For these reasons, the doctrinal requirement of state practice in the

identification of customary international humanitarian law is a challenge. It is this challenge against which the Martens clause is called upon by courts.

The second doctrinal issue concerns the place of general principles in the formal source of international law. In the formulation of the Martens clause in Additional Protocol II, the principles of humanity and the dictates of the public conscience are severed from custom. As it is, there is room to argue that this part of the expressions of the Martens clause is not customary principles. The formal source of international law as announced by the ICJ Statute does not exclude this possibility, either. "General principles of law" are enumerated as an independent source besides treaties and customary international law.[80] But the classic understanding of this source is restrictive and has little to do with the Martens clause. In a classic doctrine, these are general principles that are shared by a majority of municipal legal systems and are mainly procedural rules of courts in practice.[81] For the purpose of the examination of the Martens clause, the more interesting view is that these general principles could encompass generic principles of law, without a reference to municipal legal systems. To distinguish them from the common rules of municipal legal systems, they can be called either simply general principles or general principles of international law.[82] As it is pointed out by many authors, the alleged general principles are frequently the principles that are in truth found in customary international law.[83] Nevertheless, general principles that derive from neither custom nor common rules of municipal law are theoretically conceivable. One of the ways in which the Martens clause is called upon by courts today concerns this type of general principles.

The reference to the Martens clause in contemporary jurisprudence is examined below[84] according to the three functions it appears to fulfil: affirmative function; attenuating function; and dislocating function. The affirmative function designates the use of the Martens clause as a reminder of customary international law and its role. The attenuating function designates the instances where the Martens clause is called upon to change the weight attached to state practice in the two-element theory of customary international law. The dislocating function designates the instances where the Martens clause appears to dislocate customary international law as a source of obligations and replace it with general principles.

Affirmative Function: Role of Customary International Law

The first and uncontroversial function of the Martens clause in jurisprudence is an affirmation of customary international law: customary international law is applicable regardless of existence, applicability and contents of treaty instruments.

In the *Legality of Nuclear Weapons* case, the ICJ stated that the Martens clause served "as an affirmation that the principles and rules of humanitarian law apply to nuclear weapons" .[85] This was indeed an affirmation of customary international law, and an important affirmation because of the reservations to Additional Protocol I by states such as the United Kingdom and France. Both nuclear powers limit the applicability of Additional Protocol I to conventional warfare and exclude nuclear weapons from its scope by their reservations.[86] Given these known attitudes of a number of nuclear powers, the point made by the ICJ by referring to the Martens clause is clear. Regardless of the validity of these reservations, customary international humanitarian law continues to govern the matter. The Martens clause in this case is used to recall and affirm the role of customary international law, regardless of the status of treaty rules.

The affirmative function of the Martens clause is also observed in the ICTY. The function of the Martens clause in many cases of the ICTY is an affirmation of customary international law in the context of non-international armed conflict, where the defence tries to cast a doubt upon certain rules by highlighting the absence of these rules in Additional Protocol II. The response of the Trial Chamber to the defence in the *Hadžihasanović* case in 2002 is, among others, a typical use of the Martens clause for its affirmative function.[87] One of the charges in the case was that the accused, as superiors, did not punish the commission of offences by their subordinates. The defence argued that international law in 1991, at the time of the alleged omissions they were accused of, did not provide for criminal liability of superiors for omissions in non-international conflict.[88] As it is, Additional Protocol II, which is applicable to non-international armed conflict, has no provisions concerning command responsibility. In contrast, there are rules of command responsibility in Additional Protocol I,[89] which is applicable to international armed conflict. According to the defence, this contrast between the two Protocols concerning command responsibility was a clear sign that states never intended the application of these rules to non-international conflicts.[90] In response, the Trial Chamber admitted that principles related to command responsibility are not always included in treaties.[91] However, according to the Chamber there were certain fundamental principles, even though they were not included in the treaties.[92] The Chamber went on to stress that, in that regard, the Martens clause was of fundamental importance.[93] The Martens clause served to prevent *a contrario* interpretation of silence in a treaty:[94] silence in the treaty did not result in automatic permission, because rules might exist as customary international law even in such a case. Consequently, the critical importance attached to the difference between the provisions of the two Additional Protocols by the defence, and the alleged importance of the absence of command responsibility in Additional Protocol II in determining the applicable rules, were refuted.[95] The Chamber concluded that the doctrine of command responsibility was applicable in a non-international armed conflict under customary international law in the period in question.[96]

The same affirmative function of the Martens clause was also clear in the later phase of the same *Hadžihasanović* case in 2004.[97] One of the charges was that "wanton destruction of cities, towns or villages not justified by military necessity" took place in some municipalities. The defence again argued that the charge was based on a rule applicable only in an international armed conflict. In its view, consequently, the Prosecution must either show that there was indeed an international armed conflict or that the prohibition of wanton destruction was applicable to non-international conflict, too.[98] In response, the Chamber compared Additional Protocols I and II. As in the case of command responsibility, the Chamber confirmed that only Additional Protocol I provided for a general protection of private property against wanton destruction.[99] It even confirmed that the omission in Additional Protocol II was conscious choice after the explicit discussion whether or not to insert this rule to Additional Protocol II. The reference to the Martens clause appears immediately after these confirmations.[100] Though the reference is brief, the point made by the reference in this particular context is clear: the absence of a written provision, even if a desired one, does not prevent the rule from existing in parallel in the form of customary international law. The Chamber concluded that the wanton destruction of cities during a non-international conflict was prohibited by customary international law.[101]

This affirmative function of the Martens clause is uncontroversial. The only criticism would be a stylistic one concerning the formulations of the courts, that the clause then

"states the obvious and therefore pointless" .[102] But nothing prevents the courts from formulating the obvious by referring to the Martens clause which has gained the iconic power to highlight the importance of customary international law.

Attenuating Function: Role of State Practice in Customary International Law

A more creative, and accordingly more controversial, function with regard to customary international law is attributed to the Martens clause by the ICTY. It has resorted to the Martens clause to modify the weight attached to state practice in the two-element theory of customary international law. Concretely, the Martens clause is said to have an attenuating effect on the criterion of state practice, thereby enlarging the possibility of the identification of customary international law even when constant state practice is hard to demonstrate. The clearest articulation of the attenuating function was made by the Trial Chamber in the *Kupreškić* case in 2000.[103]

The Trial Chamber discussed the Martens clause in relation to the prohibition of reprisal against civilian population and objects. The reprisal against civilians is forbidden by Additional Protocol I[104] and one of the tasks of the Trial Chamber was to determine whether this prohibition was also a customary rule. The Chamber admitted that it was unable to support the rule with a widespread and constant state practice. However, it declared that this was "an area where *opinio juris sive necessitatis* may play a much greater role than *usus*, as a result of the aforementioned Martens Clause" .[105] In this way, the Trial Chamber moved on to the examination of *opinio juris* without a detailed examination of state practice and pronounced that the prohibition of reprisals against civilians was a customary rule. The Martens clause in this case attenuates one of the requirements in the formation of customary international law.[106]

Admittedly, there is no other case that professes the attenuating function of the Martens clause as articulately as the *Kupreškić* case.[107] Nonetheless, there are a number of cases where the ICTY is either unable or unwilling to discuss state practice in detail, in which the Martens clause is referred to as if it compensated for the absence of this discussion.[108] This overall tendency of the ICTY jurisprudence has provoked the criticism that "the Tribunal is painting with a fairly broad brush when it comes to the establishment of customary international law, particularly with regard to non-international conflicts" .[109] The underlying difficulty is unmistakably that of the two-element theory of customary international law and its requirement of state practice. The attenuating function of the Martens clause proposed in the *Kupreškić* case is an attempt to find an answer to this difficulty, and to provide a coherent response vis-à-vis the criticism.

On one hand, the attenuating function of the Martens clause is criticized for not being supported by any precedent or confirmed by subsequent decisions. Those who refuse to accept the attenuating function of the Martens clause criticize the *Kupreškić* case that the Chamber should have looked into state practice more thoroughly.[110] On the other hand, the supporters of the attenuating function of the Martens clause highlight the need to address humanitarian needs in this branch of law even before the consideration of such needs crystallizes into custom.[111] It was perhaps unfortunate that the concrete issue dealt with in the *Kupreškić* case was the prohibition of reprisals against civilians. The affirmation of this prohibition as a customary rule proved to be extremely controversial because of the existing contrary practice: certain states explicitly and unequivocally express their position that there is no such customary prohibition.[112] The attenuating

function of the Martens clause can also be controversial in the context of international criminal law as it raises the question of the principle of legality.

Dislocating Function: Role of General Principles

With regard to customary international law and the source doctrine, there is another controversial function that is arguably attributed to the Martens clause. While it is also an answer to the difficulty produced by state practice in the two-element theory, it is entirely a different type of answer, in that it proposes a departure from customary international law through the Martens clause. Since customary international law is thus dislocated, such use of the Martens clause can be called a dislocating function.

In the *Military and Paramilitary Activities in and against Nicaragua* case in 1986, common Article 3 of the Geneva Conventions was found by the ICJ to be applicable to the case as "fundamental general principles of humanitarian law" .[113] There was no examination of state practice. In place of such an examination, the ICJ offered the Martens clause and "elementary considerations of humanity" .[114] Similarly, in the *Legality of Nuclear Weapons* case, in identifying the principle of civilian protection and the prohibition of unnecessary suffering as principles of international humanitarian law, the ICJ omitted the examination of state practice. There was only a generic description of the wide accession to the Hague and Geneva Conventions. In place of the examination of state practice, the ICJ again offered the Martens clause[115] and "elementary considerations of humanity" .[116]

Although the Martens clause is cited in place of state practice, unlike the *Kupreškić* case of the ICTY discussed above, nowhere in these cases did the ICJ suggest an attenuating function of the Martens clause. Because of the way and the location in which the Martens clause is referred to in these cases, the Martens clause looks as if it is the direct source of the identified rules. If so, the identified rules are norms that are not based on custom. The paradigm of reasoning in these cases is no longer customary international law. Customary international law as a source of obligations is dislocated by the Martens clause, and possibly by the elementary considerations of humanity, and its place is filled by general principles they themselves embody.

Those who refuse to see the dislocating function in the Martens clause in the *Nicaragua* case and continue to see the case in the paradigm of customary international law assert that "the Court should be reproached for the virtual absence of discussion of the evidence and reasons supporting this conclusion" .[117] The missing discussion is that of state practice. Similarly, those who refuse to see the dislocating function of the Martens clause in the *Legality of Nuclear Weapons* case criticize the Opinion on the ground that "some of its conclusions are not easy to justify by reference to the criteria for the determination of rules of customary international law" .[118] This criterion is again state practice. These views, which refuse to see the dislocating function of the Martens clause and continue to locate the reasoning of the Court in customary international law, cannot be entirely excluded. In fact, in both cases there are references to custom: in the *Nicaragua* case, the result of the discussion in question without a reference to custom did lead to the conclusion that there was a breach of obligation "under customary international law";[119] the identified principles in the *Legality of Nuclear Weapons* case were nominally described as "intransgressible principles of international customary law" .[120] Thus, it is not impossible to argue that the paradigm of reasoning continued to be that of customary

international law in these cases. It is also true that the cases do not make any explicit assertion of the dislocating function of the Martens clause.

At the same time, the principles of international humanitarian law identified in these cases with the aid of the Martens clause are given such special treatment, both in terms of the requirement of state practice and the stress of the fundamental value they embody, that there is something artificial about squarely locating the reasoning in the paradigm of customary international law. The possibility that the Martens clause had a function of shifting paradigms from customary international law to that of general principles in these two cases is supported,[121] or at the very least earnestly discussed,[122] by commentators.

The proposition of the dislocating function of the Martens clause and the resulting paradigm shift to general principles is another attempt to answer the challenge resulting from the two-element theory of customary international law, that requires widespread state practice in identifying customary international humanitarian law.[123] While being an answer, the dislocating function of the Martens clause is potentially a source of a different type of tension. Customary international law is supported by consensus, even though its formation does not require unanimous and explicit consent of all states. Consensus is reflected in the custom. General principles – to which the Martens clause calls the attention – are not supported by consensus in the same way. Taken at its face value, the dislocating function of the Martens clause implies a revolutionary vision of international law diametrically opposed to the vision of law discussed under military necessity as an unlimited justification.[124] In the latter vision, states were ultimate masters and they practically had a complete control over international humanitarian law. In the vision implied by the dislocating function of the Martens clause, states lose this control completely.

Conclusion

The Martens clause and military necessity are often described as principles representing the two sides of balancing in international humanitarian law, namely, humanitarian concerns and military considerations. Both of them have valid places in contemporary international humanitarian law, and this is confirmed by contemporary jurisprudence. The valid and uncontroversial use of the Martens clause in contemporary jurisprudence is the affirmation of customary international law by this clause. The Martens clause stresses that a particular wording in treaty provisions or a particular status of the treaty does not diminish or change the applicable rules under customary international law. The valid and uncontroversial place of military necessity was observed in the application of treaty provisions with military necessity. The examined cases showed that such a provision was nonetheless subject to posterior legal scrutiny, and that it did not function as an unlimited justification.

At the same time, both of them also possess highly controversial aspects. The juxtaposition of the Martens clause and military necessity is perhaps most significant when these controversial aspects are juxtaposed, because it showed two, completely different visions of international humanitarian law. The lingering spectre of military necessity as an unlimited justification can only make sense in a vision of international law in which states are ultimate and sole masters of law: states are not only creators of international humanitarian law but also effectively holders of a power to avoid the rules according to their convenience. Military necessity as an unlimited justification is thus a cloak to place the interests of states above everything. In contrast, the most radical

proposition of the Martens clause glimpsed in the dislocating function is that there are norms that bind the states even though these norms are not supported by the consensus of states demonstrated through custom or treaties. The proposition is only possible in a vision in which states are no longer the sole creators and masters of law. The Martens clause, together with the elementary considerations of humanity, advocates that the moral and humane dimension be given a place regardless of interests of states. Neither vision of international humanitarian law has an overwhelming support of the international community today, as it is clear in the conclusion of the *Legality of Nuclear Weapons* case. The technical controversies of military necessity and of the Martens clause described in this chapter are only symptoms of these split visions, and there is no quick remedies to these technical issues without a decision on the fundamental vision.

Endnotes

[1] U.K. Ministry of Defence (2004), 21-24; Bothe (2004), 633-34; Rogers (2004), 3-7; Pustogarov (1999), 133; Horn (1990), 168; Draper (1973), 132-33.
[2] 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 (hereinafter referred to as the Hague Convention).
[3] Kalshoven (2005), 366; de Visscher (1917), 100.
[4] For a concise explanation, see Cassese (2000), 193-98; Kalshoven (2005), 58-59.
[5] This is not the expression used in the Hague Conference, but is a convenient term to describe the issue. See Neff (2005), 208-10; Best (1999), 627; Cassese (2000), 193-98.
[6] The clause is in fact immediately followed by the explanation in the same preamble "that it is in this sense especially that Articles 1 and 2 of the Regulations must be understood."
[7] de Martens (1900), 24-29.
[8] Nussbaum (1952), 60-61; Fleck (2003), 22-23.
[9] For the explanation of *Kriegsraison* (or *Kriegsräson*), see Nippold (1920), 35-69.
[10] Strupp (1914), 3-4; Huber (1913), 362-363.
[11] Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899 (Annex to the Hague Convention (II), hereinafter referred to as the Hague Regulations).
[12] Normand and af Jochnick (1994), 63-65; de Visscher (1917), 101.
[13] For a summary of this side of the argument, see v. Knieriem (1953), 321-22.
[14] Meurer (1907), 11.
[15] Strupp (1914), 7-8. Strupp denounces *Kriegsnotwendigkeit*, that more or less corresponds to military necessity as an unlimited justification discussed in this chapter, but moves on to argue that *Notstand,* which is distinguished from *Kriegsnotwendigkeit*, may justify the acts otherwise prohibited by the Hague Convention.
[16] de Visscher (1917), 101.
[17] Ibid., 98.
[18] Mérignhac (1903), 145.
[19] Ibid., 145.
[20] *E.g.*, Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Second Protocol.
[21] Protocol additional to Geneva Convention of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts [hereinafter referred to as Additional Protocol I]. See the ILC Commentary on the Articles on State Responsibility, Article 25 (Necessity), footnote 435, reproduced in Crawford (2002), 186.
[22] Additional Protocol I, Art. 54(2).
[23] Additional Protocol I, Art. 54(5).
[24] GCIV Art. 49.
[25] GCIV Art. 53, see *infra*.
[26] First Geneva Convention of 1949 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field [hereinafter referred to as GCI], Art. 33.

[27] Second Geneva Convention of 1949 for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea [hereinafter referred to as GCII], Art. 28.
[28] GCI Art. 42.
[29] Fourth Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War [hereinafter referred to as GCIV], Art. 18.
[30] Third Geneva Convention of 1949 relative to the Treatment of Prisoners of War [hereinafter referred to as GCIII], Art. 126.
[31] GCIV Art. 143.
[32] Art. 8/8/8/9 of the four Geneva Conventions, respectively.
[33] Green (2000), 253, footnote 3, in the discussion of Art. 62(1) of Additional Protocol I.
[34] Lubell (2005), 301-302.
[35] Dinstein (2004), 19-20.
[36] Ibid., 20.
[37] Bettati (2000), 53.
[38] Sandoz, et al. (1987), 101.
[39] Klabbers (2005), 12, in the version available in the website of the Erik Castrén Institute of International Law and Human Rights, at http://www.valt.helsinki.fi/blogs/eci/ (last visited on 19 June, 2006).
[40] Normand and af Jochnick (1994), 93.
[41] The main difference between Article 23(g) of the Hague Regulations and this provision is that the relevant section of the Hague Regulations applies in cases of hostilities, whereas Article 53 of the Fourth Geneva Convention is applicable under the occupation.
[42] Eritrea Ethiopia Claims Commission, Partial Award, Central Front, Ethiopia's Claim 2 (28 April, 2004).
[43] *Ibid.*, para. 71.
[44] *Ibid.*, para. 73.
[45] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 19 Dec. 2005, ICJ.
[46] *Ibid.*, para. 219.
[47] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, ICJ [hereinafter referred to as the *Wall Advisory Opinion*].
[48] *Ibid.*, para. 132.
[49] *Ibid.*, para. 135.
[50] *Armed Activities on the Territory of the Congo* case, para. 170.
[51] *Ibid.,* para. 208.
[52] This omission of the detailed examination of military necessity is criticized by commentators. Kretzmer (2005), 98; Imseis (2005), 109-114; Lubell (2005), 299, 304; Gross (2006), 400.
[53] See the Separate Opinion of Judge Buergenthal, para. 7. The Israeli High Court of Justice does this in cases such as *Beit Sourik Village Council v. the Government of Israel* (Supreme Court Sitting as the High Court of Justice, HCJ 2056/04, 30 June 2004) and *Mara'abe v. The Prime Minister of Israel* (Supreme Court Sitting as the High Court of Justice, HCJ 7957/04, 21 June 2005). Concerning the treatment of military necessity by the Israeli courts, see Orakhelashvili (2006), 136-37.
[54] *Wall Advisory Opinion*, para. 140.
[55] GCIV, Art. 6.
[56] Pictet (1958), 63.
[57] Among numerous literature that articulate this idea, see U.K. Ministry of Defence (2004), 20-23.
[58] Gardam (2004), 8; Ticehurst (2004), 316; David (2002), 238-39; Bothe (2004), 603. In these writings, military necessity is not juxtaposed to the Martens clause, but is placed together with the Martens clause as principles that restrain military excess in the balancing between humanitarian and military concerns.
[59] Green (2000), 350-352; Jaworski (2003), 175-206. For the principle of proportionality itself, see Chapter XII, *Proportionality*.
[60] Bettati (2000), 53; Gardam (2004), 70-73. See also the Dissenting Opinion of Judge Higgins in the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. (July 8) [hereinafter referred to as the *Legality of Nuclear Weapons* case]. For the prohibition of unnecessary suffering itself, see Chapter VIII, *Avoidance of Unnecessary Suffering and Superfluous Injury*.
[61] *Legality of Nuclear Weapons* case. Though the Court was asked to determine the legality of both the use and the threat of nuclear weapons, the discussion in this chapter will be limited to the former.
[62] Kohen (1999), 310-11; Müllerson (1999), 271-72; Greenwood (1999), 263-64.
[63] *Legality of Nuclear Weapons* case, para. 151 (*dispositif* (2)E).
[64] Greenwood (1999), 264; Condorelli (1999), 242.
[65] *Legality of Nuclear Weapons* case, para. 151 (*dispositif* (2)E).

[66] Though Kohen also discusses state of necessity and applies its conditions stipulated in the ILC Articles on State Responsibility (Kohen (1999), 306-308), it is submitted that state of necessity should be considered irrelevant. ILC Commentary to Article 25 of its Articles on State Responsibility makes it clear that state of necessity in this article is not intended to cover discussions of military necessity in humanitarian law. See para. 21 of the Commentary, reproduced in Crawford (2002), 185-86.
[67] Opinion individuelle de M. Guillaume, para. 8-9; Dissenting Opinion of Judge Higgins, para. 29; Opinion individuelle de N. Ranjeva.
[68] See the explanation in Condorelli (1999), 242-45; Greenwood (1999), 263-64. Both of them proceed to take a position that this blending of *jus ad bellum* and *jus in bello* was not intended by the Court.
[69] Kohen (1999), 304-305. See also Condorelli (1999), 242, who articulately rejects this view.
[70] See Opinion individuelle de M. Guillaume, para. 10; Dupuy (1999), 461. This is a term taken from the *S.S. Lotus* case of the Permanent Court of International Justice.
[71] GCI Art. 63(4); GCII Art. 62(4); GCIII Art. 142(4); GCIV Art. 158(4).
[72] See the Preamble of Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, as well as the Preamble of the Convention on Prohibitions and Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects.
[73] Additional Protocol I, Art. 1(2).
[74] Protocol additional to Geneva Convention of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts [hereinafter referred to as Additional Protocol II], Preamble.
[75] Sandoz, et al. (1987), 1341.
[76] The present chapter only discusses the implications for international humanitarian law. Both are examined in depth in the studies of sources of international law.
[77] The study of customary international humanitarian law by the ICRC also makes evaluations according to the two-element theory. See Henckaerts and Doswald-Beck (2005), xxxi-xxxix.
[78] Moir (1998), 350.
[79] The present author examined this issue elsewhere with a focus on the inter-war period, see Hayashi (2005), 106-14.
[80] ICJ Statute, Art. 38(1)b.
[81] Kolb (2000), 45-47. See also Thirlway (2003), 131.
[82] Dupuy (2006), 346-51; Kolb (2000), 54-57. As Kolb (2000), 56, points out, certain authors prefer to locate these principles outside Article 38 of the ICJ Statute. For the purpose of this chapter, this discussion, which is in fact that of the interpretation of Article 38, is not necessary, and therefore not pursued.
[83] Thirlway (2003), 132-33; O'Keefe (2004), 298-99.
[84] Since there are quite a few cases in the ICTY that refer to the Martens clause, the examination below contains only the representative ones.
[85] *Legality of Nuclear Weapons* case, para. 84. See Higgins (2006), 253.
[86] See the reservation text of the United Kingdom, para. a, as well as the reservation text of France, para. 2, available at http://www.icrc.ch/IHL.nsf (last visited on 9 December 2006). Though the United States is only a signatory, its attitude regarding the question of nuclear weapons and Additional Protocol is the same as those of the United Kingdom and France.
[87] *Prosecutor v. Hadžihasanović, Alagić and Kubura*, IT-01-47-PT (Decision on Joint Challenge to Jurisdiction, 12 November 2002) [hereinafter referred to as the *Hadžihasanović et al.* case].
[88] *Hadžihasanović et al.* case, para. 9.
[89] Additional Protocol I, Art. 86.
[90] *Hadžihasanović et al.* case, para. 18.
[91] *Ibid*., para. 65.
[92] *Ibid*., para. 64.
[93] *Ibid*., para. 64.
[94] *Ibid*., para. 160.
[95] *Ibid*., para. 160.
[96] *Ibid*., para. 179.
[97] *Prosecutor v. Hadžihasanović and Amir Kubura*, IT-01-47-T (Decision on Motions for Acquittal pursuant to Rule 98*bis* of the Rules of Procedure and Evidence, 27 September, 2004) [hereinafter referred to as the *Hadžihasanović and Kubura* case].
[98] *Hadžihasanović and Kubura* case, para. 93.
[99] *Ibid*., para. 98.
[100] *Ibid*., para. 98.

[101] *Ibid*., para. 104. See also *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-AR73.3 (Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98bis Motions for Acquittal, 11 March 2005). The Appeals Chamber agreed with this part of the conclusion by the Trial Chamber (para. 30). It noted the way the Martens clause was referred to by the Trial Chamber, too (para. 17).
[102] Cassese (2000), 192.
[103] *Prosecutor v. Kupreškić*, IT-95-16-T (Judgment, 14 January 2000) [hereinafter referred to as the *Kupreškić* case].
[104] Art. 51(6), Additional Protocol I.
[105] *Kupreškić* case, para. 527. In this context, *usus*, as opposed to *opinio juris*, is a synonym of state practice.
[106] Cassese (2004), 160-61. The case is also known for attributing a function to the Martens clause with regard to treaty interpretations. The topic of treaty interpretation is not pursued in this chapter: for details, see para. 525, the *Kupreškić* case, and Cassese (2000).
[107] For its part, the ICRC study of customary international humanitarian law cites the *Martić* case in 1996 and the *Kupreškić* case in 2000 as findings of customary rules "based largely on the imperatives of humanity or public conscience." Henckaerts and Doswald-Beck (2005), 523. For the reference to the Martens clause in the *Martić* case in 1996, see 108 ILM 39-52, at 46 (1998).
[108] See for example, *Prosecutor v. Furundžija*, IT-95-17/1-T (Judgment, 10 December 1998) and the way in which the prohibition of torture and the prohibition of rape were identified as customary rules stemming from the relevant rules of the Hague Regulations "read in conjunction with the 'Martens clause' laid down in the Preamble to the same Convention" (paras. 137, 168).
[109] Greenwood (2004), 601.
[110] Greenwood (2001), 556.
[111] Cassese (2004), 161; Cassese (2000), 214-15; Meron (2000), 88.
[112] See the delicate conclusion concerning the customary status of this prohibition in Henckaerts and Doswald-Beck (2005), 523. The *Martić* case in 1996, *supra* note 107 – another ICTY case which identified the prohibition of reprisals against civilians as a customary rule and included a reference to the Martens clause in its reasoning – also received very vocal criticism.
[113] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986, ICJ, para. 218 [hereinafter referred to as the *Nicaragua* case].
[114] *Nicaragua* case, para. 218. The earlier case in which the expression was used for the first time is Corfu Channel, (U.K v. Alb.), Merits, 1949, ICJ, p. 22.
[115] *Legality of Nuclear Weapons* case, para. 78.
[116] *Legality of Nuclear Weapons* case, para. 79.
[117] Meron (1987), 358.
[118] Greenwood (2003), 816.
[119] *Nicaragua* case, para. 292(8). See also Meron (2005), 819.
[120] *Legality of Nuclear Weapons* case, para. 79.
[121] Kalshoven (2003) articulately supports the view that the dislocating function was at work in the *Nicaragua* case. Verhoeven (1987), 1207-1208, is also convinced that relevant part of the *Nicaragua* case is about general principles and not customary rules, with an indication of the dislocating function of the Martens clause as a possible technical explanation. Pustogarov (1999), 131, expresses a very articulate support of the dislocating function of the Martens clause in the *Legality of Nuclear Weapons* case.
[122] Thirlway (1990), 9-13, sees it as possibly a reasoning based on general principles and not customary rules, but refrains from a definite conclusion. See also Koskenniemi (2005), 400-403.
[123] See the explanations in Dupuy (2006), 348.
[124] The present author owes the idea of the two visions of law and the tension between them to writings of Pierre-Marie Dupuy, in particular Dupuy (1999), 461.

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