

« Marten's Clause » Fortress of Protection in Integrated Customary International Humanitarian Law

شرط مارتنز حصن الحماية في القانون الدولي الانساني العرفي المتكامل

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Abstract:

Marten's Clause is a main principle, that aim to ensure the protection of people affected by armed conflict, even in situations not expressly covered by international treaties. This clause states that Respect for the values of humanity, public international conscience, and customary IHL is required of all parties participating in the war. Marten's Clause is a main tool for the protection of civilians and combatants in armed conflict. Despite the challenges facing its application, It continues to be the pillar of IHL and supports the advancement of human dignity in all circumstances.

Key words: Marten's Clause, IHL, Customary international law, Military combats, Civilians protection

المخلص:

شرط مارتنز هو مبدأ قاعدي في القانون الانساني الدولي، يتناول ضمان حماية الأشخاص المتأثرين بالنزاعات المسلحة، حتى في الحالات التي لا تغطيها المعاهدات الدولية بشكل صريح، ينص هذا الشرط على أن جميع الأطراف المتورطة في النزاع ملزمة باحترام قواعد القانون الدولي الانساني العرفي ومبادئ الانسانية وإملاءات الضمير العام. كما يعتبر شرط مارتنز أداة أساسية لحماية المدنيين والمقاتلين في النزاعات المسلحة،

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على الرغم من التحديات التي تواجه تطبيقه، إلا أنه يظل حجر الزاوية في القانون الدولي الإنساني، كما يساهم في تعزيز احترام الكرامة الإنسانية في جميع الظروف.

الكلمات المفتاحية: شرط مارتنز، القانون الدولي العرفي، القانون الدولي الإنساني، القتال العسكري، حماية المدنيين

1. Introduction

Marten's Clause is a crucial principle in IHL that carry out in the lack of certain clauses in treaties or other legal texts. It stipulates that international humanitarian law resorts to this principle to protect victims of armed conflicts when there is no explicit provision. Marten's Clause fills legal gaps and ensures basic protection for civilians and combatants in the absence of specific provisions. It originated in the 19th century and was included in the HC. Although not stated specifically in the GC, Marten's Clause is embodied in their principles of international humanitarian law. which applied during armed conflicts, it have a strong legal nature, constituting binding rules for all parties involved. These principles aim to balance military necessity with humanitarian considerations¹". As for The Hague Convention of 1907 stated that in cases not covered by existing regulations, the principles of international law should apply to inhabitants and belligerents. These principles are inherited from the refined peoples traditions, laws of humanity, and the standards of public morality²". From this introduction we can discuss the following question:

What is Marten's Clause's legal status from this perspective?

What does this clause in international humanitarian law consider it to be worth?

2. The notion of Marten's Clause

M.C is a main principle in IHL. It applies in cases not covered by existing treaties or legal texts, stipulating that international humanitarian law resorts to this principle to protect victims of armed conflicts when there is no explicit provision"³. Marten's Clause fills legal gaps and ensures basic protection for civilians and combatants in the absence of specific provisions. It originated in the 19th century and was included in

the Hague Conventions (1899, 1907). While not explicitly mentioned in the Geneva Conventions (1949), Marten's Clause is embodied in their principles of international humanitarian law.

2.1. An explanation of Marten's Clause and its relation with humanity doctrine:

The M.C was formally enshrined in 1977 into the First Additional Protocol to the Geneva Conventions of 1949. Art. 1 provides that Existing agreements do not cover individuals and fighters, continue to be protected by international law established by custom, humanitarian doctrine, and public international conscience.

2.1.1. Marten's Clause Meaning:

Marten's Clause is an essential component of minimum humanitarian treatment. It means that customary international law remains in force even after the adoption of treaty rules. Additionally, it implies that acts not expressly prohibited by treaties are not permitted. Furthermore, it means that conduct not expressly prohibited by contract is impermissible. Conduct during armed conflict is therefore judged not only by treaty and custom, but also by the principles of international law set out in Marten's Clause. Although the ICJ did not explicitly interpret the clause in its 1996 opinion, some letters submitted by countries highlighted its importance. The United Kingdom adopts a narrow interpretation, while the ICJ describes Marten's Clause as a means of responding to the rapid development of military technology⁴.

2.1.2. Marten's Clause components:

Three pillars that support the M C originated in three different sources:

- Customs established among civilized peoples, defined by the phrase (as established by custom) and as stated in Art. 1, para 2 of Add. P I of 1977. Whereas IL in general and all its branches in particular were customary rules, which were embodied in international conventions after the Vienna Convention on the Law of Treaties of 1969, which defined the concept of treaties and the extent to which they impact custom, as well as the rules of treaty interpretation and the extent to

which the latter interacts with customary rules, and this Convention's emphasis on the interrelationship between customary HIL and written HIL, within the framework of the so-called integrated customary HIL, all contributed significantly to the codification of the rules of CIL after the start of codification campaigns at the level of the international community, to refer to the customary rules that have been confirmed and developed through international treaties; and then it also touches on the impact of these treaties on the development of customary rules.

- The term "humanitarian principles," which is also used in the preceding para. of Art. 1 of PI, defines humanitarian legislation. Along with the principle of military necessity, these also include the principles of difference and proportionality; the humanity principle will be explained in the section that deals with how Marten's Clause relates to this principle.
- The public international conscience's rules, as stated in the same sentence in the preceding article. Regarding the idea that this gain becomes a mobilization of the human conscience, as it encourages respect for human dignity even in the most severe circumstances. This public conscience has a moral and legal depth because of its association with humanity itself, through the implementation of a set of common moral values among human beings and then the humanization of IL in war, especially, by respecting human dignity, achieving justice and providing humanitarian assistance and compassion, by alleviating the pain that victims endure and the defense that they receive during armed warfare.

2.1.3. The connection between the principle of humanity and MC.

Humanity is affirmed as a basic value by Marten's Clause *in international humanitarian law*. It obliges states and conflicting parties to respect human dignity and fundamental rights, even in the absence of specific legal texts regulating specific situations. Throughout the Enlightenment, the idea of natural human rights and the evolution of natural law contributed to the emergence of the principle of humanity.

and the adoption of natural human law as a doctrine, as this resulted in the fact that the pain caused by wars does not fall within human destinies, by virtue of the fact that human beings are equal, have rights that cannot be compromised. While wars have not been completely eliminated. Humanitarian considerations have led to international agreements aimed at reducing their negative effects⁵.

Marten's Clause is a fundamental principle in international humanitarian law that applies in the absence of specific providing. The norms of IL, which are drawn from human rights legislation, civilized traditions, and public international conscience, must be followed by all parties involved in a war. Marten's Clause has been enshrined in various international instruments, including the Hague Conventions and Additional Protocols, reaffirming its importance. It serves as a guiding principle for interpreting and applying international humanitarian law, ensuring the protection of individuals during armed conflicts and contributing to a more just and peaceful world⁶.

A fundamental tenet of HIL is the concept of humanity, which is expressed in Common Article 3 of the 4th Geneva Conventions. It obliges all parties to a conflict to abide by fundamental laws safeguarding both fighters and civilians in all situations. The principle acknowledges the right of all individuals to humane treatment, regardless of discriminatory characteristics, affirming the equality of all human beings and prohibiting discrimination. It serves as a basic "minimum" for protection, embodying compassion and respect for human dignity even in the most challenging conditions⁷.

2.2. *Marten's Clause's legal status.*

Positive law and natural law are the two primary streams of international law. Positive law proponents contend that submission to international rules is voluntary and based on the consent of states. In contrast, Natural law proponents contend that the fundamentals of natural law are binding on all peoples and states, regardless of consent, it's based on the idea of the preponderance of justice⁸. as a basic principle

aimed at achieving a balance between the various conflicting interests in international relations.

The majority of Prior to being enshrined in international treaties, written standards pertaining to humanitarian law were customary. New rules can emerge through international agreements, particularly with the development of warfare methods and means. Repeated adoption of these rules by states turns them into international customary law that is relevant to every person on the planet, irrespective of their status as parties to international conventions. Protocol I of 1977 has been acceded to by 162 states in 2005, with five states signing but not ratifying it. Protocol II has been acceded to by 141 states, with four states signing but not ratifying it⁹.

One source of HIL is Marten's Clause applied in the lack of legal texts. While not a precautionary principle, it is essential due to its reliance on humanity, customs, and public conscience. It serves as a complementary source to written rules and remains in force regardless of treaty accession. The Nuremberg Court considered it a general condition respecting the United Nations' long-standing customs, human rights law, and public international conscience standards¹⁰. According to the Marten's Clause's restrictive interpretation, customary IL remains applicable after the adoption of a treaty rule. The broader interpretation states that anything not expressly prohibited by a treaty is not permissible. This means that conduct in armed conflict, especially the use of certain weapons, should be judged not only by conventions and custom but by adherence by the international legal norms mentioned in Marten's Clause¹¹.

2.2.1. Marten's Clause a Common Legal custom.

The highest point of the legal hierarchy is Marten's Clause in fields where certain acts are not wholly or universally prohibited. It is a crucial principle in international humanitarian law that applies when there is no explicit agreement regulating the conduct of conflicting parties. It requires parties to be guided by general humanitarian law, customary rules, humanity, justice, and public conscience. This clause fills the legal

vacuum formed in the lack of agreement texts, functioning as a rule of customary IL that clarifies the principles of the Hague Rules, which serve as the foundation for the laws of war. No state can disavow these principles¹².

Marten's Clause is a crucial complementary rule in humanitarian law. It stems from the overarching idea that a party's ability to employ weapons and tactics in a combat is subject to limitations. The preamble to the 1899 and 1907 conventions made reference to the provision for the first time, which began with the "Von Marten's" proclamation at the Hague Peace negotiation in 1899¹³. In light of this, it is a customary rule that has evolved through the ongoing international practice of States, giving it binding force in customary international law.

2.2.2. Marten's Clause is a well-established legal principle under humanitarian principles.

Marten's Clause does not compete with the requirements of war or respect for human subjectivity. It recognizes that human subjectivity is immune, and war is not a justification for attacking the lives of those who do not participate in killing or are incapable of doing so. The principle of humanity is considered the most common and important in human law¹⁴. Marten's Clause goes beyond a specific customary rule to develop into a broad tenet of HIL that directs the interpretation and implementation of other regulations. It is a fundamental humanitarian principle established in international humanitarian law, serving as a moral and legal compass during wars.

The MC highlights how crucial customary laws are in controlling violent conflict. It speaks of the "dictates of the public international conscience" and the "humanity principles." The phrase "laws of humanity," which was used in the previous iteration of the MC (Preamble, 1899 HC II), is equivalent to "principles of humanity." The "principles of humanity (Add. PI)" are mentioned in the latter edition¹⁵.

The humanity principle represents the morals of reducing pain among people, giving assistance, and respecting human dignity and rights. It also requires refraining from attacking individuals' property.

The Geneva Conventions of 1949 affirm the obligation to respect protected persons, which includes preventing harm and danger to them. This principle integrates two basic concepts alleviating suffering and avoiding damage¹⁶. When the humanitarian morales in armed conflicts is embodied by the notion of humanity, concentrating on protection, respect, and human treatment. It aims also to maintain people's dignity and safeguard their moral and physical integrity¹⁷.

Humanity's guiding ideals forbid using pointless weapons and tactics in conflict. Jean Pictet interpreted humanity as prioritizing capture over wounding or killing enemies and exempting non-combatants as much as possible. He emphasized causing the least possible pain to wounded combatants and making those prisoners able to endure as much as possible¹⁸. The principle of humanity derives its name from man himself and is closely related to Marten's Clause, a crucial complementary rule in international humanitarian law. Its importance lies in its mandatory application in all cases not covered by international conventions or when parties to a dispute have not accepted these agreements¹⁹.

Art. 27 of the 4th Geneva Convention 1949 affirms the humanity principle by stating that persons who are protected shall be dealt humanely and with regard for their person, family rights, customs and traditions. This principle imposes on conflicting parties the obligation to respect war victims, treat them humanely, and prohibit subjecting them to acts of violence. **However**, international humanitarian law allows parties to a conflict to take necessary measures of control or security towards persons under their control²⁰, and the principle of humane treatment extends to all individuals, without distinction, including those who are imprisoned and those who live in areas controlled by the warring parties²¹.

3. Marten's principle's legal value.

In the 1948 Krupp case, Nuremberg Court Judge Shahabuddeen upheld the idea that Marten's concept goes beyond a declaration, serving as a safety valve in the lack of international legal provisions controlling

the means and methods of battling during armed conflicts. It is referred to when there is no convention rule stipulating the presence or restriction of means and methods that violate international law and public conscience. Positive law, despite its perfection, cannot predict future events²².

3.1. « *Marten's principle* » a foundation of international humanitarian law

The foundation of HIL is Marten's principle, sometimes known as the concept of humanity. Its goal is to uphold human dignity in all circumstances, including during war. for determining whether the use of force in armed disputes is lawful as well as for interpreting and applying HIL. The Doctrine of Marten's is a fundamental and indispensable principle that plays a crucial role in protecting human lives and dignity during wartime²³.

3.1.1. *The importance of Marten's principle.*

Marten's principle is a complementary and sometimes fundamental principle of international humanitarian law that applies in situations lacking a conventional or customary text. It makes it possible to interpret HIL in response to evolving situations, encompassing developments in warfare methods such as cyber warfare and unmanned weapons. This enhances the effectiveness and adaptability of international humanitarian law to new challenges and emphasizes the importance of protecting human life and dignity at all times, even when specific rules are absent²⁴. Marten's Clause is a crucial principle in international humanitarian law that addresses unexpected situations and fills legal gaps. It promotes humanitarian principles and emphasizes the importance of public conscience in developing international law. This clause serves as a complementary rule to international humanitarian law, ensuring the protection of individuals during armed conflicts and contributing to a more just and peaceful world²⁵.

3.1.2. The International Court of Justice's view regarding Marten's principle.

The ICJ considered the MC, included in the HC II of 1899, as a fragment of customary IL. An updated version of this section was cited by the Court in para 2 of Art. 1 of Add. P I of 1977. The Court upheld the significance of the MC in confronting the swift advancement of military technology and its continued existence and applicability. on this base, "Para 78 of the consultative view, no state contests the Court's conclusion that the fundamental rules of HL nevertheless apply to all new arms, counting nuclear arms²⁶. In their consultative judgment on the legality and use of nuclear arms, the ICJ emphasized the significance of the MC. The Court emphasized that the lack of international regulations governing the use of nuclear arms does not imply that it is permissible to use them and found the MC to be a valuable tool in slowing down the swift advancement of developing defence tools²⁷.

3.2. Marten's Initiative filling legal gaps in armed conflicts.

Marten's Initiative played a crucial role in developing international law by creating new rules in the absence of explicit provisions. It originated at the Hague Conference of 1899 to address the legal loophole regarding civilians taking up arms against occupation. Russian diplomat Martins proposed a general rule stating that all warring parties, even without specific rules, must adhere to international humanitarian law principles²⁸. Marten's Principle allows for a flexible interpretation of basic principles of international humanitarian law to address new and unexpected situations. It provides a general framework for protecting victims by ensuring minimum humanitarian standards, preventing a legal vacuum that could allow serious transgressions²⁹.

Marten's Principle can be applied to assess the extent wherein the employment of new weapons conforms with fundamental rules of HIL, especially in cases of non-traditional wars where international conventions may be limited. It provides a general framework for protecting victims and ensures their protection in all circumstances. Marten's Initiative contributes to international law by filling legal gaps,

promoting humanitarian principles, and emphasizing the importance of public conscience. It demonstrates how international law can develop through practice and custom³⁰”.

4. Conclusion:

Marten's principle, despite its importance, faces challenges in application due to difficulties in defining military necessity, a lack of a clear mechanism for control, and the rapid development of military technology. Continuous efforts are needed to develop and adjust the principle to reflect modern circumstances. The MP extends beyond the realm of law, because it is an expression of fundamental human values. Its application aims to build a world that respects human dignity and protects the weak. It remains a flexible and adaptable legal framework, making it an effective tool for addressing the increasing challenges faced by international humanitarian law. **From this stand point, The following recommendations are offered.**

- It is important to examine the stances taken on Marten's Clause by international institutions like the (ICC) and the (ICRC).
- Turn on State Roles: Encourage international cooperation and train military personnel and judges on Marten's Clause to promote its application at national and international levels.
- Activate NGO Roles: Empower NGOs to promote understanding and application of Marten's Clause.
- Strengthen Monitoring and Investigation: Enhance mechanisms for monitoring and investigating violations of Marten's Clause.
- Explicit Inclusion: Include Marten's Clause explicitly in relevant international conventions and protocols.
- Train Military: Provide military training on Marten's Clause

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- [3] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, adopted on 12 August 1949, entered into force on 21 October 1950.
- [4] Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, adopted on 12 August 1949, entered into force on 21 October 1950.
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2- The preamble to the Fourth Hague Convention, adopted in 1907, highlights that the Second Hague Conference, convened in 1904 by U.S. President Theodore Roosevelt in response to the Russo-Japanese War, produced only a few significant developments compared to the 1899 Convention.

³- Nils Melzer, International Humanitarian Law: A Comprehensive Introduction, International Committee of the Red Cross, Geneva, 2016, p. 24.

⁴- The Russian Federation argued that Marten’s Clause was redundant due to the development of international humanitarian law. However, both the Geneva Conventions and Additional Protocols reaffirmed Marten’s Clause. The 1977 Diplomatic Conference emphasized its continued importance by moving it from the preamble to a substantive provision in the First Protocol. The Republic of Nauru confirmed the relevance of Marten’s Clause, stating that it was not a historical aberration and has been included in many modern conventions.

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⁵- Ahmed Ali Dehoum, Introduction to International Humanitarian Law, "A Comparative Historical Study in the Rights of Prisoners in International and Internal Organization, Journal of Law for Legal and Economic Research, Faculty of Law, Ain Shams University, Volume 2, No. 3, 2019, pp. ⁹²⁸929.

⁶ - The international instruments that has been enshrined this clause are : Preamble to the Hague Conventions of 1899, 1907. Article 63 of the First Geneva Convention. Article 62 of the Second Geneva Convention. Article 142 of the Third Geneva Convention. Article 27 of the Fourth Geneva Convention. Article 1 Paragraph 2 of Additional Protocol I. Preamble to Additional Protocol II.

⁷- The principle of humanity is a customary principle applicable to all armed conflicts, regardless of circumstances. It embodies basic values like respect for human dignity and the right to life, and contributes to alleviating human suffering during war. Respecting this principle is a moral and legal duty for all parties to a conflict, reflecting a shared responsibility of the international community. The principle of humanity is a fundamental pillar for protecting civilians and combatants who are unable to fight, contributing to building a more peaceful and just world. Common Article 3 (1) of the four Geneva Conventions and Rules 87 and 88 of the Rules of Customary International Humanitarian Law affirm this principle.

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¹³- Aisha Belabbas, op. Cit., P. 12.

¹⁴- Tamer Massalha Ordinance, *Basic Principles of International Humanitarian Law*, Mossawa Center, Haifa, 2009, p. 75.

¹⁵- Rupert Ticehurst, op cit, p 129.

¹⁶- Felig Ghazalan, Musa Samer, *The Concise in International Humanitarian Law*, Academy of Refugee Studies , London, 2019, p. 5.

¹⁷- Al-Akoun Saed, *The Principle of Distinguishing between Combatants and Non-combatants and the Challenges of Contemporary Armed Conflicts*, Master's thesis, Faculty of Law Specializing in International Humanitarian Law, Haj Lakhdar University, Batna, 2008/2009, p. 93.

¹⁸- Marten's Clause does not add much to existing laws of armed conflict because the protection it offers appears to be reflected in the principle of military necessity. This principle requires using force only when strictly necessary to achieve legitimate military objectives. It is well established in treaties such as the Hague Regulations of 1907, which the International

Military Tribunal at Nuremberg explicitly recognized as a declaration of custom in 1946.

- Rupert Ticehurst, op cit, p 129.

¹⁹- Al-Akoun Saed, op cit, p. 93.

²⁰- Article 27 (4) of the Fourth Geneva Convention.

²¹- Melzer Nils, op. Cit., P. 20.

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