

Martens Clause for Environmental Protection

by Dinah Shelton* and Alexandre Kiss**

The World Conservation Congress held in Amman, Jordan from 4-11 October 2000 (see page 313), adopted a landmark recommendation on environmental protection. Several IUCN member organizations and States moved adoption of the recommendation, which was drafted by Commission on Environmental Law (CEL) members Dinah Shelton and Alexandre Kiss. The recommendation urges all United Nations member States to endorse a policy

that respects a minimum standard for environmental protection in the absence of relevant international conventional law or regulation. The minimum standard applies “until a more complete international code of environmental protection has been adopted.” The level of protection afforded the biosphere and all its constituent elements and processes is to be based upon principles of international law “derived from established custom, from dictates of the public conscience, and from the principles and fundamental values of humanity acting as steward for present and future generations.”

The language of the recommendation is adapted from

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the Martens Clause, which is contained in preambular paragraph nine of the Convention Respecting the Laws and Customs of War on Land of 29 July 1899 and in the eighth preambular paragraph of the Revised Hague Convention (IV) Respecting the Laws and Customs of War on Land (18 October 1907).¹ The clause finds echoes in the Geneva Conventions of 1949² and is reiterated in Article 1(2) of Protocol (I) Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts. It was also included in Resolution XXIII of the United Nations Conference on Human Rights, held in Teheran from 22 April-13 May 1968, and subsequently approved by the General Assembly of the United Nations.

The Martens Clause has proved to be of fundamental importance in providing a minimum legal standard to govern the conduct of all persons in times of armed conflict when no other international law is applicable. The drafters of the Hague Convention realized that they could not regulate all the circumstances of armed conflict and that unforeseen cases would arise that should not be left to the arbitrary judgment of military commanders. In particular, there was concern that technological developments in armaments and other methods of warfare could escape regulation and thus could be the basis of massive destruction of human society.

The Martens Clause imported into humanitarian law a dynamic dimension that was not limited by time, bringing in fundamental principles beyond those contained in written conventions. It permitted constant and spontaneous development of norms as needed in the common interest of humanity due to scientific, technological, military, social and historical evolution. The concept responds to the fundamental purpose of humanitarian law: the preservation of humanity.

The meaning of the Martens Clause has been understood in two ways. First, it makes it clear that customary international law remains valid so long as it is not altered by codification in international agreements. Second, it establishes that international principles can be the source of new rules when new means and methods of warfare develop in the future. In regard to the latter, a commentator on the Martens Clause has demonstrated the importance of evolving norms in respect of a specific problem: "mankind as a species is now confronted with a crisis of survival because of nuclear weapons and other weapons of mass destruction."³

The new environmental Martens Clause, which applies during peacetime as well as during armed conflicts, is of particular importance because present international law applicable in armed conflicts includes only a few prin-

ples aimed at environmental protection.⁴ Moreover, environmental law outside the context of armed conflicts has significant lacunae. Like the original Martens Clause, the IUCN resolution reflects the need for appropriate measures at the national and international, individual and collective, private and public levels to ensure human survival against the environmental consequences of destructive human activities. Environmental regulation, like the regulation of warfare, is likely to be responsive in most instances, coming after the technological and economic changes that make evident the need for norms and standards.

As a consequence, it is essential that all relevant actors base their conduct on an international minimum standard derived from the principles of international law. Relevant environmental principles that can be the source of

obligations include the duty to prevent environmental harm and the precautionary principle. By calling for application of the minimum standard in peacetime as well as during armed conflicts, the IUCN resolution reflects the fact that most environmental harm occurs as a result of daily human activities, from industrial emissions to household waste disposal. States are now asked to base their responses to this harm on an international minimum standard derived from prin-

ciples of international law, the laws of humanity, and the dictates of the public conscience.



Notes

¹ "Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain 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." The Martens Clause is so called after Friedrich von Martens, the Russian delegate who chaired the 11th meeting of the Second Committee of the Second Commission of the First Hague Peace Conference of 1899.

² See Articles 63/62/142/158 restricting the impact of denouncing the Conventions. The denouncing power remains bound to fulfil obligations arising "by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience."

³ Shigeki Miyazaki, "The Martens Clause and International Humanitarian Law," in *Studies and Essays on International Humanitarian Law and Red Cross Principles* in honour of Jean Pictet (C. Swinarski, ed.) (Martinus Nijhoff Publishers, 1984), p. 433.

⁴ Two provisions expressly mentioning environmental protection were included in Protocol I to the Geneva Conventions of 12 August 1949, adopted on 10 June 1977. Article 35(3) provides: "It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment." Article 55 adds, "1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes the prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population. 2. Attacks against the natural environment by way of reprisals are prohibited."



Plenary Hall at Amman's Sports City complex.