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# The Martens Clause, Global Pandemics, and the Law of Armed Conflict

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*In the aftermath of the UN Secretary General's call for a global ceasefire following the outbreak of COVID-19, a discussion emerged regarding how international humanitarian law applies during a global pandemic. This Article contributes to that discussion through the lens of two distinct strands of thought on the Martens Clause. The first considers the Martens Clause as capable of affecting understandings of how the existing law of armed conflict applies to the conduct of hostilities during a global pandemic. Applying various scholarly and judicial interpretations of the Martens Clause's contemporary legal import, the Article argues that the humanitarian law principles of proportionality, distinction, and military necessity have significant legal bearing on the conduct of hostilities concurrent to a global pandemic. During a global pandemic, the principle of proportionality ought to insist that military commanders include foreseeable incidental harm to civilians resulting from an attack's expected impact on disease transmission in their incidental harm calculus. The principle of distinction should mandate that the effects of chosen means and methods of combat—including on disease transmission—be limited to military objectives. And the principle of military necessity obliges respect for its delicate balance with humanity, allowing only that which is necessary to achieve legitimate objectives—including taking seriously the duty to take tailored precautions before attacks amidst a global pandemic. These principles, particularly in light of the Martens Clause's principles of humanity and the dictates of the public conscience, have important legal sway over the conduct of hostilities during pandemics.*

*The second strand of thought on the Martens Clause relates to its ability in certain limited and defined situations to affect the formation process of new customary rules of humanitarian law. This Article argues that armed conflict during a global pandemic falls into this narrow category and that, as a result, the Martens Clause might influence the formation of an emerging custom regulating armed conflict during a global pandemic. In light of significant international support for the call for a global ceasefire in response to the outbreak of COVID-19, the Article assesses whether a new rule of humanitarian law mandating a ceasefire amidst the outbreak of future global pandemics is forming. Analyzing the current stage of this* lex ferenda*, the Article illustrates the elements lacking in the formation process. Nonetheless, such a rule solidifying into new customary law in the aftermath of the COVID-19 pandemic would be a normatively positive evolution in light of the threat posed by future pandemics.*

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*"The fury of the virus illustrates the folly of war. That is why today, I am calling for an immediate global ceasefire in all corners of the world. It is time to put armed conflict on lockdown and focus together on the true fight of our lives . . . End the sickness of war and fight the disease that is ravaging our world. It starts by stopping the fighting everywhere. Now."*[1]

—U.N. Secretary-General António Guterres

## Introduction

On March 23, 2020, the UN Secretary-General called for a global ceasefire in the wake of the outbreak of the COVID-19 disease.[2] It was the first call for a global ceasefire in the history of the United Nations,[3] and many individuals around the world supported the appeal.[4] Moreover, on June 22, 2020, 171 States signed onto an official statement strongly supporting the Secretary-General's appeal for a global ceasefire.[5] On July 1, 2020, the UN Security Council issued a resolution demanding a "general and immediate cessation of hostilities" due to COVID-19.[6] U.N. General Assembly Resolution 74/306 also unequivocally supported the call for a global ceasefire.[7]

While there is a correlation between armed conflict and infectious disease—both in historical[8] and empirical[9] terms—the Secretary-General's call

1. António Guterres, *"The Fury of the Virus Illustrates the Folly of War"*, United Nations (Mar. 23, 2020), https://www.un.org/en/un-coronavirus-communications-team/fury-virus-illustrates-folly-war [https://perma.cc/YYM8-LR8C].

2. *Id.*

3. Govinda Clayton, *The U.N. Has Appealed for a Global Coronavirus Cease-fire*, Wash. Post (Apr. 13, 2020), https://www.washingtonpost.com/politics/2020/04/13/un-has-appealed-global-coronavirus-ceasefire/ [https://perma.cc/VX6K-58TQ].

4. As of March 20, 2021, over 2.4 million people have signed a petition supporting the global ceasefire. *Covid-19: Sign the Call for Global Ceasefire!*, Avaaz (Mar. 30, 2020), https://secure.avaaz.org/campaign/en/global_ceasefire_loc/ [https://perma.cc/W9R3-KW4E].

5. *See* Statement of Support by 171 UN Member States, Non-Member Observer States, and Observers to the U.N. Secretary-General's Appeal for a Global Ceasefire amid the COVID-19 Pandemic (June 22, 2020), https://reliefweb.int/report/world/statement-support-171-un-member-states-non-member-observer-states-and-observers-un [https://perma.cc/2Y5C-EG3D] [hereinafter "Statement of Support by 171 U.N. Member States"].

6. S.C. Res. 2532 (July 1, 2020) ("*Demands* a general and immediate cessation of hostilities in all situations on its agenda [and] *calls* upon all parties to armed conflicts to engage immediately in a durable humanitarian pause for at least 90 consecutive days").

7. G.A. Res. 74/306 (Sept. 11, 2020) ("Supports the Secretary-General's appeal for an immediate global ceasefire, including to help to create corridors for life-saving aid, open windows for diplomacy of dialogue and bring hope to places and people among the most vulnerable to COVID-19, notes with concern the impact of the pandemic on conflict-affected States as well as those at risk of conflict, and that conditions of violence and instability in conflict situations can exacerbate the pandemic, and that inversely the pandemic can exacerbate the adverse humanitarian impact of conflict situations . . .").

8. *See, e.g.*, Matthew Smallman-Raynor & Andrew Cliff, *Impact of Infectious Diseases on War*, 18 Infectious Disease Clinics N. Am. 341, 342 (2004) (noting that "[d]own the ages, epidemics of infectious diseases have decimated the fighting strength of armies, caused the suspension and cancellation of military operations, and wrought havoc on the civil populations of belligerent and nonbelligerent states"); *see also* Carol R. Byerly, *The U.S. Military and the Influenza Pandemic of 1918–1919*, 125 Pub. Health Rep.

appeared to be a recognition that in the twenty-first century, humanitarian considerations compel a cessation of hostilities to allow the world to focus on containing the spread of the pandemic and protecting the world's most vulnerable populations. Yet conflicts around the world did not cease.[10] And in light of hostilities continuing despite the calls for a global ceasefire, a parallel discussion also emerged following the outbreak of COVID-19 regarding how extant international humanitarian law ("IHL") applies to armed conflict amidst the COVID-19 pandemic.[11] This discussion made clear that while in the past, infectious disease has been actively harnessed as a destructive force in warfare,[12] today, rules exist in IHL—such as protections for medical personnel, humanitarian agencies, and detainees[13]—that provide important legal safeguards to civilians and combatants during armed conflict concurrent to a global pandemic.[14]

This Article utilizes the calls for a global ceasefire following the outbreak of the COVID-19 pandemic as a foundation for continuing this discussion. The "holy triad" of IHL—distinction, proportionality, and military necessity[15]—derived from both treaty law provisions and customary law, applies to parties engaged in armed conflict concurrent to a pandemic. Moreover, particularly in light of the global reaction to armed conflicts amidst the

82, 83 (2010) ("The American military experience in World War I and the influenza pandemic were closely intertwined . . . [b]y the War Department's most conservative count, influenza sickened 26% of the Army—more than one million men—and killed almost 30,000 before they even got to France.").

9. *See, e.g.*, Máire A Connolly & David L Heymann, *Deadly Comrades: War and Infectious Diseases*, 360 LANCET 23, 23 (2002) (discussing how "conflict promotes factors that lead to increased incidence of infectious diseases, including mass movement of populations, overcrowding, lack of access to clean water, poor sanitation, lack of shelter, and poor nutritional status. In addition, the collapse of public health infrastructure and the lack of health services hampers control programmes such as vaccination or vector control.").

10. *See, e.g.*, *How Covid-19 Gave Peace a Chance, and Nobody Took It*, ECONOMIST (May 5, 2020), https://www.economist.com/international/2020/05/05/how-covid-19-gave-peace-a-chance-and-nobody-took-it [https://perma.cc/M4UN-TFGN].

11. *See, e.g.*, Emily Camins, *The Value of International Humanitarian Law in the Time of COVID-19*, AUSTRALIAN RED CROSS, https://www.redcross.org.au/stories/ihl-blog/ihl-and-covid-19 [https://perma.cc/8C6D-Q87N].

12. *See, e.g.*, Stefan Riedel, *Biological Warfare and Bioterrorism: A Historical Review*, 17 BAYLOR U. MED. CTR. PROCEEDINGS 400 (2004) (noting a number of instances throughout history of infectious disease in warfare. For instance, "[d]uring the siege of Caffa, a well-fortified Genoese-controlled seaport (now Feodosia, Ukraine), in 1346, the attacking Tartar force experienced an epidemic of plague. The Tartars, however, converted their misfortune into an opportunity by hurling the cadavers of their deceased into the city, thus initiating a plague epidemic in the city." *Id.* at 400.).

13. *See* INT'L COMM. OF THE RED CROSS, *COVID-19 and International Humanitarian Law*, ICRC, https://www.icrc.org/ru/download/file/116784/covid-19_and_ihl.pdf [https://perma.cc/UZ68-BC6R].

14. For an overview of the laws applicable, see Oona Hathaway, Mark Stevens & Preston Lim, *COVID-19 and International Law Series: International Humanitarian Law—Conduct of Hostilities*, JUST SEC. (Nov. 10, 2020), https://www.justsecurity.org/73316/covid-19-and-international-law-series-international-humanitarian-law-conduct-of-hostilities/ [https://perma.cc/ZZF3-QWPB].

15. Robert Sloane, *Puzzles of Proportion and the Reasonable Military Commander: Reflections on the Law, Ethics, and Geopolitics of Proportionality*, 6 HARV. NAT'L SEC. J. 299, 310 (2015) [hereinafter Sloane, *Puzzles of Proportion*].

outbreak of the COVID-19 pandemic,[16] the Martens Clause's principles of humanity and dictates of the public conscience could have an impact on the judicial application of these principles.[17]

The Article makes two central claims about the Martens Clause. First, the Martens Clause may play a role in understanding how extant IHL applies during a global pandemic.[18] Second, the Martens Clause might influence the formation process of an emerging customary international law relating to armed conflict in the event of a future global pandemic.[19] Relatedly, the Article investigates two facets of international law. First, and as recognized by others,[20] treaty and customary law making up the foundational *in bello* principles contain protections for civilians and combatants involved in armed conflict during a pandemic.[21] Second, in light of the significant international support for a global ceasefire following the outbreak of COVID-19, a new customary international law mandating a ceasefire during a future outbreak of a global pandemic may be forming.[22] Recognizing that some of the claims are wide-ranging, this Article hopes to provoke further discussion among international adjudicators and scholars over the Martens Clause, the COVID-19 pandemic, and the law of armed conflict.

The Article is structured as follows. Part I provides a brief background on the Martens Clause—its history, its modern legal import, and interpretations on the meaning of its provisions. Part II adds to the emerging discussion on how the *in bello* principles of proportionality, distinction, and military necessity inherently contain protections for civilians and combatants involved in armed conflict concurrent to a pandemic. It demonstrates the possible role that varying scholarly and judicial interpretations of the legal import of the Martens Clause may play in this analysis.[23] Specifically, other scholars and tribunals have identified how the Martens Clause can function as an aid to judicial interpretation,[24] a legal clause underpinning

16. Stefania Negri, *Introductory Note to United Nations Security Council Resolution 2532*, 60 INT'L LEGAL MATERIALS 24, 24 (2020) ("This call [for a global ceasefire] received worldwide support from heads of state and government, regional organizations, non-state armed actors, religious leaders and civil society networks. It was also supported by a non-binding statement issued by 171 UN member states and observers.").

17. For readers unfamiliar with the Martens Clause, see *infra* Part I.

18. *See infra* Part II.

19. *See infra* Part III.A.

20. *See* Hathaway, Stevens & Lim, *supra* note 14.

21. *See infra* Part III.A.

22. *See infra* Part III.C.

23. *See infra* Parts II.A.–D.

24. *See* Antonio Cassese, *The Martens Clause: Half a Loaf or Simply Pie in the Sky?*, 11 EUR. J. INT'L L. 187, 187 (2000); Theodor Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, 94 AM. J. INT'L L. 78, 88 (2000); Mitchell Stapleton-Coory, *The Enduring Legacy of the Martens Clause: Resolving the Conflict of Morality in International Humanitarian Law*, 40 ADELAIDE L. REV. 471, 478 (2019); Michael Salter, *Reinterpreting Competing Interpretations of the Scope and Potential of the Martens Clause* 17 J. CONFLICT & SEC. L. 403, 413 (2012); Jeremy Sarkin, *The Historical Origins, Convergence and Interrelationship of International Human Rights Law, International Humanitarian Law, International Criminal Law and Public International Law and Their Application From at Least the Nineteenth Century*, 1 HUM. RTS. & INT'L

the very foundation of IHL,[25] a means of addressing changing circumstances in armed conflict,[26] and a floor below which humanitarian standards ought not to fall during any armed conflict.[27] The Article applies these diverse interpretations of the Martens Clause to the contention that the IHL principles of proportionality, distinction, and military necessity have legal bearing on the conduct of hostilities amidst a global pandemic.[28] The discussion invokes the possible utility of varying interpretations on the Martens Clause to this analysis while recognizing its limitations. In doing so, the Article continues the debate concerning the place of the Martens Clause in international law today.

Part III steps away from existing IHL rules and undertakes a prescriptive, and then predictive, analysis on the emergence and possible formation of a humanitarian customary law relating to armed conflict during a global pandemic. Prescriptively, the Article explores scholarship and judicial decisions illustrating how the Martens Clause, in limited and defined situations, can alter the formation process of a new customary law, rather than affecting existing rules of international law.[29] Specifically, some scholars and international judges have claimed that the Martens Clause can affect the relation-

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LEGAL DISCOURSE 125, 153 (2007); Peter Sutch, *Normative IR Theory and the Legalization of International Politics: The Dictates of Humanity and of the Public Conscience as a Vehicle for Global Justice*, 8 J. INT'L POL. THEORY 1, 12 (2012); Prosecutor v. Kupreškić et al., Case No. IT-95-16-T, Judgement, ¶ 524 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000) [hereinafter *Kupreškić*]. *See generally* authors and judgements cited *infra* Part II.A.

25. *See* Prosecutor v. Martić, Decision, Case No. IT-95-11-R61, ¶13 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 8, 1996) [hereinafter *Martić*]; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8), at 257, ¶¶ 78–79 [hereinafter *Nuclear Weapons*]; Nuclear Weapons, 1996 I.C.J. at 486 (Weeramantry, J., dissenting) [hereinafter *Nuclear Weapons Weeramantry Dissent*] ("The Martens Clause . . . has been generally accepted in international legal literature as indeed encapsulating in its short phraseology the entire philosophy of the law of war."); *see also* citations *infra* Part II.B.

26. See Jeffrey Kahn, *"Protection and Empire": The Martens Clause, State Sovereignty, and Individual Rights*, 56 VA. J. INT'L L. 1, 28 (2016); *Nuclear Weapons*, *supra* note 25, at 257, ¶ 78 ("[T]he Martens Clause . . . has proved to be an effective means of addressing the rapid evolution of military technology."); *Nuclear Weapons*, 1996 I.C.J. at 406 (Shahabuddeen, J., dissenting) [hereinafter *Nuclear Weapons Shahabuddeen Dissent*]; *see infra* Part II.C.

27. *See* Emily Crawford, *The Modern Relevance of the Martens Clause,* 6 ISIL Y.B. INT'L HUMANITARIAN & REFUGEE L. 1, 16 (2006) ("States were to consider themselves bound by certain minimum fundamental standards of behaviour, as understood by considerations of 'humanity' and 'public conscience.'"); Kahn, *supra* note 26, at 48 ("The law sets a minimum standard of conduct from which neither states nor non-state actors may lawfully depart."); *see also* Andreas Schüller, *Fundamental Standards of Humanity—Still a Useful Attempt or an Expired Concept?*, 14 INT'L J. HUM. RTS. 744, 752 (2010); *see also* Asbjorn Eide, Allan Rosas & Theodor Meron, *Combating Lawlessness in Gray Zone Conflicts Through Minimum Humanitarian Standards*, 89 AM. J. INT'L L. 215 (1995); Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 129 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) [hereinafter *Tadić*]; Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, at 113–14, ¶ 218 (June 27) [hereinafter *Nicaragua*]; s*ee infra* Part II.D.

28. These various scholarly and judicial interpretations of the Martens Clause are not without some controversy. Care is taken throughout the Article to recognize competing views. But the main contribution of the Article is the theoretical application of these varying scholarly and judicial interpretations to armed conflict during a global pandemic. Readers will nonetheless find varying levels of persuasion depending on their stance on the scholarship and judicial opinions explored in the Article.

29. *See infra* Part III.

ship between state practice and *opinio juris* in the formation of customary law by changing the necessary ratio of ingredients required for emerging customary humanitarian law to materialize.[30] Taking on a predictive lens, the Article looks toward the future, assessing the possible materialization of a new customary international law that mandates a ceasefire during the uncontained outbreak of a global pandemic. Analyzing the current stage of this *lex ferenda*, the Article illustrates the elements lacking in its formation process. Nonetheless, the Article concludes that such a new customary law regulating and limiting the conduct of armed hostilities during future global pandemic outbreaks would be a normatively positive evolution for international law in light of the peril that future global pandemics already present.[31]

Before commencing, a terminological clarification is in order. The following phrases—infectious disease outbreak, pandemic, and global pandemic—are used throughout the Article. For the purposes of this Article, an infectious disease outbreak transpires "when there is a sudden increase in the number of people with a condition greater than is expected."[32] Likewise, an epidemic is "an outbreak of disease such that for a limited period of time a significantly greater number of persons in a community or region are suffering from it than is normally the case."[33] A pandemic is "an epidemic occurring over a wide area, crossing international boundaries and usually affecting a large number of people."[34] The key features of a pandemic include wide geographic extension, high attack rates and explosiveness, minimal population immunity, novelty, infectiousness or contagiousness, and severity.[35] The phrase global pandemic clarifies that the pandemic is occurring simultaneously worldwide.[36]

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30. *See infra* Part III.A.

31. *See* Jeremiah Oetting, *Forecasting the Next COVID-19*, PRINCETON U. (Dec. 14, 2020), https://www.princeton.edu/news/2020/12/14/forecasting-next-covid-19 [https://perma.cc/D77M-UEX5] (noting that "COVID-19 isn't the first global pandemic, and it won't be the last.").

32. Dara Grennan, *What Is a Pandemic?*, 321 J. AM. MED. ASS'N 910, 910 (2019).

33. Jonny Anomaly, *What Is an Epidemic?*, 42 J. L. MED. & ETHICS 389, 389 (2020) (citing JOHN WALTON AND PAUL BEESON, THE OXFORD COMPANION TO MEDICINE (Oxford Univ. Press, 1st ed. 1986)).

34. Heath Kelly, *The Classical Definition of a Pandemic Is Not Elusive*, 89 BULL. WORLD HEALTH ORG. 540, 541 (2011).

35. David M. Morens, Gregory K. Folkers & Anthony S. Fauci, *What Is a Pandemic?*, 200 J. INFECT. DIS. 1018, 1019–20 (2009).

36. Some definitions of pandemic say that it is an "epidemic occurring worldwide." Kelly, *supra* note 34, at 540. Yet others understand a pandemic to encompass any international occurrence of an epidemic. *See* Rebecca S. B. Fischer, *What's the Difference Between Pandemic, Epidemic and Outbreak?*, CONVERSATION (Mar. 9, 2020), https://theconversation.com/whats-the-difference-between-pandemic-epidemic-and-outbreak-133048 [https://perma.cc/YG4M-TA6U] ("In the most classical sense, once an epidemic spreads to multiple countries or regions of the world, it is considered a pandemic."). The definition of *global pandemic* indicates the scope of geographic occurrence with important impacts on measurement and risk metrics. *See* Benjamin J. Singer, Robin N. Thompson & Michael B. Bonsall, *The Effect of the Definition of 'Pandemic' on Quantitative Assessments of Infectious Disease Outbreak Risk*, 11 SCIENTIFIC REPORTS 2547 (2021) ("[B]etween pandemic definitions that are satisfied by any transregional transmission and definitions that are satisfied only by truly global spread. . .there is a marked difference between the probability

*The principles of proportionality, distinction, and military necessity, by their nature, already mandate some consideration of an attack's impact on infectious disease transmission.*[37] This Article's emphasis, however, is on pandemics. Care is nonetheless taken throughout to indicate whether the arguments relate to pandemics or infectious disease outbreaks more generally. There is nonetheless some overlap, as "[o]utbreaks, epidemics, and pandemics do not differ in kind. They differ [only] in degree."[38]

## I. The Martens Clause

### A. A Brief History

Fyodor F. Martens,[39] an Estonian-born Russian diplomat,[40] originally proposed the eponymous Martens Clause as a way of breaching a diplomatic impasse during the 1899 Hague Conference with respect to the Laws and Customs of War on Land.[41] The stalemate in negotiations during the Conference revolved primarily around a disagreement on the status of *francs-tireurs*—those who picked up arms but did not belong to any national armed force—during one state's belligerent occupation of another.[42] Smaller European powers, such as Belgium, were afraid of harsh treatment of their nationals during belligerent occupation, and larger powers, like Russia, were

of either of these definitions being satisfied."). For the purposes of this Article, the infectious disease need not be present in every single country in the world. In the WHO's Pandemic Alerts system, stage 6 would meet my definition of a global pandemic. World Health Org., Pandemic Influenza Preparedness and Response: A WHO Guidance Document (2009), https://www.ncbi.nlm.nih.gov/books/NBK143062/pdf/Bookshelf_NBK143062.pdf [https://perma.cc/AFD9-F7AG].

37. *See infra* Part II.

38. Federica Paddeu & Michael Waibel, *The Final Act: Exploring the End of Pandemics*, 114 Am. J. Int'l L. 698, 700 (2020) (noting also that definitions of the term outbreak, epidemic and pandemic "are, to some extent, arbitrary and their usage inconsistent" and that "[t]here is no clear and uncontested definition of the term 'pandemic.'").

39. He was also known as Friedrich Fromhold von Martens, among other names. *See generally* Lauri Mälksoo, *F.F. Martens and His Time: When Russia Was an Integral Part of the European Tradition of International Law*, 25 Eur. J. Int'l L. 811 (2014).

40. F.F. Martens was born to ethnic Estonian parents in Pärnu, Estonia. *Id.* at 816; *see also* Richard B. Bilder & W. E. Butler, *Professor Martens' Departure*, 88 Am. J. Int'l L. 863, 863–64 (1994) (reviewing Jan Kross, Professor Martens' Departure (1995)) ("Martens was of Estonian ethnic origin (an issue thoroughly researched recently in Estonia on the basis of complicated church and orphanage records) . . . .").

41. Crawford, *supra* note 27, at 16. For background on F.F. Martens, see, for example, Vladimir Pustogarov, *Fyodor Fyodorovich Martens (1845-1909)—A Humanist of Modern Times*, 36 Int'l Rev. Red Cross 300 (1996); Arthur Eyffinger, *Friedrich Martens: A Founding Father of The Hague Tradition*, 15 Estonian Nat'l Def. C. Proc. 13 (2012); *see also Frederic de Martens*, 3 Am. J. Int'l L. 983, 983–85 (1909). For a more critical account of Martens, see Arthur Nussbaum, *Frederic de Martens—Representative Tsarist Writer on International Law*, 22 Nordic J. Int'l L. 51 (1952).

42. *See* Kahn, *supra* note 26, at 21–24; Pustogarov, *supra* note 41, at 310 ("At one point, a situation arose which Martens described as 'critical': a group of small countries headed by Belgium opposed the very principle of the rights and duties of armies of occupation, and demanded an unlimited right of resistance for the population of occupied territories.").

concerned with granting protections against their own interests.[43] This disagreement—similar to the current debate on the status of civilians who take up arms during armed conflict—threatened the success of the Conference itself.[44] Martens therefore proposed an addition to the preamble of the Hague Convention of 1899, which is today known as the Martens Clause:

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.[45]

According to some scholars, it was the inclusion of this clause as a compromise that ultimately helped parties overcome disagreement during the Conference.[46] The Clause was agreeable to delegates of the larger powers[47] and apparently allayed the fears of the smaller powers.[48]

Martens himself likely never intended the clause to be more than a means to breach the impasse in negotiations and appease delegates who were wary of the lack of protections for *francs-tireurs* in the drafts.[49] Further, Martens' intentions behind the inclusion of the Clause may not have been humanitarian at all.[50] Nonetheless, the Clause and its protections have proved obstinate in the years since its inclusion in the preamble. Indeed, versions of the Martens Clause appear in the denunciation clauses of the Geneva Conventions,[51] in Article 1 of Additional Protocol I ("API"),[52] in the Preamble to

43. Kahn, *supra* note 26, at 23.

44. *Id*. at 22.

45. Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, Preamble [hereinafter Hague Convention II].

46. Kahn, *supra* note 26, at 24–25; Crawford, *supra* note 27, at 1.

47. *See* Eyffinger, *supra* note 41, at 28 (noting that the delegates likely considered the Clause as simply a restatement of well-established principles of international law).

48. Kahn, *supra* note 26, at 24.

49. *See* Rotem Giladi, *The Enactment of Irony: Reflections on the Origins of the Martens Clause*, 25 EUR. J. INT'L L. 847, 859 (2014).

50. *Id*. at 859, 861–62 (arguing that "contrary to prevailing assumptions, Martens did not propose the clause 'with a humanitarian goal in mind . . . Martens espoused the cause of small states—in order to rebut the case they were making . . . His declaration was meant to ward off amendments containing explicit recognition of the right to resist the occupant.").

51. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 63, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, art. 62, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, art. 142, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 158, Aug. 12,1949, U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

52. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. I, §2, June 8,1977, 1125 U.N.T.S. 3

Additional Protocol II,[53] and in numerous other international conventions.[54]

Tribunals—both national and international—have also referenced the Martens Clause. Several war crimes trials in the aftermath of World War II referred to the Martens Clause,[55] and prosecutions relied to some degree on ideas of natural law during the trials because many of the crimes committed by the Nazis were formally legal under the Nazi legal system.[56] Moreover, the International Criminal Tribunal for the Former Yugoslavia ("ICTY") invoked the Clause in support of several different propositions,[57] in what some commentators have supported as pushing forward the nascent field of International Criminal Law and others have deemed judicial law-making.[58] Finally, the International Court of Justice ("ICJ") has confirmed the Martens Clause's status as an expression of preexisting customary law,[59] as well

[hereinafter Additional Protocol I] ("In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from *the principles of humanity and from the dictates of public conscience*.") (emphasis added).

53. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) preamble, June 8, 1977, 1125 U.N.T.S. 609, [hereinafter Additional Protocol II] ("[I]n cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience.").

54. *See* Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction preamble § 10, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163 [hereinafter Biological Weapons Convention]; Convention on Cluster Munitions preamble §11, May 30, 2008, 2688 U.N.T.S. 39; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction preamble §8, Sept. 18, 1997, 2056 U.N.T.S. 211.

55. A non-exhaustive list includes *In re Krupp*, 15 Ann. Dig. 620, 622 (U.S. Mil. Trib. 1948); KW (Opinion and Judgment) (Conseil de guerre de Bruxelles [Military Court of Brussels], 8 February 1950) (1949–50) 30 Revue de droit penal et de criminologie [Journal of Criminal Law and Criminology] 562 [hereinafter *KW Decision*]; Klinge Decision, Supreme Court of Norway (Annual Digest and Report of Cases of International Public Law, 1946, at 263); Trial of Hans Albin Rauter, 14 L.R.T.W.C. 89 (Netherlands Special Court of Cassation, 1949).

56. *See, e.g.*, Nuremberg Trial Proceedings, Vol. 2: Second Day, Wednesday, 21 November 1945, The Avalon Project, Yale L. Sch., Lillian Goldman L. Library (2008), https://avalon.law.yale.edu/imt/11-21-45.asp [https://perma.cc/2WFR-7L4A] (last visited Mar. 27, 2021) (Robert Jackson's opening statement before the International Military Tribunal invoked the common sense of mankind to argue that ex post facto laws did not prevent criminal prosecution of alleged Nazi war criminals).

57. *Cf. Martić*, *supra* note 25, ¶ 13; Prosecutor v. Furundžija, Judgement, Case No. IT-95-17/1-T, ¶ 137 (Dec. 10, 1998) [hereinafter *Furundžija*]; *Kupreškić*, *supra* note 24, ¶ 524; *Tadić*, *supra* note 27, ¶ 119.

58. *See, e.g.*, Mary Fan, *Visionary Legal Construction Custom, General Principles and the Great Architect Cassese*, 10 J. Int'l Crim. Just. 1063, 1064 (2012) (noting, with important critique of this judicial approach and the controversy therein, that "[t]hese judicially elucidated sources of unwritten international law enable adjudication to keep up with changing configurations of violence that far outpace the slow codification of international criminal law."); Vladimir-Djuro Degan, *On the Sources of International Criminal Law*, 4 Chinese J. Int'l L. 45, 75–76 (2005) (claiming that "considering themselves as organs of the international community, these ad hoc Tribunals do not hesitate to create new 'customary rules' deducing them directly from 'elementary considerations of humanity' . . . They could perhaps even achieve some desirable results in these efforts of humanizing war, had not they taken on almost unlimited freedom in this act of law-creating.").

59. *Nuclear Weapons*, *supra* note 25, at 259 ¶ 84 ("[T]he Court recalls that all States are bound by those rules in Additional Protocol I which, when adopted, were merely the expression of the pre-existing customary law, such as the Martens Clause, reaffirmed in the first article of Additional Protocol I.").

as its "continuing existence and applicability."[60] Far from being a dusty relic of the Hague Conference of 1899, the Martens Clause continues to have relevance in courts in the new millennium.[61]

### *B. The Modern Legal Import of the Martens Clause*

While the Martens Clause undoubtedly remains an integral part of international law, the precise modern legal significance of the Martens Clause is still the subject of much debate and uncertainty.[62] Today, interpretations of the Martens Clause exist on a spectrum, with correspondingly different approaches to its legal import.[63] The narrowest interpretation posits that the Clause ceased to be of any legal importance once a more complete code of the laws of war was adopted.[64] However, the Clause's inclusion in API and courts' continuing references to it have largely nullified this stance.[65] In contrast, the broadest interpretation maintains that the Clause contains stand-alone peremptory norms of international law.[66] Though this approach has gained scholarly and judicial attention, it remains a minority view.[67] Between these two poles lies the majority view, a "not too hot, not too cold" Goldilocks approach to the Clause's modern legal import that recognizes the

60. *Id.* ¶ 87 ("Finally, the Court points to the Martens Clause, whose continuing existence and applicability is not to be doubted, as an affirmation that the principles and rules of humanitarian law apply to nuclear weapons.").

61. *See, e.g.*, BVerfG, 2 BvR 955/00, Oct. 26, 2004, http://www.bverfg.de/e/rs20041026_2bvr095500en.html [https://perma.cc/F2KT-TV3Q]; Kononov v. Latvia, 2010-IV Eur. Ct. H.R. 35.

62. *See, e.g.*, Dieter Fleck, *The Martens Clause and Environmental Protection in Relation to Armed Conflicts*, 10 GOETTINGEN J. INT'L L. 243, 249 (2020) ("[E]xperts are skeptical as to the meaning of the Clause and its practical consequences."); Sutch, *supra* note 24, at 10 ("[T]here is significant dispute (in scholarly and juridical argument) about the normative import or precise meaning of the clause."); Vincent Chetail, *The Contribution of the International Court of Justice to International Humanitarian Law*, 85 INT'L REV. RED CROSS 235, 258 (2003) ("[T]here is no generally accepted interpretation of the Martens Clause and its precise meaning is highly debated."); Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, 37 INT'L REV. RED CROSS 125, 125 ("The problem faced by humanitarian lawyers is that there is no accepted interpretation of the Martens Clause. It is therefore subject to a variety of interpretations, both narrow and expansive.").

63. *See* Tyler D. Evans, *At War with the Robots: Autonomous Weapon Systems and the Martens Clause*, 41 HOFSTRA L. REV. 697, 723–24 (2013).

64. *See* Ticehurst, *supra* note 62, at 125 (citing Russian Federation's written submission on the Nuclear Weapons, Advisory Opinion, requested by the General Assembly, at 13); Crawford, *supra* note 27, at 12 ("The most extreme perspective is that the Martens Clause has become a historical relic, and serves no purpose in modern international humanitarian law.").

65. *See* Ticehurst, *supra* note 62, at 127.

66. *See* Salter, *supra* note 24, at 421; Vladimir V. Pustogarov, *The Martens Clause in International Law*, 1 J. HIST. INT'L L. 125, 134 (1999) ("In international humanitarian law, the Martens clause is a particular norm, moreover a norm of jus cogens."); *see also Nuclear Weapons Shahabuddeen Dissent*, *supra* note 26, at 407–08 ("The reservation does not neutralize the main proposition that 'considerations of humanity give rise in themselves to obligations of a legal character' . . . The basic function of the Clause was to put beyond challenge the existence of principles of international law which residually served, with current effect, to govern military conduct by reference to 'the principles of humanity and . . . the dictates of public conscience.'").

67. Evans, *supra* note 63, at 733 ("Although this interpretation is by no means the majority view, it is not completely unsupported.").

Clause's enduring importance in certain narrow situations while being wary of its potential overreach.[68] The Goldilocks approach is apt given, on the one hand, the broad and all-encompassing wording of the Clause, and on the other, the Clause's role as a counterbalance to the implications of the permissive approach to international law espoused in the *Lotus* case for IHL.[69]

Nevertheless, pinning down the precise legal import of the Martens Clause in modern international law remains a difficult task. Indeed, as further explored in Part II, it appears that the Martens Clause can serve different legal functions depending on the circumstances and tribunal in which it is invoked.[70] But what exactly does the text of the Clause—namely the principles of humanity and the dictates of the public conscience[71]—signify, and how might a tribunal looking to invoke such broad concepts deduce their content?

### *C. The Principles of Humanity, the Dictates of the Public Conscience, and Continued Hostilities During a Global Pandemic*

Critics of the Martens Clause worry that because of the Clause's broad and indistinct wording, it could apply in limitless ways depending on the motivation of the invoking tribunal and that tribunal's interpretation of the principles of humanity and the prevailing dictates of the public conscience. While this critique is warranted, some scholarly interpretations and judicial opinions designate guideposts that delimit the Martens Clause's application

68. *See* Cassese, *supra* note 24, at 212 ("Clearly, in spite of its ambiguous wording and its undefinable purport, it has responded to a deeply felt and widespread demand in the international community: that the requirements of humanity and the pressure of public opinion be duly taken into account when regulating armed conflict."); Kahn, *supra* note 26, at 1 (noting that " . . . the reach and importance of the Martens Clause has grown . . . but the Clause is not, and never was, a panacea."); Meron, *supra* note 24, at 88 ("[T]he Martens clause does not allow one to build castles of sand. Except in extreme cases, its references to principles of humanity and dictates of public conscience cannot, alone, delegitimize weapons and methods of war, especially in contested cases.").

69. The Lotus Principle stands for the proposition that "whatever is not explicitly prohibited by international law is permitted." An Hertogen, *Letting* Lotus *Bloom*, 26 EUR. J. INT'L L. 901, 902 (2015). The dissent in the case summarized the majority's holding as: "on the contention that, under international law, every door is open unless it is closed by treaty or by established Custom. The Court in its judgment holds that this view is correct, well-founded, and in accordance with actual facts." S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, ¶ 97–98 (Sept. 7) (Loder, J., dissenting). However, other scholars have questioned that the case actually stood for such a far-reaching principle in international law. *See* Hugh Handeyside, *The* Lotus *Principle in ICJ Jurisprudence: Was the Ship Ever Afloat?*, 29 MICH. J. INT'L L. 71, 72–73 (2007) (examining "various potential interpretations of the Lotus principle and then quer[ying] whether such interpretations find support in the jurisprudence of the International Court of Justice" and concluding that "the Court, from its early days, has viewed the principle at best as inapposite and at worst as an inaccurate statement of the principles of international law").

70. *Compare Nuclear Weapons*, *supra* note 25, at 257, ¶ 78 (Jul. 8) ( "[T]he Martens Clause . . . has proved to be an effective means of addressing the rapid evolution of military technology."), *with Martić*, *supra* note 25, ¶ 13 ("[T]he prohibition against attacking the civilian population as such, as well as individual civilians, and the general principle limiting the means and methods of warfare also derive from the 'Martens clause.'").

71. This Article utilizes the version of the Clause in Additional Protocol I—the principles of humanity and the dictates of public conscience—throughout for consistency, and because scholars understand the various versions of the Clause to mean the same thing. *See* Meron, *supra* note 24, at 82.

and use in important ways.[72] Exploring these parameters may benefit adjudicators and scholars looking to invoke the Martens Clause regarding existing IHL's application during a global pandemic. Because scholars tend to discuss the principles of humanity and the dictates of the public conscience as "semi-distinct elements,"[73] the Article briefly considers each in turn.

The concept of principles of humanity predates the Hague Convention of 1899.[74] Several different theories exist as to the well-spring of the concept of humanity, including moral philosophy, natural law, and international law.[75] In the aftermath of the inclusion of the Martens Clause in the preamble of the Hague Convention, tribunals have referenced an equivalent,[76] but differently phrased idea: that of "elementary considerations of humanity,"[77] which is understood to derive from the Martens Clause.[78] As further explored in Part II, the jurisprudence of international tribunals has invoked the principles of humanity for varying reasons, depending on the facts and circumstances in the case.[79]

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72. *See* authors cited *infra* citations 80, 91–95.

73. Sutch, *supra* note 24, at 11 ("When exploring the clause, legal scholars tend to treat considerations of 'humanity' and the idea of the 'public conscience' as semi-distinct elements.").

74. *See, e.g.*, Sarkin, *supra* note 24, at 170. Hugo Grotius, widely recognized as a founding father of international law, also mentioned the "laws of humanity." Hugo Grotius, 2 The Rights of War and Peace, Chapter 25 (1853) (stating that "[e]very Man, as Man has a right to the Aid of other Men, in Necessity and every Person is obliged to give it to him, if in his Power *by the laws of humanity*" ) (emphasis added).

75. *See* Ruti Teitel, *For Humanity*, 3 J. Hum. Rts 225, 226 (2004). *See generally* Ruti Teitel, Humanity's Law (Oxford Univ. Press, 2011).

76. Meron, *supra* note 24, at 82 ("Principles of humanity are not different from elementary considerations of humanity").

77. Corfu Channel Case (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 22 ("Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war"); Responsabilité de l'Allemagne à raison des dommages causés dans les colonies portuguaises du sud de l'Afrique, 2 R.I.A.A. 1013, 1026 (1928) ("[la représaille] est limité par les expériences de l'humanité.").

78. Meron, *supra* note 24, at 82 (citing Prosecutor v. Martić, Review of the Indictment Pursuant to Rule 61, No. IT-95-11-R61, para 13 (Mar. 13, 1996) ("[T]he prohibition against attacking the civilian population as such, as well as individual civilians, and the general principle limiting the means and methods of warfare also derive from the 'Martens Clause' . . . these norms also emanate from the elementary considerations of humanity which constitute the foundation of the entire body of international humanitarian law applicable to all armed conflicts.")).

79. *Cf. Nicaragua*, *supra* note 27, at 113–14, ¶ 218 ("Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a noninternational character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity.'"); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 199 (July 9) ("With regard to international humanitarian law, the Court recalls that in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons it stated that 'a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" . . . that they are 'to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law . . . .'"); *Kupreškić*, *supra* note 24, ¶ 524 ("Elementary considerations of humanity . . . should be fully

Considering how to gauge their content, some scholars and judicial opinions have contended that human rights standards could serve as a guide for judicial interpretations of the principles of humanity,[80] which might help to "avoid arbitrary [judicial] constructions."[81] According to this view, the human rights standards of the post-WWII era may serve as a lighthouse in understanding the principles of humanity—assisting tribunals to navigate uncertainties regarding, and avoid the perils of, subjective judicial understandings of the principles of humanity.[82] If one accepts this view,[83] post-WWII human rights standards emphasizing the right to health[84] could give some guidance to tribunals as to the principles of humanity in the context of armed conflict concurrent to a global pandemic. Due care must be taken, nonetheless, regarding the different scope of application and varying scholarly and judicial stances regarding the interaction of these two bodies of law.[85]

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used when interpreting and applying loose international rules, on the basis that they are illustrative of a general principle of international law."); *see infra* Parts II.A–D.

80. *See, e.g.*, Cassese, *supra* note 24, at 212; *KW Decision*, *supra* note 55, at 562–69; *Nuclear Weapons Shahabuddeen Dissent*, *supra* note 26, at 409–10; *Nuclear Weapons Weeramantry Dissent*, *supra* note 25, at 490; *see also* Meron, *supra* note 24, at 88 (noting that the Martens Clause "serves as a powerful vehicle for governments and especially NGOs to push the law ever more to reflect human rights concerns.").

81. Cassese, *supra* note 24, at 212.

82. Lighthouses have two functions: to provide navigational information and to warn of danger. *See* David E. van Zandt, *The Lessons of the Lighthouse: "Government" or "Private" Provision of Goods*, 22 J. LEGAL STUD. 47, 49 (1993).

83. The literature on the relationship between IHL and human rights law is vast. One author considers that "the same fundamental ethical values are shared both by humanitarian law and human rights law. Despite their different historical backgrounds and their own normative specificities, the central concern of both branches of international law is human dignity. They originate from the same source: the laws of humanity." Chetail, *supra* note 62, at 240. For a comprehensive treatment of those two bodies of law, including discussion of relevant ICJ decisions, see Oona Hathaway et al., *Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law*, 96 MINN. L. REV. 1882 (2012); for this article's discussion of human rights as a guidepost to understanding the principles of humanity and the dictates of the public conscience, *see infra* citations 287–97 and accompanying text.

84. *See* U.N. Charter art. 55; Constitution of the World Health Organization preamble, Apr. 7, 1948, 14 U.N.T.S. 185; International Covenant on Economic, Social and Cultural Rights art. 12, Jan. 3, 1976, 993 U.N.T.S. 3; Universal Declaration of Human Rights art. 25, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR]; African Charter on Human and People's Rights art. 16, 1520 U.N.T.S. 217; American Declaration of the Rights and Duties of Man art. 11, *reprinted in* 43 AM. J. INT'L L. SUPP. 133 (1949); Additional Protocol to the American Convention on Human Rights on the Area of Economic, Social and Cultural Rights art. 10, 1144 U.N.T.S. 1978.

85. *See generally* THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW (1989); Alexander Orakhelashvili, *The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?*, 19 EUR. J. INT'L L. 161 (2008); Hathaway et al., *supra* note 83. *See also Nuclear Weapons*, *supra* note 25, at 240, ¶ 25 ("The Court observes that the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right to not be arbitrarily deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis,* namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed

The dictates of the public conscience are most aptly characterized as referencing world opinion on the conduct of hostilities.[86] The "public conscience" is not static but ever shifting and may not always represent "just" views.[87] Moreover, as recognized by Judge Theodor Meron, a former president of the ICTY, there is some overlap between *opinio juris*—the legal opinions of countries—and the public conscience,[88] but the concepts are nonetheless distinct. *Opinio juris* may evidence the state of the public conscience; likewise, the *vox populi* may influence the legal position taken by countries.[89] But while *opinio juris* could serve as evidence as to the state of the public conscience, not all evidence of the public conscience is *opinio juris*.[90] Given that it is impossible to poll the citizens of the world to gauge their opinion on the means and methods of warfare, the difficult question is how to deduce what the prevailing world opinion is, and what legal effect the public conscience—if it can be determined—holds.

Antonio Cassese, the first president of the ICTY, has posited that the dictates of the public conscience may be determined with reference to "authoritative acts of representative international bodies."[91] Additionally, in their dissents in the Nuclear Weapons Advisory Opinion, the ICJ Judges Shahabuddeen and Weeramantry provided some guidance on what sources might indicate what constitutes the public conscience. While qualifying that it is not the Court's role "to transform public opinion into law," Judge Shahabuddeen stated that judges may evaluate whether a "standard" exists "indicating the state of the public conscience" as well as its effect.[92] To do so, reference may be made to "the views of States" and authoritative sources,

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conflict and not deduced from the terms of the Covenant itself."). *But see* Coard v. United States, Inter-Am. Ct. H.R., Rep. No. 109/99, ¶ 39 (Sept. 29, 1999) ("while international humanitarian law pertains primarily in times of war and the international law of human rights applies most fully in times of peace, the potential application of one does not necessarily exclude or displace the other.").

86. Crawford, *supra* note 27, at 11 ("[T]here is some scope to argue that the idea of 'public conscience' is akin to notions of 'world opinion'"); *see also* Meron, *supra* note 24, at 83 ("Dictates of public conscience . . . can be seen as public opinion that shapes the conduct of the parties to a conflict").

87. Meron, *supra* note 24, at 85 ("'Bad' public opinion is not always limited to one country. In pre-World War II Europe, anti-Semitism and fascism were popular. Subject a country or countries to a barrage of hate propaganda and a monster of public opinion will rise."); *see also* Michel Veuthey, *Public Conscience in International Humanitarian Action*, 22 REFUGEE SURV. Q. 197, 217 (2003) ("Public conscience is not static. It can change over time, it can even be manipulated for the better or for the worse.").

88. Meron, *supra* note 24, at 83 ("[D]ictates of public conscience can be seen as a reflection of *opinio juris*.").

89. *Id*. ("Although popular opinion, the *vox populi*, may be different from the opinion of governments, which constitutes *opinio juris*, the former influences and helps to form the latter.").

90. *See infra* notes 91–97 and accompanying text (the Article notes that General Assembly Resolutions, to the extent they allow states an opportunity to express their sense of legal obligation, may evidence *opinio juris* and public conscience. The notion of public conscience is, still, a far broader concept than that of *opinio juris*.).

91. Cassese, *supra* note 24, at 212.

92. *Nuclear Weapons Shahabuddeen Dissent*, *supra* note 26, at 409–10 ("The task of determining the effect of a standard may be difficult, but it is not impossible of performance; nor is it one which a court of justice may flinch from undertaking where necessary. The law is familiar with instances in which a court has to do exactly that, namely, to apply a rule of law which embodies a standard through which the rule exerts its force in particular circumstances.").

such as General Assembly Resolutions.[93] Several other scholars have supported this proposition.[94] Nonetheless, there exists no precise catalogue of what constitutes an authoritative source, the relative weight to be accorded to sources, or the method of interpreting how these sources evidence the "public conscience."[95]

Therefore, this Article envisages a hierarchy of actors in the international arena whose views might count for varying weights in determining the public conscience, with progressively more evidence needed the further down the hierarchy of authority. The U.N. General Assembly would be at the top of this hierarchy because of its representative nature of the world community. Next would be the U.N. Security Council due to its role in the maintenance of international peace and security.[96] The power dynamics and veto power, often considered a hitch in the Council's functioning, would serve as an antidote to a regional or power-based public conscience on a means or method of warfare. Then, one might look to other international organizations, regional blocks of states, individual states, treaties, and the decisions of tribunals. Finally, a determination of the public conscience might consider—where pervasive, consistent, and unambiguous evidence exists—the views of international NGOs, civil society networks, non-state armed groups, and individuals.[97] The point of emphasis behind adopting such a methodology is that a tribunal could not make up a "public conscience"

93. *Id.* at 410 ("The standard being one which is set by the public conscience, a number of pertinent matters in the public domain may be judicially noticed . . . [T]he Court is not bound by the technical rules of evidence found in municipal systems; it employs a flexible procedure. That, of course, does not mean that it may go on a roving expedition; it must confine its attention to sources which speak with authority. Among these there is the General Assembly.").

94. Cassese, *supra* note 24, at 212; Sean McBride, *The Legality of Weapons of Social Destruction*, *in* Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet 406 (Christophe Swinarski ed., 1984) ("Many resolutions adopted by the General Assembly of the United Nations have, either directly or by inference, condemned completely the use, stockpiling, deployment, proliferation and manufacture or nuclear weapons. While such resolutions may have no formal binding effect in themselves, they certainly do represent "the dictates of public conscience" in the 20th century, and come within the ambit of the Martens Clause prohibition.")

95. *See* Tara Smith, *Challenges in Identifying Binding Martens Clause Rules from the 'Dictates of the Public Conscience' to Protect the Environment in Non-International Armed Conflict*, 10 Transnat'l Legal Theory, 184, 186, 193 (2019) (noting that in the two dissenting Opinions in the Nuclear Weapons Advisory Opinion that discuss authoritative sources, "Judge Shahabuddeen stopped short of identifying examples of authoritative sources which clearly identify the dictates of the public conscience with sufficient precision that would allow rules to be derived from them and enforced on the battlefield side by side with other more established laws of armed conflict. Judge Weeramantry felt that the dictates of the public conscience had been expressed with sufficient precision on the issue of nuclear weapons such that no uncertainty existed regarding the Martens Clause prohibition on these weapons, yet he too failed to provide guidance on the types of authoritative sources that had informed and shaped his view.") (citations omitted).

96. For a comprehensive look at the U.N. Security Council's power dynamics, critiques, and potential reform, see Bart M.J. Szewczyk, *Variable Multipolarity and U.N. Security Council Reform*, 53 Harv. Int'l L.J. 449 (2012).

97. *See Nuclear Weapons Weeramantry Dissent*, *supra* note 25, at 487 ("Vast numbers of the general public in practically every country, organized professional bodies of a multinational character, and many other groupings across the world have proclaimed time and again their conviction that the public conscience dictates the non-use of nuclear weapons. Across the world, presidents and prime ministers, priests

from thin air that might then bear on that tribunal's legal analysis regarding a means or method of warfare. It must undergo a rigorous analysis and largely sticks to authoritative acts of representative international bodies.

As explored below, important evidence has surfaced following the outbreak of the COVID-19 pandemic indicating the stance of the public conscience on continued hostilities amidst a global pandemic.[98] In light of this evidence and the varying scholarly and judicial interpretations of the Martens Clause's modern legal import presented in the following section, the Article turns to how the *in bello* principles of proportionality, distinction, and military necessity regulate the conduct of parties to hostilities amidst a global pandemic.

## II. The Martens Clause and the Conduct of Hostilities during a Pandemic

### A. *An Interpretive Device for Existing Rules? The Principle of Proportionality*

Some scholars and judicial opinions have cited the Martens Clause as a potential aid to judicial interpretation.[99] This view posits that where an existing rule of IHL is not "sufficiently rigorous or precise,"[100] the Martens Clause allows tribunals to consider the principles of humanity and the dictates of the public conscience in making their decision.[101] Nonetheless, this view claims, the Martens Clause must be used *in conjunction* with an existing rule of humanitarian law.[102] Tribunals are not to invoke the Martens Clause

and prelates, workers and students, and women and children have continued to express themselves strongly against the bomb and its dangers.").

98. Negri, *supra* note 16, at 24; s*ee infra* notes 277–87 and accompanying text.

99. *See*, *e.g.*, Cassese, *supra* note 24, at 187 ("in case of doubt, rules of international humanitarian law should be construed in a manner consonant with standards of humanity and the demands of the public conscience."); Meron, *supra* note 24, at 88; *see also* Stapleton-Coory, *supra* note 24, at 478 ("In vesting the Martens Clause with the ability to directly influence the interpretation and application of the concrete provisions of IHL, the 'standards of humanity' and 'public conscience' become defining factors of its development."); Salter, *supra* note 24, at 413 (stating "the Clause authorizes judges to select that interpretation of fact and law which best gives effect to the standards endorsed by this measure"); Sarkin, *supra* note 24, at 153 ("Another view to which some authors subscribe is that of the clause as an interpretative tool. In their opinion, the Clause means that legal principles should be interpreted in the context of the principles of humanity and public conscience."); Sutch, *supra* note 24, at 12 ("[W]here doubts concerning the interpretation of principles of IHL arise demands of humanity and of the public conscience should inform the interpretation."); *Kupreškić*, *supra* note 24, ¶ 525. *But see* Degan, *supra* note 58, at 75–76.

100. *Kupreškić*, *supra* note 24, ¶ 525. It is important to note that Judge Antonio Cassese, cited in the scholarship above, was also the presiding Judge on a panel of three judges in the *Kupreškić* Trial Judgement.

101. *Id.* ("this Clause enjoins, as a minimum, reference to those principles and dictates any time a rule of international humanitarian law is not sufficiently rigorous or precise: in those instances the scope and purport of the rule must be defined with reference to those principles and dictates.")

102. Evans, *supra* note 63, at 725 ("The principles of humanity and the dictates of the public conscience are well established aids for interpreting and supplementing *the traditional pillars of the LOAC*" (emphasis added)).

to create new rules or depart from existing text.[103] In the words of Judge Meron, "where there already is some legal basis for adopting a more humanitarian position, the Martens Clause enables decision makers to take the extra step forward."[104] In this context, the principle of proportionality is both pertinent to armed conflict amidst a global pandemic and possibly in need of interpretive aid.

### 1. *The Principle of Proportionality*

The principle of proportionality prohibits any attack that is expected to cause incidental civilian harm excessive to the "concrete and direct military advantage anticipated."[105] Moreover, Article 8(2)(b)(iv) of the Rome Statute classifies as a war crime the intentional launch of an attack in the knowledge that it will cause incidental harm that would be "clearly excessive in relation to the concrete and direct overall military advantage."[106] Because the principle is part of the corpus of customary international law, it applies to both international and non-international armed conflict.[107]

In the *Galić* case, the ICTY stated that judges are to conduct proportionality assessments of attacks in the manner of a "reasonably well-informed person . . . making reasonable use of the information available to them (at the time of attack)."[108] Subsequent judicial opinions and commentators have altered this to a reasonable military commander standard.[109] Moreover, rea-

103. *Id.* at 718 "stating one interpretation viewing "the Clause as establishing a framework for interpreting international rules, rather than creating them . . . courts can and should consider the principles of humanity as well as the dictates of the public conscience, which, while not determinative, may serve as guidelines for evaluating the issue before them.").

104. Meron, *supra* note 24, at 88 (also arguing that "[the Clause] argues for interpreting international humanitarian law, in case of doubt, consistently with the principles of humanity and the dictates of public conscience.").

105. Additional Protocol I, *supra* note 52, arts. 51(5)(b), 57(2)(a)(iii), 57(2)(b); 1 Int'l Comm. of the Red Cross, Customary International Humanitarian Law 46 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter I Customary IHL] (Rule 14 prohibits "launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.").

106. Rome Statute of the International Criminal Court art. 8(2)(b)(iv), July 17, 1998, 2187 U.N.T.S. 95 [hereinafter Rome Statute].

107. I Customary IHL, *supra* note 105, at 3. *But see* James Kilcup, *Proportionality in Customary International Law: An Argument Against Aspirational Laws of War*, 17 Chi. J. Int'l L. 244, 254–59 (2016) (disagreeing with the "excessive" standard adopted by the ICRC's Customary International Law study and instead arguing that the standard in the ICC Statute should be the customary law standard.).

108. Prosecutor v. Stanislav Galić, Case No. IT-98-29-T, Judgment, ¶ 58 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).

109. *See* International Criminal Tribunal for the Former Yugoslavia: Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia 39 (2000) ("the determination of relative values must be that of the "reasonable military commander.""); HCJ 2056/04 Beit Sourik Vill. Council v. Gov't of Israel, 58(5) PD 817, ¶ 46 (2004) (Isr.) ("All we can determine is whether a reasonable military commander would have set out the route as this military commander did."); HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov't of Israel 62(1) PD 507, ¶ 57 (2006) (Isr.) ("The court will ask itself whether a reasonable military commander would have made the decision that was actually made.").

sonable military commanders are to carry out proportionality assessments honestly and in good faith, based on the information known from all sources reasonably available to them at the time of attack,[110] taking into account all circumstances ruling at the time, and based on what was feasible at the time of attack.[111] This inquiry during a pandemic is therefore heavily dependent on the circumstances, feasibility of the assessment, and availability of information to the reasonable military commander at the time of attack.

Notwithstanding these elucidations, the precise contours of the principle of proportionality have long been a subject of scholarly debate and critique.[112] The principle of proportionality has remained abstract for at least four reasons. First, any legal rule that seeks to govern the innumerable situations that might appear on the battlefield must, by its nature, be somewhat flexible. Indeed, there is no clear-cut mathematical formula or objective test that can balance values attached to civilian lives and military objectives.[113] Second, there is some debate on what qualifies as expected incidental civilian harm.[114] Some ambiguity thus exists regarding the precise meaning of "expected to cause."[115] Third, there is very little case law—either domestic or

110. *See Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity*, 86 AM. SOC'Y INT'L L. PROC. 39, 44 (1992) (remarks of Frits Kalshoven) ("[An attacker] is obliged to take into account all available information. Negligence in this respect makes him responsible.").

111. *See* EMANUELA-CHIARA GILLARD, PROPORTIONALITY IN THE CONDUCT OF HOSTILITIES: THE INCIDENTAL HARM SIDE OF THE ASSESSMENT 18–25 (2018).

112. *See, e.g.*, W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 173 (1990) (suggesting that "[b]y American domestic law standards, the concept of proportionality [in the law of armed conflict] would be constitutionally void for vagueness."); Michael N. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 YALE HUM. RTS. & DEV. L.J. 143, 150 (1999) (noting that "terminological imprecision, specifically as to the phrase "concrete and direct," invites subjective interpretation and application."); Emanuela-Chiara Gillard, *Some Reflections on the "Incidental Harm" Side of Proportionality Assessments*, 51 VAND. J. TRANSNAT'L L. 827, 833 (2018) (arguing that the use of other areas of public international law or domestic tort law's causation analysis might prove a useful benchmark to guide the unclear incidental harm analysis.); Ben Clarke, *Proportionality in Armed Conflicts: A Principle in Need of Clarification?,* 3 J. INT'L HUMANITARIAN LEGAL STUD. 73, 73 (2012) ("highlighting reasons why clarification of the law on proportionality is necessary").

113. *See* Charles P. Trumbull IV, *Re-Thinking the Principle of Proportionality Outside of Hot Battlefields*, 55 VA. J. INT'L L. 521, 542 (2015).

114. *Compare* OFF. OF THE GEN. COUNS., U.S. DEP'T OF DEF. L. OF WAR MANUAL § 5.12.1.2 (rev. ed. 2016) ("The expected loss of civilian life, injury to civilians, and damage to civilian objects is generally understood to mean such immediate or direct harms foreseeably resulting from the attack. Remote harms that could result from the attack do not need to be considered in applying this prohibition."), *with* Australian Defence Force, Australian Defence Doctrine Publication 06.4 (ADDP 06.4): Law of Armed Conflict, 5-4, ¶ 5.9 (2006), http://www.defence.gov.au/adfwc/Documents/DoctrineLibrary/ADDP/ADDP06.4-LawofArmedConflict.pdf [https://perma.cc/A4F8-LNHB] ("Proportionality requires a commander to weigh the military value arising from the success of the operation against the *possible* harmful effects to protected persons and objects. There must be an acceptable relationship between the legitimate destruction of military targets and the possibility of consequent collateral damage.") (emphasis added).

115. *Compare* PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE 91–92 (2010), http://ihlresearch.org/amw/Commentary on the HPCR Manual.pdf [https://perma.cc/LPR3-U5LR] ("Expected" collateral damage and "anticipated" military advantage, for these purposes, mean that that outcome is probable, i.e. more likely than not."), *with* GILLARD, *supra* note 111, at 18 ("The incidental harm to be considered is that harm which would not occur but for the attack, but excluding harm that results from the conduct of another actor and is not due to the physical effects of the attack;

international—that clarifies the principle of proportionality.[116] Moreover, scholars have critiqued much of the case law that does exist[117] for its lack of clarity regarding what a disproportionate use of force entails.[118] Fourth, there is some debate in IHL concerning situations where an *a priori* balancing of military advantage and incidental harm yields a result that is on the fence between "excessive" in relation to the anticipated military advantage and a result which is not.[119] Building on the above, because the principle of proportionality is imprecise by nature, depending on the circumstances and the law applicable to the tribunal hearing the case,[120] an international adju-

and which was reasonably foreseeable at the time the attack was planned or launched."). *See also* authors cited *infra* notes 127–33.

116. *See* Rogier Bartels, *Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: The Application of the Principle in International Criminal Trials*, 46 ISR. L. REV. 271, 272 (2013) (observing that "no case law exists to which the International Criminal Court . . . could turn were it to be seized of a case concerning alleged disproportionate attacks."); Jens David Ohlin, *Targeting and the Concept of Intent*, 35 MICH. J. INT'L L. 1, 86 (2013) (noting "that there are almost no examples of [proportionality-based] prosecutions before international tribunals that might provide guiding precedent on the nature of proportionality"); Sloane, *Puzzles of Proportion*, *supra* note 15, at 303 ("A bare handful of judicial decisions discuss or apply *in bello* proportionality."); Alexander K.A. Greenawalt, *Targeted Capture*, 59 HARV. INT'L L.J. 1, 45 (2018) (noting that "the now voluminous case law of international criminal tribunals reveals barely a single war crimes conviction based on a finding that an attack directed against a military objective lacked sufficient anticipated military advantage in comparison to the expected harm to civilians.").

117. A non-exhaustive list of cases that have referenced proportionality include: *Kupreškić*, *supra* note 24, ¶¶ 513, 524, 535; Prosecutor v. Strugar, Case No. IT-01-42-T, Judgment, ¶¶ 281, 295 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005); Prosecutor v. Strugar, Case No. IT-01-42-A, Judgment, ¶ 179 (Int'l Crim. Trib. for the Former Yugoslavia July 17, 2008); Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-T, Judgment, ¶ 949 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 12, 2007); Prosecutor v. Dordević, Case No. IT-05-87/1-T, Judgement, ¶¶ 980, 2063–65, 2069 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 23, 2011); Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the Confirmation of Charges, 01/04-01/07-717, Pre-Trial Chamber I, 30 September 2008 (Katanga Confirmation Decision) ¶ 374.

118. *See* Ian Henderson & Kate Reece, *Proportionality Under International Humanitarian Law: The "Reasonable Military Commander" Standard and Reverberating Effects*, 51 VAND. J. TRANSNAT'L. L. 835, 837 (2018) (disagreeing with the outcome in the *Prosecutor v. Prlić* case as well as the unclear proportionality analysis conducted therein); Walter B. Huffman, *Margin of Error: Potential Pitfalls of the Ruling in The Prosecutor v. Ante Gotovina*, 211 MIL. L. REV. 1, 5 (2012) (disagreeing with the outcome in the Gotovina Trial Judgement, particularly in light of the proportionality assessments carried out, and arguing that the tribunal's "200 meter rule upsets the law's careful balance between military necessity and humanitarian restraint").

119. Various approaches have been suggested as to the meaning of excessive. *See*, *e.g.*, YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 120 (1st ed. 2004) ("'Excessive' means that the disproportion is clearly discernible . . . the view that 'excessive' applies 'only when the disproportion is unbearably large' goes too far."); *see also* Jason D. Wright, *'Excessive' Ambiguity: Analysing and Refining the Proportionality Standard*, 94 INT'L REV. RED CROSS 819, 820 (2012) ("When weighing the anticipated military advantage against the expected collateral damage, is there any consensus on what is "excessive"? The answers from the panel varied considerably: from damage that would 'shock the conscience', to 'clearly unreasonable', to just plain 'unreasonable.'"). *But see* Rome Statute, *supra* note 106 (adopting the "clearly excessive" standard for purposes of criminal liability).

120. For example, domestic war crimes trials may apply domestic legislation. State parties to the Additional Protocol I may apply that Protocol's grave breach provision. A tribunal tasked with applying customary international law for alleged disproportionate uses of force during a non-international conflict in a state that is not a signatory to the Rome Statute would have to determine the precise standard to apply under customary international law, which remains an open question. *See* Kilcup *supra* note 107, at 246-249.

dicator could choose to invoke the Martens Clause as an interpretive device in a war crime allegation for the disproportionate use of force.

### 2. *Incidental Civilian Harm Considerations during a Global Pandemic*

In the field, military decision-makers might take into account a number of important ways that an operation could spread disease among and cause incidental harm to the civilian population during a global pandemic.[121] Consider the potential direct and indirect effects of a military operation during a global pandemic that a reasonable military commander might consider for a disease that spreads via air droplets, like COVID-19. First, direct transmission may occur via human-to-human contact.[122] Combatants may directly spread a virus when coming into contact with civilians during an operation. Where armed forces detain civilians, the disease may spread via initial contact, or it may spread when detainees are held with other detainees. Finally, during a global pandemic, where armed conflict causes the movement of civilians in an area where the pandemic-causing virus is present, disease spread from human-to-human contact is a significant risk factor.[123] Where hostilities during a global pandemic cause the movement of civilians away from the conflict, those people face the trifold alarm of facing overcrowding, limited access to protective equipment to prevent catching the disease, and inadequate health care access.[124]

In addition, operations may destroy or impede access to important resources such as critical water and sanitation infrastructure,[125] personal protective equipment, information infrastructure, and vaccine distribution networks, which take on greater importance during a global pandemic due to their role in effectively containing, or treating, the infectious disease among both civilians and combatants. Where hostilities disrupt supply chains of protective equipment, treatment supplies, or preventative medicine like vaccines, that attack may indirectly cause incidental harm to civilians. An attack may also have an impact on both civilian and combatant

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121. *See* Amrei Müller, *States' Obligations to Mitigate the Direct and Indirect Health Consequences of Non-International Armed Conflicts: Complementarity of IHL and the Right to Health*, 95 Int'l Rev. Red Cross 129, 152 (2013) (noting how diverse infectious diseases spread in different ways—ranging from air droplet to fecal-oral to blood to sexually—with important implications for risk factors and mitigation efforts of a military operation taking place during a pandemic; listing the most severe risk factors from infectious disease during armed conflict as "overcrowding; inadequate shelter; insufficient nutrient intake; insufficient vaccination coverage; poor water, sanitation and hygiene conditions; high exposure to and/or proliferation of disease vectors; [and] lack of and/or delay in treatment.") (citations omitted).

122. *See infra* note 180.

123. *See, e.g.*, Hans Henri P. Kluge et. al., *Refugee and Migrant Health in the COVID-19 Response*, 395 Lancet 1237, 1238 (2020).

124. *See, e.g.*, *The Virus that Shut Down the World: The Plight of Refugees and Migrants*, UN News (Dec. 29, 2020), https://news.un.org/en/story/2020/12/1080742 [https://perma.cc/H9A6-MLZ5].

125. *See* Hathaway, Stevens & Lim, *supra* note 14 (noting that during the COVID-19 pandemic "[i]n Ukraine, armed attacks linked to ongoing hostilities between Ukrainian forces and separatist groups have damaged critical water and sanitation infrastructure."). *See also* I Customary IHL, *supra* note 105, at 189 ("Rule 54. Attacks against Objects Indispensable to the Survival of the Civilian Population").

access to healthcare. For example, where already-at-capacity hospitals fill up with combatants wounded in battle, care for sick civilians may take a back seat to battle wounds, resulting in delays in treatment; overcrowding in hospitals may create favorable conditions for airborne infectious disease to spread among those *hors de combat*. Finally, combatants may spread an infectious disease to enemy soldiers, who then, in turn, spread it among their own civilians. The above considerations, far from exhaustive, nonetheless illustrate some of the ways in which, during a global pandemic, attacks may directly spread the pandemic-causing disease among civilians or indirectly create conditions that exacerbate the disease's spread.

### 3. *"Expected to Cause": The Incidental Harm Calculus during a Global Pandemic*

In an armed conflict, the contours of behavior that constitutes "excessive" incidental civilian harm relative to an anticipated military advantage is difficult to ascertain in non-pandemic times.[126] During a pandemic, exactly what the incidental harm calculus includes may be more indeterminate. A number of questions arise that the principle of proportionality does not readily answer. The most obvious question is: Does the incidental injury calculus include expected incidental civilian harm resulting from the military operation's spread of the pandemic-causing disease?

The notion that military decision-makers ought to factor in expected incidental civilian harm due to the spread of an infectious disease when conducting a proportionality assessment finds some scholarly support.[127] Indeed, the incidental harm literature divides the concept of incidental civilian harm along two lines: the direct and indirect effects of an attack.[128] Indirect or reverberating effects—those that are "not directly and immediately caused by the attack, but are nevertheless the product thereof"[129]—can occur in different ways. "Delayed effects" occur when an attack does not

126. *See, e.g.*, Jack M. Beard, *Law and War in the Virtual Era*, 103 AM. J. INT'L L. 409, 428 (2009) ("The obligation to refrain from disproportionate attacks often forces military commanders to make difficult decisions, to weigh the value of innocent human lives in relation to the capture or destruction of a particular military objective . . . the test is much easier to formulate in principle than to apply to a complex or uncertain set of circumstances.").

127. *See* GILLARD, *supra* note 111, at 18–19 (claiming that where, for example, an attack disrupts "an electricity generation and distribution system, which in turn prevents water purification systems from operating, leading to an outbreak of waterborne diseases among the civilian population . . . provided each step in the chain of causation was reasonably foreseeable, the foreseeably ensuing disease and deaths fall within the scope of proportionality assessments.").

128. *Cf.* DINSTEIN, *supra* note 119, at 159 ("the only consequences that count are those that occur directly: remote effects need not be counted."); Michael N. Schmitt & Major Michael Schauss, *Uncertainty in the Law of Targeting: Towards a Cognitive Framework*, 10 HARV. NAT'L SEC. J. 148, 171–74 (2019) ("[T]he authors are of the view that foreseeable indirect harm should be included in the proportionality analysis . . . [t]he relevant harm includes not only that directly caused by the attack, as with damage or injury from the blast effects of a weapon, but also foreseeable indirect effects, which are sometimes labelled reverberating or knock-on effects.").

129. Michael N. Schmitt, *Wired Warfare: Computer Network Attack and Jus in Bello*, 84 INT'L REV. RED CROSS 365, 392 (2002).

manifest for some time, like cluster munitions.[130] "Long-term harm" continues after an attack, like radiation from the use of a nuclear weapon.[131] "Knock-on effects" occur as a result of damage to another object, such as a hospital.[132] On the question of what incidental harm ought to be included in proportionality assessments during a global pandemic, proportionality literature indicates a growing consensus that foreseeable indirect effects must be considered in the incidental harm calculus.[133] According to this view, the relevant inquiry during a global pandemic is whether, and to what extent, the military operation in question will foreseeably cause—either directly or indirectly—incidental civilian harm through disease transmission. In theory, this analysis may include a number of considerations—depending on what is possible for the attacking force at the time of the attack,[134] and the availability of such information more generally[135]—not limited to testing capacity in the attacking force, civilian density, the extent to which the operation can be conducted without individuals coming into contact with others, the demographics of the civilian population, and the expected effect of the operation on civilian capacity to contain the infectious disease.

During a global pandemic, the proportionality principle therefore may mandate some inclusion of incidental civilian harm in the proportionality analysis when incidental civilian harm resulting from disease transmission is an expected consequence of the attack. Where including such incidental harm in the pre-operation proportionality calculus yields a result that is "excessive in relation to the concrete and direct military advantage anticipated," the attack is prohibited.[136] Failing to "cancel or suspend"[137] the

130. Gillard, *supra* note 112, at 832.

131. *Id.*

132. *Id.*

133. *See*, *e.g.*, Isabel Robinson & Ellen Nohle, *Precautions in Attack: The Reverberating Effects of Using Explosive Weapons in Populated Areas*, 98 Int'l Rev. Red Cross 107, 108 (2016) (arguing that commanders must take into account those reverberating effects that are reasonably foreseeable in the circumstances ruling at the time, in light of the reasonably available information); Laurent Gisel, *Relevant Incidental Harm for the Proportionality Principle*, 46 Collegium 118, 120 (2015) (noting that "[d]espite some exceptions, it is today generally agreed in the literature that the incidental harm relevant for the rules on proportionality and precautions in attack is not limited to the direct effects of the attack, but include the reverberating or indirect ones."); Rebecca J. Barber, *The Proportionality Equation: Balancing Military Objectives with Civilian Lives in the Armed Conflict in Afghanistan*, 15 J. Conflict & Sec. L. 467, 481 (2010); U.S. Dep't of Def., Law of War Manual 262 (2016) ("If the destruction of a power plant would be expected to cause the loss of civilian life or injury to civilians very soon after the attack due to the loss of power at a connected hospital, then such harm should be considered in assessing whether an attack is expected to cause excessive harm."); Henderson & Reece, *supra* note 118, at 839 ("reverberating or indirect effects *are* counted as part of the collateral damage assessment but only where that harm will arise as an expected consequence of the attack.") (emphasis added); *see* Int'l Comm. Red Cross, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, 42–43, 52 (2015) (the incidental harm calculus includes the *foreseeable* reverberating effects of an attack).

134. *See* Gillard, *supra* note 111, at 16.

135. *Id.* at 3.

136. Additional Protocol I, *supra* note 52, art. 51(5)(b) (prohibiting "any attack which may be expected to cause incidental loss of life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.").

attack despite such a calculus could implicate individual criminal responsibility as well as potential state responsibility under international law.[138]

### 4. *Possible Invocations of the Martens Clause Regarding the Disproportionate Use of Force During a Global Pandemic*

Applying the Martens Clause to proportionality assessments of military operations that occur during a global pandemic might affect normative assessments of excessiveness and support the inclusion of pandemic-related incidental civilian harm in proportionality assessments. But any invocation of the Martens Clause as an interpretive device for existing IHL in a criminal trial would need to proceed with great caution and would not be appropriate before the International Criminal Court ("ICC").

As discussed above, there is some debate as to the exact standard of excessiveness to be applied regarding the balance between expected incidental civilian harm and anticipated military advantage.[139] To be sure, proportionality decisions lean in general towards being highly deferential to the subjective "reasonable military commander" standard and therefore "lawful within a broad 'margin of appreciation.'"[140] Some tribunals that have deemed an attack disproportionate have not clearly delineated the reasoning involved behind either their proportionality assessment or the precise excessiveness standard applied.[141] Nonetheless, the dictates of the public con-

137. *Id*. art. 57(2)(b) ("an attack shall be *cancelled or suspended* if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.") (emphasis added).

138. Article 85 API counts disproportionate attacks as grave breaches of the Geneva Conventions. *Id.* art. 85(1). Thus, they are subject to universal domestic jurisdiction to prosecute as violations of the Geneva Conventions. *See* Ward Ferdinandusse, *The Prosecution of Grave Breaches in National Courts*, J. Int'l Crim. Just. 723, 741 (2009). *See* Marco Sassoli, *State Responsibility for Violations of International Humanitarian Law*, 84 Int'l Rev. Red Cross 401, 433 (2002). The Article recognizes how complex, and perhaps unlikely, international criminal prosecution is. For a more comprehensive treatment, see generally Bartels, *supra* note 116.

139. *See* authors cited *supra* note 119.

140. Sloane, *Puzzles of Proportion*, *supra* note 15, at 309 (citing Isayeva v. Russia, App. No. 57959/00, Eur. Ct. H.R. (2005); Case Concerning Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161 (Nov. 6)).

141. *See, e.g.,* Prosecutor v. Prlić et al., Case No. IT-04-74-T, Judgment, Vol. III ¶¶ 1583–1584 (Int'l Crim. Trib. for the Former Yugoslavia May 29, 2013) [hereinafter *Prlić et al. Chamber Vol. III*] ("The Chamber therefore holds that although the destruction of the Old Bridge by the HVO may have been justified by military necessity, the damage to the civilian population was indisputable and substantial. It therefore holds by a majority, with Judge Antonetti dissenting, that the impact on the Muslim civilian population of Mostar was disproportionate to the concrete and direct military advantage expected by the destruction of the Old Bridge."). For a critique of the proportionality aspect of this tribunal's ruling, see Rogier Bartels, *Prlić et al.: The Destruction of the Old Bridge of Mostar and Proportionality*, EJIL:Talk! (July 31, 2013), https://www.ejiltalk.org/prlic-et-al-the-destruction-of-the-old-bridge-of-mostar-and-proportionality/ [https://perma.cc/5TFR-HQ5F] ("[T]he Chamber did not balance the anticipated military advantage that the HVO would achieve by destroying the bridge and the expected damage to the bridge itself and/or the civilians . . . When reading the relevant part of the *Prlić* judgement, one wonders why no explicit legal finding was made on the proportionality of the attack on the Old Bridge.").

science—which favor a *total* cessation of hostilities during the COVID-19 pandemic—might give some interpretive support regarding the normative standard of excessiveness in disproportionate use of force cases when an attack is carried out during a global pandemic. The calls for a global ceasefire were concerned about the impact of continued armed conflict amidst the COVID-19 pandemic on vulnerable civilian populations, as well as on humanitarian access.[142] In this regard, the U.N. Security Council's call directly referenced humanitarian principles, including the principle of humanity, with respect to the unimpeded and safe delivery of humanitarian aid and related services to assist populations battling the pandemic.[143] The U.N. Secretary-General's original call observed that "in war-ravaged countries, health systems have collapsed" and health professionals are scarce—evidencing the importance of unimpeded humanitarian assistance during the COVID-19 pandemic.[144] Thus, the calls for a global ceasefire then suggested preference for the *complete* cessation of hostilities to mitigate the pandemic's impact on vulnerable civilian populations and their access to humanitarian assistance. To the extent that an attack carried out despite the global ceasefire calls would be expected to cause pandemic-related incidental civilian harm that those calls sought to avoid, it is conceivable that a tribunal might, particularly given doubts as to the excessiveness standard to be applied under customary law,[145] adopt Judge Meron's and Judge Cassese's view of the Martens Clause as an interpretive device. The dictates of the public conscience, calling for a complete cessation of hostilities, could then impact normative judgments of the principle of proportionality's excessiveness standard during a global pandemic.

In a similar vein, the Martens Clause might also bolster the normative contention that foreseeable incidental harm of the attack's impact on disease transmission during a pandemic—even if indirect—ought to be included in incidental civilian harm calculations. Despite the debate on the precise cut-off point for measuring incidental civilian harm,[146] the principles of human-

142. *See* Statement of Support by 171 U.N. Member States, *supra* note 5 ("We express our deep concern for the continuation of hostilities in various parts of the world, particularly in the midst of the global health crisis, and their devastating impact on the most vulnerable – especially on women and children . . . We are mindful that a peaceful condition is indispensable to facilitate humanitarian access in fragile and conflict-affected situations.").

143. S. C. Res. 2532, *supra* note 6, ¶ 2 ("*Calls* upon all parties to armed conflicts to engage immediately in a durable humanitarian pause for at least 90 consecutive days, in order to enable the safe, unhindered and sustained delivery of humanitarian assistance, provisions of related services by impartial humanitarian actors, in accordance with the humanitarian *principles of humanity*, neutrality, impartiality and independence, and medical evacuations, in accordance with international law, including international humanitarian law and refugee law as applicable.") (emphasis added). For more on the humanitarian principles, see *What are Humanitarian Principles?* United Nations Office for the Coordination of Humanitarian Affairs (June 2012), https://docs.unocha.org/sites/dms/Documents/OOM-humanitarian principles_eng_June12.pdf.

144. *See supra* note 1.

145. *See, e.g.*, the hypothetical scenario outlined in Kilcup, *supra* note 107, at 246, 249 (noting that "[w]hich definition of proportionality constitutes CIL remains an open question.").

146. *See* sources cited *supra* notes 114–15.

ity and the dictates of the public conscience appear to support the normative contention that consideration of the attack's expected impact on pandemic transmission is warranted, even if the principle of proportionality's "expected to cause" standard regarding incidental civilian harm from pandemic transmission may be unclear.

Consider an extreme hypothetical. Would a squadron of untested soldiers searching a civilian nursing home in pursuit of one non-priority enemy soldier—during a pandemic that has a high fatality rate for elderly civilians, such as the COVID-19 pandemic[147]—be a proportionate attack? Absent other information, what is the expected incidental civilian harm in such a situation? It seems conceivable that a tribunal might view such an attack as disproportionate, and that a tribunal could look to invoke the Martens Clause as an interpretive aid regarding the principle of proportionality's application during a global pandemic.

Uncertainty also plays an important role in the above example—perhaps none of the soldiers were carriers of the virus. But in the context of the COVID-19 pandemic for example, uncertainty has played, and continues to play, an outsized role. The sudden emergence of new, more contagious, and lethal variants of the disease,[148] divergent scientific evidence of the disease's effects,[149] and strains that appear not to show up on some tests,[150] illustrate just a few examples of the significant degree of uncertainty surrounding the current pandemic-causing virus. While commentary has grappled with uncertainty's role in the proportionality calculus,[151] the heightened uncertainty during a global pandemic—considered in light of evidence of the public conscience supporting a *complete* cessation of hostilities precisely to protect vulnerable civilian populations and preserve humanitarian access—might have some effect on the normative judgement as to what is excessive.

To illustrate important limits of such an interpretive view of the Martens Clause, consider a hypothetical war crimes case before the ICC in which an attack during a global pandemic was allegedly undertaken in the knowledge that it would cause "clearly excessive" incidental civilian harm resulting from disease transmission relative to the concrete and direct overall military advantage. For example, where soldiers before the attack showed symptoms

147. *See* N. David Yanez et al., *COVID-19 Mortality Risk for Older Men and Women*, 20 BMC PUB. HEALTH 1, 1 (2020) (finding that "in the 16 countries examined, persons age 65 years or older had strikingly higher COVID-19 mortality rates compared to younger individuals, and men had a higher risk of COVID-19 death than women.").

148. *See* Eric Pfanner, *U.K. Coronavirus Variant More Deadly, New Study Confirms*, BLOOMBERG (Mar. 10, 2021), https://www.bloomberg.com/news/articles/2021-03-10/u-k-coronavirus-variant-more-deadly-new-study-confirms [https://perma.cc/229H-TG9B].

149. *See* Julian W. Tang, *COVID-19: Interpreting Scientific Evidence—Uncertainty, Confusion and Delays*, 20 BMC INFECTIOUS DISEASES 653 (2020).

150. *See* Elisa Braun, *New French Coronavirus Variant Appears to Bypass Standard Tests*, POLITICO (Mar. 16, 2021), https://www.politico.eu/article/new-french-coronavirus-variant-might-bypass-pcr-tests/ [https://perma.cc/76Q4-6NZF].

151. Schmitt & Schauss, *supra* note 128, at 171–74.

of the disease and the attack envisioned close contact with civilians, a tribunal might find that proceeding with the attack gave rise to criminal liability if it deemed that the attack was launched intentionally and with the knowledge that it would cause clearly excessive civilian harm vis-à-vis overall military advantage.[152] Such a finding would be heavily dependent on the circumstances at the time of the attack, proof of the defendant's scienter, the information available to the defendant, and a causal link between the defendant's conduct and the harm incurred. However, the ICC would likely not be able to invoke the Martens Clause as an interpretive aid. The "clearly excessive" standard adopted in the ICC's statute would allow little room for the Martens Clause to influence the normative standard of excessiveness, and the ICC statute is clear on the *mens rea* standard regarding disproportionate use of force.[153] The calls for a global ceasefire's potential normative push toward recognizing pandemic-related incidental civilian harm, argued for above, would have little bearing on the criminal standard set out in the ICC statute, as that finding would relate to the specific knowledge of the individual defendant on the basis of the facts of the case.

To be sure, the ICC statute's definition of proportionality does not necessarily constitute the applicable proportionality rule under customary law.[154] Domestic war crimes legislation is also often phrased differently than the Rome Statute,[155] and a war crimes case could also proceed under the grave breach provision in API.[156] While different standards outside of ICC contexts might allow room for a tribunal's invocation of the Martens Clause, any such invocation in a disproportionate use of force ruling relating to conduct during a global pandemic would need to proceed with great caution due to two longstanding criminal law doctrines: the principle of legality and the principle of lenity.[157] Judicial invocation of the Martens Clause in a criminal judgement, particularly as an interpretive aid, must respect those principles.[158]

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152. Rome Statute, *supra* note 106, art. 8(2)(b)(iv).

153. *Id.*

154. *See* Kilcup, *supra* note 107, at 249.

155. For an overview of varying standards set out in different national legislation, see *Practice Relating to Rule 14 Proportionality in Attack*, ICRC, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule14#:~:text=collateral%20damage%20may%20be%20the,advantage%20anticipated%20from%20the%20attack [https://perma.cc/84AH-HSYY] (last visited Apr. 11, 2021).

156. Additional Protocol I, *supra* note 52, art. 85; *see generally* Ferdinandusse, *supra* note 138.

157. *See, e.g.*, Neha Jain, *Comparative International Law at the ICTY: The General Principles Experiment*, 109 Am. J. Int'l L. 486, 488 (2015) ("International criminal tribunals claim the authority to punish individuals who are alleged to have violated fundamental norms of humanity. This ability to incarcerate individuals in the name of the international community places criminal tribunals in a unique position amongst international courts and immediately implicates the principle of *nullum crimen sine lege* (the principle of legality).").

158. *See* George H. Aldrich & Christine M. Chinkin, *A Century of Achievement and Unfinished Work*, 94 Am. J. Int'l L. 90, 97 (2000) ("[W]e note with concern that the clause may be dangerous if used as a ground to overturn the continuing practices of states or as a marker of criminal offenses.").

In sum, perhaps particularly during a global pandemic,[159] there are grave civilian consequences for attacks which do not respect the careful balance between military necessity and humanity inherent in the principle of proportionality.[160] But any finding of criminal responsibility for conduct during a global pandemic must not find fault where the good-faith carrying out of military duties leads to unexpected civilian harm. Indeed, one advantage of abiding by the calls for a complete cessation of hostilities in light of a global pandemic is not putting military personnel in a position to have to make such difficult decisions. The reasonable military commander is neither an epidemiologist, a public health expert, nor even a person with any special knowledge of infectious disease. As a final observation, given the calls for a global ceasefire in light of the COVID-19 pandemic, states and military manuals would do well to clearly and consistently articulate their position on how the principle of proportionality operates during a global pandemic—if at all differently—to increase legal certainty and predictability as to that principle's operation on the battlefield during a global pandemic.

### B. *The Principle of Distinction, IHL's Telos, and the Doctrine of* Effet Utile

#### 1. *The Principle of Distinction During a Global Pandemic*

The principle of distinction regulates two aspects of armed conflict: the type of weapons employed and the conduct of combatants.[161] Under the former, weapons that "are by nature indiscriminate are prohibited."[162] Under the latter, parties to a conflict must "at all times distinguish between civilians and combatants," and only direct attacks against combatants.[163] Therefore, the principle of distinction, as applied to armed conflict concurrent to a global pandemic, runs into two definitional hurdles. First, a global pandemic, resulting from an infectious disease, is not a weapon in the traditional sense.[164] To be sure, IHL has progressed a long way in terms of which types of weapons and methods of warfare are lawful.[165] Today, numerous conventions prohibit certain types of weapons for their excessively injurious or indiscriminate nature.[166] The difficulty is that an actively circulating pan-

159. *See* Morens, Folkers & Fauci, *supra* note 35, at 910 (outlining elements making a pandemic different from say, the common flu, including novelty, severity, high attack rates, minimal population immunity, and infectiousness—making direct spread from a military operation possible.).

160. *See* Sloane, *supra* note 15, at 308.

161. *See* Schmitt, *The Principle of Discrimination in 21st Century Warfare*, *supra* note 112, at 147–48.

162. I Customary IHL, *supra* note 105, at 44; Additional Protocol I, *supra* note 52, art. 51(4).

163. I Customary IHL, *supra* note 105, at 3; Additional Protocol I, *supra* note 52, art. 48.

164. On definitions of the word weapons, see International Committee of the Red Cross Geneva in *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977*, 88 Int. Rev. Red Cross 931, 937 n.17 (2006).

165. *See, e.g.*, Burrus M. Carnahan & Marjorie Robertson, *The Protocol on "Blinding Laser Weapons": A New Direction for International Humanitarian Law*, 90 Am. J. Int'l L. 484 (1996).

166. *See, e.g.*, Final Act of the United Nations Conference on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 7, *reprinted in* 19 I.L.M. 1523 (1980).

demic-causing disease possesses deadly potential during armed conflict. While the disease is not itself a weapon, it may be used as such,[167] or its disregard may result in indiscriminate and severe harm to civilians.[168] Therefore, there is an incongruity regarding the principle of distinction between weapons that are by their nature indiscriminate, and conduct which harnesses destructive forces which are not, *a priori*, illegal. While IHL has come to regulate the use of biological weapons in the Convention on the Prohibition of the Development, Production and Stockpiling of Biological Weapons,[169] that Convention does not address naturally occurring disease amounting to a global pandemic,[170] even though the effects resulting from armed conflict—the widespread circulation of biological, harmful and indiscriminate disease among civilian and combatant populations—*could* be materially the same.

The second hurdle is the proposition that attacks *directed* against military objectives—that inopportunely occur during a global pandemic and that result in spread of the disease among civilian populations—respect the principle of distinction in a purely textual manner.[171] Indeed, the ICRC's compilation of customary humanitarian law emphasizes the "direction" of attacks in the principle of distinction.[172] Nonetheless, the resolution of both of these hurdles is the same.

Under API, what is discriminatory in fact and what is discriminatory in effect finds little difference.[173] Additional Protocol I emphasizes not only where and how attacks are directed, but also the degree to which the "effects" of the method or means of combat can be "limited" to military objectives rather than civilians or civilian objects.[174] Additional Protocol I's emphasis on "effects" is where the nexus between the principle of distinc-

167. *See* Riedel, *supra* note 12, at 400 (noting that "[m]ilitary leaders in the Middle Ages recognized that victims of infectious diseases could become weapons themselves. . . [t]he crude use of filth and cadavers, animal carcasses, and contagion had devastating effects and weakened the enemy.").

168. *See, e.g.*, Elizabeth A. Fenn, *Biological Warfare in Eighteenth-Century North America: Beyond Jeffrey Amherst*, 86 J. AM. HIST. 1552 (2000) (discussing the potential use of smallpox blankets by British troops against the local Indians during the siege of Fort Pitt in 1763).

169. Biological Weapons Convention, *supra* note 54.

170. *Id*. The scope of the convention does not include any regulation on the conduct of armed conflict *amidst* infectious disease. Article 1 states: "Each State Party to this Convention undertakes never in any circumstances to develop, produce, stockpile or otherwise acquire or retain: (1) microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes; (2) weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict."

171. This is notwithstanding the argument presented in the section above detailing the implications of the proportionality principle.

172. I CUSTOMARY IHL, *supra* note 105, at 3 ("The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.").

173. Additional Protocol I, *supra* note 52, art. 51(4)(c) ("Indiscriminate attacks are . . . those which employ a method or means of combat *the effects of which* cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.") (emphasis added).

174. *Id.* arts. 51, 57.

tion and the scenario presented by armed conflict which occurs during a global pandemic lies. The phrase "method or means of combat" encompasses not only weapons that are indiscriminate by nature, but also conduct which harnesses destructive forces as weapons.[175] Therefore, an attack may be intended against solely a military object, but where the attack's effects strike civilians and combatants without distinction, the principle still applies.[176] Finally, the principle of distinction serves to limit not only attacks directed against civilians, but also situations "where the attack is made with culpable disregard for the civilian consequences."[177]

### 2. *The Principle of Distinction and Prospective Judicial Use of the Martens Clause*

International tribunals hearing alleged breaches of the principle of distinction during a global pandemic might choose to invoke the Martens Clause in their judgement to the extent that: (1) the Clause may serve as a nexus between the prohibition of biological warfare in international law[178] and situations where armed conflict during a global pandemic results in materially similar outcomes; (2) the principles of humanity serve as the foundation of the principle of distinction and the limited right to choose means or methods of warfare[179] more generally; and (3) the Clause supports a teleological approach to IHL rules applied during a global pandemic. Considering a few of the practical challenges presented by the COVID-19 pandemic helps to illustrate these possible uses of the Martens Clause.

The COVID-19 virus is highly contagious, spreads through air droplets, and can be transmitted by asymptomatic, otherwise healthy, individuals.[180] Where an attack involves close human-to-human contact, or grouping and movement of civilians, the attack may directly—or create effects which—spread a potentially lethal virus that strikes civilians and military objectives without distinction. Additionally, in many countries, national militaries have been called upon to assist with humanitarian COVID-19 prevention, containment, and treatment efforts.[181] The reverse of civilians taking part in armed conflict—militaries around the world have been mobilized to help

175. *See* International Committee of the Red Cross Geneva, *supra* note 164, at 937.

176. Additional Protocol I, *supra* note 52, art. 57.

177. Schmitt, *Wired Warfare*, *supra* note 129, at 390–91 (2002) ("Distinction limits direct attacks on protected persons or objects and those in which there is culpable disregard for civilian consequences.").

178. *See* Biological Weapons Convention, *supra* note 54, art. 1.

179. Additional Protocol I, *supra* note 52, art. 35.

180. *See, e.g.*, *Transmission of SARS-CoV-2: Implications for Infection Prevention Precautions, Scientific Brief*, World Health Org. (July 9, 2020), https://apps.who.int/iris/rest/bitstreams/1286634/retrieve [https://perma.cc/RB6B-SM5G].

181. *See, e.g.*, Jori Pascal Kalkman, *Military Crisis Responses to COVID-19*, 29 J. Contingencies & Crisis MGMT 99, 99 (2020) (noting that "[c]ountries across the globe have mobilized their armed forces in response to the COVID-19 pandemic"); *Over 5,000 Armed Forces Deployed In Support Of The COVID-19 Response In The Biggest Homeland Operation In Peacetime*, U.K. Gov't (Jan. 4, 2021), https://www.gov.uk/government/news/over-5000-armed-forces-deployed-in-support-of-the-covid-response-in-the-biggest-homeland-operation-in-peacetime [https://perma.cc/P9PZ-ZPN5]; *Pentagon to Deploy 1,100*

with COVID-19 civilian relief efforts. Moreover, the reference in the UN Security Council's call for a cessation of hostilities to the principle of humanity in the provision of humanitarian assistance and related services[182] suggests the call recognizes that an attack might jeopardize the provision of potentially life-saving civilian pandemic assistance. Likewise, many countries during the COVID-19 pandemic have instituted national lockdowns because the virus has overwhelmed their national healthcare systems.[183] In countries afflicted by armed conflict, the health situation is even more stark.[184] In light of such considerations, how might the principle of distinction apply during a global pandemic where an attack is either intended to produce, or proceeds with culpable disregard of, pandemic-related civilian consequences?

One of the reasons the use of biological weapons is prohibited under international law is their indiscriminate nature.[185] Moreover, the preamble to the Biological Weapons Convention indirectly references the Martens Clause's "public conscience":

> Determined, for the sake of all mankind, to exclude completely the possibility of bacteriological (biological) agents and toxins being used as weapons, [and] Convinced that such use would be repugnant to the *conscience* of mankind and that no effort should be spared to minimise this risk.[186]

Armed conflict operations during a global pandemic, where it involves either person-to-person contact or attacks which constrain a civilian community's ability to protect itself from the spread of the virus may result in effects analogous to a biological weapon, even if not intended as such against the civilian population. Where armed conflict during a global pandemic intends to cause such a civilian calamity, it is conceivable that a tribunal might consider it similarly repugnant to the public conscience, particularly in light of the global ceasefire calls.

Second, the ICTY in the *Martić* case recognized that from elementary considerations of humanity emanate the principle of distinction and the limited right to choose methods or means of warfare.[187] Respect for these foun-

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*Troops to Help COVID-19 Vaccination Efforts*, REUTERS (Feb. 5, 2021), https://www.reuters.com/article/us-healthcare-coronavirus-whitehouse-pen-idUSKBN2A529G [https://perma.cc/H75X-2TKE].

182. S.C. Res. 2532, *supra* note 6.

183. *See, e.g.*, Danielli Oliveira da Costa Lino et al., *Impact of Lockdown on Bed Occupancy Rate in a Referral Hospital during the COVID-19 Pandemic In Northeast Brazil*, 24 BRAZILIAN J. INFECTIOUS DISEASES, 466–69, (2020); *see also* Osamu Tsukimori, *Overwhelmed by Virus, Hospitals in Japan Struggle to Treat Other Emergency Patients*, JAPAN TIMES (Jan. 26, 2021), https://www.japantimes.co.jp/news/2021/01/26/national/coronavirus-hospitals-emergency-patients-japan/ [https://perma.cc/JA9H-2FFJ].

184. *See*, *e.g.*, Seyyed Meysam Mousavi & Mina Anjomshoa, *COVID-19 in Yemen: A Crisis within Crises*, 19 INT'L J. EQUITY HEALTH 120 (2020).

185. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, *supra* note 112, at 147.

186. Biological Weapons Convention, *supra* note 54.

187. *Martić*, *supra* note 25, ¶ 13; *see also Nuclear Weapons*, *supra* note 25, at 257, ¶¶ 78–79.

dational principles would be in jeopardy were parties to try to actively harness the destructive force of the global pandemic to weaken the enemy in unnecessary or superfluous ways,[188] or so as to cause effects of a nature to strike military objectives and civilians without distinction. Any judicial invocation would be heavily fact- and case-specific. Nonetheless, the Martens Clause, as part of the foundation of these rules, reinforces their continued respect during all armed conflict, including that which takes place during a global pandemic.

As a related observation, the Martens Clause, perhaps especially during a global pandemic, reinforces the fact that "IHL is excluded from any positivist assertion to the effect that all which is not forbidden in international law is permitted."[189] Were parties to believe that a gap as to how the laws of war apply during a global pandemic[190] might allow them to exploit their adversary,[191] the Martens Clause reminds them that "the mere absence of an express IHL rule on point does not necessarily justify an action on the basis of military necessity; actions in warfare must equally reflect respect for humanity."[192]

Finally, the Martens Clause might serve as a parallel legal clause upholding the doctrine of *effet utile*[193] in the interpretation of those treaty provisions which form the backbone of humanitarian law. Where the relevant rule on point is customary rather than treaty law, the Martens Clause might similarly serve to uphold the teleology of existing IHL rules.[194] Judge Cassese maintains that interpretations of legal clauses in general, including the Martens Clause, "must be so construed as to prove meaningful, with the consequence that any interpretation making them pointless must be dismissed whenever possible."[195] Indeed, the ICJ considers *effet utile* to be "one of the

188. *See* Additional Protocol I, *supra* note 52, art. 35(2) ("It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.").

189. Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT'L L. 795, 800 (2010).

190. The author is not aware of parties to conflict arguing for such a "gap" during the COVID-19 pandemic. But as of the writing of this Article, the pandemic is still ongoing. Moreover, evidence has surfaced of armed non-state actors exploiting the COVID-19 pandemic "both militarily and politically to gain territory and popular support" making this observation still important. Sara M.T. Polo, *A Pandemic of Violence? The Impact of COVID-19 on Conflict*, 26 PEACE ECON. PEACE SCI. & PUB. POL'Y 1, 6 (2020).

191. Kahn, *supra* note 26, at 7 ("The Martens Clause also continues to stand for the proposition that, although the development of new law tends to lag behind such change in the nature of armed conflict, that fact does not present the state a *non liquet* to exploit against its adversary.").

192. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, *supra* note 189, at 800.

193. *See Effet utile*, OXFORD REFERENCE ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW (John P. Grant & J. Craig Barker eds., 3d ed. 2009) ("A form of interpretation of treaties and other instruments derived from French administrative law which looks to the object and purpose of a treaty, as well as the context, to make the treaty more effective.").

194. *See, e.g.*, *Furundžija*, *supra* note 57, ¶¶ 137, 168 (Dec. 10, 1998). *But see* Jain, *supra* note 157, at 488 (critiquing the use of general principles in the judgement).

195. Cassese, *supra* note 24, at 215.

fundamental principles of interpretation of treaties."[196] One of the central purposes of humanitarian law is to protect those not actively participating in hostilities from the devastating effects of conflict.[197] Therefore, applying the concept of *effet utile* to the principle of distinction in IHL cuts against interpreting that principle in such a way that it has no application to armed conflict during a global pandemic. Such an interpretation would fail to account for the role that disease, including pandemic-causing disease,[198] has played throughout the history of armed conflict,[199] current evidence of the stance of the public conscience on continued hostilities amidst a pandemic,[200] as well as the special importance of adhering to the principle of distinction when armed conflict occurs during a global pandemic.[201] The broad provisions of the Martens Clause can serve as a link between the purpose and fundamental tenets of IHL, and the devastating and intertwined relationship between armed conflict and infectious disease,[202] which becomes more concerning during a global pandemic. More concretely, a tribunal might invoke the principles of humanity and the dictates of the public conscience where military operations during a pandemic spread the virus in vulnerable populations with dramatic, and expected, civilian consequences. The principles of humanity and the dictates of the public conscience, in conjunction with customary or treaty law defining the principle of distinction, might lead a tribunal to conclude such conduct during armed conflict concurrent to a global pandemic sanctionable under the laws of war.

196. Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. REP. 6, 25, ¶ 51 (Feb. 3).

197. *See, e.g.*, Amanda Alexander, *A Short History of International Humanitarian Law*, 26 EUR. J. INT'L L. 109, 111 (2015).

198. *See* Anton Erkoreka, *Origins of the Spanish Influenza Pandemic (1918–1920) and Its Relation to the First World War*, 3 J. MOLECULAR AND GENETIC MED. 190, 193 (2009) ("The millions of young men in army barracks, military camps and trenches constituted the vulnerable substrate on which the influenza virus developed, became extremely virulent and spread worldwide in October and November (1918)."); Byerly, *supra* note 8, at 85 ("[M]ilitary medical officers soon understood that the wave of influenza that had run through many U.S. training camps during the spring of 1918 constituted a first wave of the pandemic . . . [T]he infected troops carried the virus with them aboard ships to France." *Id.* at 85.). *But see* John Barry, *The Site of Origin of the 1918 Influenza Pandemic and Its Public Health Implications*, 2 J. TRANSLATIONAL MED. 1 (2004) ("It has never been clear, however, where this pandemic began . . . [I]t is impossible to answer this question with absolute certainty.").

199. *See* Smallman-Raynor & Cliff, *supra* note 8, at 341–68.

200. *See infra* notes 277–86.

201. *See* Mohammed Jawad et al., *Estimating Indirect Mortality Impacts of Armed Conflict in Civilian Populations: Panel Regression Analyses of 193 Countries, 1990–2017*, 18 BMC MED. 1, 1 (2020) ("Armed conflict, particularly war, is associated with a *substantial* indirect mortality impact among civilians globally with children most severely burdened" due, in part, to infectious disease spread.) (emphasis added).

202. *See, e.g.*, Sima L. Sharara & Souha S. Kanj, *War and Infectious Diseases: Challenges of the Syrian Civil War*, 10 PLOS PATHOGENS 1, 2–3 (2014) (describing impediments to immunization programs during the Syrian Civil War); *see generally* Smallman-Raynor & Cliff, *infra* note 307.

### C. A Way of Addressing Change in IHL

The broad scope of the Martens Clause's principles of humanity and the dictates of the public conscience make it suited to address one of the most dynamic areas in which law regulates human behavior: armed conflict.[203] As the ICJ pointed out in the *Nuclear Weapons* case, the Martens Clause is "an effective means of addressing the rapid evolution of military technology."[204] The corollary to this is the observation that the Martens Clause also serves as "a constant reminder of the evolving nature of armed struggles more generally."[205] In light of this scholarly observation, this section queries whether, during a global pandemic, the Martens Clause may then play some role in how current IHL rules are understood to apply given a changed global reality.

The Martens Clause's relationship with evolving notions of armed conflict is a two-sided coin, with both subjective and objective elements. On the subjective side, the principles of humanity and the dictates of the public conscience can—as reflected by changing notions of those concepts at the societal level—imprint onto discussions of the legality of new means and methods of war. This stance is reflected in Judge Shahabuddeen's dissent in the *Nuclear Weapons* case:

> In effect, the Martens Clause provided authority for treating the principles of humanity and the dictates of public conscience as principles of international law, leaving the precise content of the standard implied by these principles of international law to be ascertained in the light of changing conditions, inclusive of changes in the means and methods of warfare and the outlook and tolerance levels of the international community. The principles would remain constant, but their practical effect would vary from time to time: they could justify a method of warfare in one age and prohibit it in another.[206]

In this sense, changing societal views on what constitutes "humane" war may be determined with the ever-shifting measuring stick of the public conscience.[207] Society's public conscience—as demonstrated by "authorita-

203. *See* Eric T. Jensen, *The Future of the Law of Armed Conflict: Ostriches, Butterflies, and Nanobots*, 35 MICH. J. INT'L L. 253, 257 (2014) (noting evolving concept of warfare, the quick pace of technological development in warfare, and war being "shaped and altered by the exigencies of nations and the moral sentiments of the global community."); *see also* Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, *supra* note 189, at 805 (noting "[i]nternational humanitarian law necessarily evolves to reflect the nature of conflict and the values of its participants. Since the nineteenth century, it has moved steadily in the direction of humanity and away from that of military necessity.").

204. *Nuclear Weapons*, *supra* note 25, at 257, ¶ 78.

205. Kahn, *supra* note 26, at 28.

206. *Nuclear Weapons Shahabuddeen Dissent*, *supra* note 26, at 406.

207. *See, e.g.*, *In re Krupp*, *supra* note 55, at 622 ("The Preamble is much more than a pious declaration. It is a general clause, making the usages established among civilized nations, the laws of humanity and

tive acts of representative bodies"[208]—might adjust over time and could regulate the applicable meaning of the Martens Clause to specific situations.

This subjective element differs from factual observations about the changing nature of armed conflict more generally. The objective element recognizes circumstances as they are, not as the international community believes they should be. Today infectious disease can spread exceptionally rapidly to any corner of the world.[209] Several issues have, and continue, to contribute to the increasing capacity of infectious disease to spread swiftly around the world: increased trade[210] and travel,[211] under-resourced national healthcare systems,[212] population growth, resistance to drugs, intensive farming practices, the degradation of the environment,[213] and migratory birds.[214] Moreover, during a pandemic, actors who have come to play a key role in the modern armed conflict arena (such as skilled negotiators, humanitarian and aid workers, and journalists) may face more difficulty reaching their destinations as a result of global travel restrictions.[215] Finally, infectious disease

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the dictates of public conscience into the legal yardstick to be applied if and when the specific provisions of the Convention and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare.").

208. Cassese, *supra* note 24, at 212.

209. *See* Paul H. Wise & Michelle Barry, *Civil War & the Global Threat of Pandemics*, DÆDALUS 71, 72 (2017) (noting new threat of epidemics' "unprecedented potential for rapid dissemination throughout the world.").

210. *See, e.g.*, Lawrence O. Gostin & Benjamin E. Berkman, *Pandemic Influenza: Ethics, Law, And the Public's Health*, 59 ADMIN. L. REV. 121, 123–24 (2007) (noting that "[i]nternational trade and travel will play a major role in the spread of the [H191] virus. The majority of the outbreaks in Southeast Asia have already been attributed to the movement of poultry and poultry products.") (citations omitted).

211. *See, e.g.*, Betsy McKay & Margherita Stancati, *Why Coronavirus Spreads So Fast: Symptoms Are Mild and People Are Global*, WALL ST. J. (Feb. 27, 2020), https://www.wsj.com/articles/why-coronavirus-spread-across-the-globe-mobile-population-and-mild-symptoms-11582822312 [https://perma.cc/UDW5-YSJV] ("Increased travel and trade over the past couple of decades have significantly accelerated the risk of global spread of disease. Air passenger traffic has more than doubled since 2003, when there was an epidemic of another coronavirus, severe acute respiratory symptom (SARS), which infected nearly 8,100 people killing 774. International trade rose to $19.45 trillion in 2018 from $7.59 trillion in 2003, according to the World Trade Organization.").

212. *Id.* ("[M]any countries still don't have the staff or laboratory technologies to detect outbreaks quickly.").

213. Adrian O'Dowd, *Infectious Diseases Are Spreading More Rapidly than Ever Before, WHO Warns*, 335 BMJ 418 (2007).

214. Gostin & Berkman, *supra* note 210, at 123.

215. *See, e.g.*, Lisa K. Dicker & C. Danae Paterson, *COVID-19 and Conflicts: The Health of Peace Processes During a Pandemic*, 25 HARV. NEGOT. L. REV. 101, 106, 120 (2020) (noting that because "[G]lobal travel has become the foundation of most contemporary peace processes . . . Restrictions introduced by the spread of the pandemic have direct and tangible impacts on the ability or willingness of some international actors to engage in mediation . . . [as] the pandemic presents physical limitations on the ability to travel and convening in-person sessions."); *Coronavirus and Aid: What We're Watching*, NEW HUMANITARIAN (June 11, 2020) https://www.thenewhumanitarian.org/news/2020/06/11/coronavirus-humanitarian-aid-response [https://perma.cc/6G9T-EWJG] (noting that in Burkina Faso "Restrictions on travel to and from towns and cities with confirmed cases have also been introduced, leaving aid groups based in the capital, Ouagadougou, unsure how they are going to access people in need."); *see also* Molly Bishop, *Journalists Are No Longer Exempt from Covid Travel Restrictions and Will Now Be Required to Self-Isolate On Arrival to the UK*, BRIG NEWSPAPER (Jan. 18, 2021), https://brignews.com/2021/01/18/journalists-are-no-longer-exempt-from-covid-travel-restrictions-and-will-now-be-required-to-self-isolate-on-arrival-to-the-uk/ [https://perma.cc/6EUE-JCW8].

spreads most rapidly among displaced and vulnerable populations, and recent years have seen the largest numbers of forcibly displaced people on record,[216] with the majority of those displaced peoples fleeing armed conflict.[217] If one accepts the scholarship which considers the Martens Clause as a way of recognizing the evolving nature of armed conflict at large, which is not authoritative law, might it nonetheless affect the analysis of extant IHL rules to a global pandemic?

The Martens Clause as a "constant reminder of the evolving nature of armed struggles more generally"[218] might lead to the consideration of three categories of change related to pandemic hostilities: pandemics' spreading capacity, pandemics' capacity to limit the role of modern conflict mitigators, and pandemics' increasingly dire potential to harm vulnerable populations. Applying each of these three categories to Article 57 of API, which imposes an obligation to take all feasible precautions to protect civilians, illustrates important considerations for that rule's application during a global pandemic.

Pandemics have the ability to spread faster now than ever before, due primarily to increasingly mobile people and goods.[219] The obligation in Article 57 of API, adopted in 1977, to take feasible precautions as applied to armed conflict during a global pandemic in 2020 might lead to different precautions before an attack. The obligation to take precautionary measures may necessarily include, to the extent feasible and possible, acquiring information about infectious diseases present in the conflict zone, their lethality, likely incidental harm that might result, and choosing the method of attack most likely to minimize incidental harm. Of course, such precautions in attack as they relate to infectious disease and armed conflict will be highly fact- and case-specific. Nonetheless, in light of human mobility's potential for, and correlation with, rapid pandemic spread, the presence of a global pandemic at the time of attack might affect the choice of weapons used. According to API, the planners or deciders of an attack must take "all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects."[220] During a global pandemic, attacks that do not run the risk of further spreading an infectious disease via human-to-human contact, such as drone strikes, might provide less risk to

216. *Refugee Statistics*, UNHCR, https://www.unrefugees.org/refugee-facts/statistics/#:~:text=79.5%20million%20individuals%20have%20been,levels%20of%20displacement%20on%20record [https://perma.cc/92V6-77E8] (last visited Mar. 8, 2021) (stating that the end of 2019 saw the most number of forcibly displaced people on record, with the majority of those displaced people's resulting from armed conflict).

217. *Id.*; *see also* Wise & Barry, *supra* note 209, at 73 (noting "[c]ombat operations and the threat of violence invariably generate the migration of civilian populations into safer locations").

218. Kahn, *supra* note 26, at 24.

219. *See* McKay & Stancati, *supra* note 211.

220. Additional Protocol I, *supra* note 52, art. 57(2)(a)(ii).

civilians compared to a ground operation involving close contact between combatants and civilians.[221]

Military objectives may need to be similarly scrutinized.[222] When a choice is possible between several military objectives each allowing a similar military advantage, some additional consideration might be paid to the objective expected to produce the least amount of unsafe civilian movement. For example, given a hypothetical choice between an attack on two similar military objectives in two different cities—one that is expected to cause many civilians to move, and one that is expected to cause fewer civilians to move—all other things being equal in a proportionality assessment, the movement's correlation with pandemic spread might favor the latter.

Second, a global pandemic has the potential to limit the role of modern conflict mitigators, like humanitarian aid workers.[223] When conducting feasible precautions before an attack,[224] or even during the attack,[225] some consideration might be given to this fact. For example, where travel restrictions have prevented humanitarian aid workers from their planned distribution of pandemic containment and prevention supplies—for example, respirators, masks, or vaccines—to civilians in places afflicted by armed conflict, to the extent feasible, the choice and means of methods of attack might consider favoring that military objective or method of attack which puts those civilians at the least risk of contracting the disease in light of the delayed humanitarian aid caused by pandemic travel restrictions.

Finally, as the calls for a global ceasefire have indicated, pandemics have potential to affect increasingly large populations that are most vulnerable to the disease's rapid spread, such as refugees fleeing conflict.[226] In this light, Article 57 of API's obligation to give advance warning where attacks may affect the civilian population, where circumstances permit,[227] could take on further significance. During a global pandemic, when travel restrictions may be in place and available means of transportation may be more limited, this obligation may take on different, and perhaps greater, importance in allowing civilians fleeing conflict time to arrange secure transportation, if circumstances permit, before the attack.

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221. *See id.*

222. *See id.* art. 57(3) ("When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.").

223. *See* sources cited *supra* note 215.

224. Additional Protocol I, *supra* note 52, art. 57 2(a)ii.

225. *Id.* art. 57 2(b), ("[A]n attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.").

226. *See* Refugee Statistics, *supra* note 216.

227. Additional Protocol I, *supra* note 52, art. 2(c) ("[E]ffective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.").

To be clear, the scholarly opinion that the Martens Clause may serve as an important reminder of the evolution of the nature of armed struggles more generally does not impose a legal obligation beyond that in Article 57 API's text. Nonetheless, during a global pandemic, and as a normative matter, the principles of humanity and indications as to the public conscience's stance on the potential dire effects that armed conflict may have on the spread of the pandemic-causing disease are important enough to warrant attention. This may be an aspirational reading of Article 57—and will depend largely on operational feasibility—but small reminders, when the consequences can be great, are important. To the extent that the Martens Clause might encourage these deliberations, even if imposing no legal obligation beyond the text of applicable provisions, its consideration, this Article contends, is judicious.

### *D. The Martens Clause as a Minimum Standard for Conduct in Armed Conflict*

Several scholars have maintained that one contemporary function of the Martens Clause is to act as a floor below which conduct in armed conflict may not fall.[228] Case law from post-WWII war crimes tribunals evidences the idea that conduct in armed conflict which violates baseline principles of humanity is sanctionable.[229] But determining the bar as to what conduct falls below "elementary considerations of humanity"[230] is difficult.

International tribunals have shed some light on this question. According to the ICJ in the *Nicaragua* case, Common Article 3 to the Geneva Conventions reflects "elementary considerations of humanity" and constitutes "a

228. *See* Crawford, *supra* note 27, at 1 ("States were to consider themselves bound by certain minimum fundamental standards of behaviour, as understood by considerations of 'humanity' and 'public conscience'. . . What the Martens Clause does is operate as an important de minimis rule of international humanitarian law." *Id.* at 16); Kahn, *supra* note 26, at 48 ("The law sets a minimum standard of conduct from which neither states nor non-state actors may lawfully depart."); Schüller, *supra* note 27, at 752 ("[I]n situations in the gray zone between internal disturbances, state of emergency and armed conflicts, the Martens Clause gives some guidance on the minimum principles applicable."); Eide, Rosas & Meron, *supra* note 27, at 216 (outlining the background and text of a non-binding declaration, containing the Martens Clause, which affirms an "irreducible core of humanitarian norms and human rights [providing] a basis for observing minimum humanitarian standards in all conflict situations," thus avoiding situations where IHL or IHRL does not apply due to conflicts not meeting the threshold criteria for an armed conflict but in which fundamental rights are suspended during a public emergency).

229. *See, e.g.*, Altstötter, 6 Law Reports of Trials of War Criminals 40, 56–58 (United Nations War Crimes Commission, 1948) (U.S. Mil. Trib. 1947) (holding deportation of civilians from occupied territories a violation of the laws and customs of war, which themselves "constituted the effort of the civilised participating nations to diminish the evils of war by the limitation of the power of the invading occupant over the people and by placing the inhabitants of the occupied area or territory 'under the protection and rules of principles of law of nations as they result from usage established among the civilised peoples *from the laws of humanity and the dictates of public conscience*'") (emphasis added).

230. The phrases "principles of humanity" and "elementary considerations of humanity" have the same meaning. *See* Meron, *supra* note 24, at 82 ("Principles of humanity are not different from elementary considerations of humanity. . .").

minimum yardstick" for conduct in armed conflict.[231] Similarly, in the *Martić* case, the ICTY reiterated that "elementary considerations of humanity are reflected in Article 3 Common to the Geneva Conventions."[232] According to this view, "elementary considerations of humanity" serve to reinforce Common Article 3, which is itself a minimum yardstick for conduct during armed conflict. Yet there is reason to think "elementary considerations of humanity" are more than just reflective of Common Article 3. In *Nuclear Weapons*, the ICJ understood states' broad accession to the Hague and Geneva Conventions, and those treaties' status as customary law, to be "because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity.'"[233] Whether these considerations reflect or encompass extant IHL, "elementary considerations of humanity" are "widely recognized as the mandatory minimum for conduct in armed conflicts of any kind."[234]

Scholarship and judicial decisions that view the Martens Clause as constituting a minimum standard for conduct in IHL might implicate certain conduct during armed conflict concurrent to a global pandemic. Certain hypothetical conduct of combatants during a pandemic would clearly violate existing laws of war. For example, inviting the adversary to peaceful negotiations and then knowingly sending infected representatives to those negotiations with the intention of infecting the adversary with the virus would qualify as perfidy.[235] Similarly, sending a known-infected person to infect a civilian water supply in the hopes of collaterally infecting enemy troops would not respect the rule prohibiting attacks against objects that are crucial to the survival of the civilian population.[236] Finally, targeting facilities that are designed to help cope with the global pandemic—such as mobile testing centers and clinics—with the aim of spreading the virus among enemy troops would violate treaty and customary law protecting medical units.[237] While these examples are obvious transgressions of existing IHL, the Martens Clause might be invoked regarding conduct during a pandemic that borders the line between lawful and unlawful—perhaps due to uncer-

231. *Nicaragua*, *supra* note 27, at 113–14, ¶ 218.

232. *Martić*, *supra* note 25, ¶ 14.

233. *Nuclear Weapons*, *supra* note 25, at 257, ¶ 79.

234. *Tadić*, *supra* note 27, ¶ 129.

235. *See* I CUSTOMARY IHL, *supra* note 105, at 223–25 (noting that "[t]he essence of perfidy is thus the invitation to obtain and then breach the adversary's confidence, i.e., an abuse of good faith").

236. *Id.* at 189 ("Rule 54. Attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population are prohibited."); *see also* Riedel, *supra* note 12, at 400 ("Polluting wells and other sources of water of the opposing army was a common strategy that continued to be used through the many European wars, during the American Civil War, and even into the 20th century.").

237. I CUSTOMARY IHL, *supra* note 105, at 91; Additional Protocol I, *supra* note 52, art. 12.

tainty regarding the legal classification of the conflict[238]—yet still implicates "elementary considerations of humanity."[239] Therefore, tribunals hearing future cases regarding hostilities during a global pandemic that involve, for example, cruel or inhumane treatment, particularly of those not taking part in hostilities, or which does not respect or degrades the human person, might invoke the Martens Clause for the proposition that such operations fall below the floor set by elementary considerations of humanity.[240] During a global pandemic, the principles of humanity and the dictates of the public conscience might thus help to ascertain the floor below which conduct in armed conflict must not fall.

Reference to the principles of humanity and the dictates of the public conscience in determining a floor for conduct in armed conflict during a global pandemic would also respect the primary purpose of IHL: "to protect the victims of armed conflict and to regulate the conduct of hostilities based on a balance between military necessity and humanity."[241] Undeniably a delicate balance, maintaining a floor based on the principles outlined in the Martens Clause protects this crucial equilibrium in IHL. As stated in API: "In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited."[242] Likewise, long ago, the Lieber Code[243] aptly recognized that cruelty is not sanctioned by military necessity.[244] Building on this, certain conduct of hostilities that occurs amidst a global pandemic may not respect the baseline principles of humanity that IHL has carved out since World War II. Naturally, this inquiry will be heavily fact-intensive, and over-speculation as to the range of situations

238. *See, e.g.*, Eide, Rosas & Meron, *supra* note 27, at 220 (noting that the non-binding Turku declaration, which includes the Martens Clause, "is designed to avoid the pitfalls of the never-ending debates on thresholds of applicability and complex legal characterizations of different types of conflicts").

239. *See, e.g.*, Corfu Channel Case, *supra* note 77, at 22 (noting that Albania's "obligations [were] based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war").

240. A hypothetical example might be, in a non-international armed conflict, keeping known-infected and non-infected detainees in close contact.

241. Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on The Notion of Direct Participation in Hostilities*, 42 N.Y.U. J. Int'l L. & Pol. 831, 887 (2010).

242. Additional Protocol I, *supra* note 52, art. 35; *see also* Dep't Of The Navy, The Commander's Handbook on the Law of Naval Operations § 9.1 (2007) ("[T]he right of nations engaged in armed conflict to choose methods or means of warfare is not unlimited.").

243. The Lieber Code was "the first serious attempt to provide a practical code for the law of war . . . While written as a Civil War regulation, the Lieber Code remained in force into the twentieth century and became the basis of future international agreements on the law of war." Paul Finkelman, *Francis Lieber and the Modern Law of War*, 80 U. Chi. L. Rev. 2071, 2075–76 (2013) (reviewing John Fabian Witt, Lincoln's Code: The Laws of War in American History (2012)); *see generally* Theodor Meron, *Francis Lieber's Code and Principles of Humanity*, 36 Colum. J. Transnat'l L. 269 (1998).

244. Francis Lieber, U.S. War Dep't, General Orders No. 100: Instructions for the Government of Armies of the United States in the Field (Apr. 24, 1863), *reprinted in* The Laws Of Armed Conflicts: A Collection Of Conventions, Resolutions And Other Documents 3 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004).

that might qualify is beyond this Article's scope. Nonetheless, the point of emphasis is that, in certain situations, either actively harnessing the destructive effects of a pandemic or having broad knowledge as to the devastating effects yet acting in "culpable disregard"[245] thereof, may fall below what prior courts have deemed "elementary considerations of humanity."[246]

## III. Customary Law Regulating Armed Conflict During Global Pandemic Outbreaks: Future Prospects?

Having explored the ways in which IHL principles might regulate the conduct of hostilities amidst a global pandemic, and how the Martens Clause may be an important element of this discussion, Part III turns to the Martens Clause's potential, in limited and defined situations, to affect the formation process of new customary humanitarian law. Then, in light of the significant global support for a global ceasefire, the Article assesses whether a *lex ferenda* that mandates a global ceasefire during the outbreak of a future global pandemic may be in its latent creation process.

Before commencing, it is important to recognize the existing literature on ceasefires.[247] Moreover, although the U.N. Security Council demanded a cessation in hostilities and also called upon parties to engage in a humanitarian pause,[248] the majority of support—both by states and other international organizations—was for a global ceasefire.[249] The Article therefore adopts that terminology. Finally, the emerging custom explored in this section concerns the *jus in bello*. The conventional wisdom is that during a ceasefire "[t]he state of war is not terminated, despite the absence of combat in the interval."[250] Therefore, the use of force or an armed attack initiated during a global ceasefire would be subject to both the applicable *jus ad bellum* and *jus*

245. Schmitt, *Wired Warfare*, *supra* note 129, at 390.

246. Corfu Channel Case, *supra* note 77, at 22.

247. *See, e.g.*, David M. Morriss, *From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations*, 36 Va. J. Int'l L. 801 (1996) (exploring the evolution of the U.N.'s role in attempting to maintain international peace and security "by examining the terms of selected U.N.-sponsored cease-fire and armistice agreements since 1947"); Sydney D. Bailey, *Cease-Fires, Truces, and Armistices in the Practice of the UN Security Council*, 71 Am. J. Int'l L. 461 (1977) (detailing the history of the truce, armistice, and ceasefire); Christian Henderson & Noam Lubell, *The Contemporary Legal Nature of UN Security Council Ceasefire Resolutions*, 26 Leiden J. Int'l L. 369, 369 (2013); Yoram Dinstein, *The Initiation, Suspension, and Termination of War*, 75 Int'l L. Stud. 131 (2000).

248. S.C. Res. 2532, *supra* note 6.

249. *See* Negri, *supra* note 16.

250. Dinstein, *supra* note 247, at 150 (noting the *jus ad bellum* and *jus in bello* distinction in stating "[r]enewal of hostilities before a cease-fire expires would obviously contravene its provisions. Nonetheless, it must be grasped that hostilities are only continued, after an interruption, and no new war is started. For that reason, a cease-fire violation is irrelevant to the determination of armed attack and self-defense. That determination is made exclusively on the basis of the beginning of a new armed conflict. The reopening of fire in an on-going war is not germane to the issue.").

*in bello*,[251] whereas ongoing conflicts compelled to stop under this nascent rule would only implicate the *in bello* rules regarding ceasefires.[252]

Because this section concludes that an emerging customary law mandating a global ceasefire during the future uncontained outbreak of a global pandemic has not yet materialized into customary law, it focuses on the current formation process rather than the effects of breach should such a rule materialize into law.

### *A. Customary International Law Formation and the Martens Clause*

Article 38 of the ICJ Statute recognizes "international custom, as evidence of a general practice accepted as law" as a source of international law.[253] The two conditions necessary to form customary international law are state practice and *opinio juris*.[254] Traditionally, state practice had to occur consistently[255] over a certain period of time[256] before customary law could materialize. However, the so-called modern approach to customary law[257] recognizes that customary law formation is best characterized as a dynamic process, that can occur quickly and favors *opinio juris* over state practice.[258]

The scholarly debate on customary law[259] might lead one to believe that a unified, universally accepted, and straightforward understanding of custom-

251. *See, e.g.*, Robert Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT'L. L. 47 (2009).

252. *See, e.g.*, Geneva Convention I, art. 15; Hague Convention II, *supra* note 45, arts. 36, 40, 41; *see generally* Maria Sosnowski, *'Not dead but Sleeping': Expanding International Law to Better Regulate the Diverse Effects of Ceasefire Agreements*, 33 LEIDEN J. INT'L L. 731 (2020).

253. Statute of the International Court of Justice, art. 38, ¶ 1.

254. *See* Int'l Law Comm'n, Rep. on the Work of Its Seventieth Session, U.N. Doc. A/73/10, at 119 (2018).

255. *See* Asylum (Colom. v. Peru), 1950 I.C.J. 266, 276 (Nov. 20). ("The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question."); *see also Nicaragua*, *supra* note 27, at 97–109 ("The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules . . . ."). *But see* Fisheries Jurisdiction (U.K. v. Nor.), 1951 I.C.J. 116, at 138 (Dec. 18) ("[T]oo much importance need not be attached to the few uncertainties or contradictions").

256. *See, e.g.*, MICHAEL P. SCHARF, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE: RECOGNIZING GROTIAN MOMENTS 32 (2013) (explaining the development of CIL as a "slow process of growth, whereby courses of conduct once thought optional become first habitual or usual, and then obligatory, and the converse process of decay, when deviations, once severely dealt with, are first tolerated and then pass unnoticed") [hereinafter CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE]; *see also* G.I. Tunkin, *Remarks on the Judicial Nature of Customary Norms in International Law*, 49 CALIF. L. REV. 419 (1961) ("Customary norms of international law are being formed in international practice, as a rule, gradually.").

257. *See* Anthea E. Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 758 (2001).

258. *See* Brian D. Lepard, *Customary International Law as a Dynamic Process*, *in* CURTIS BRADLEY, CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD 62, 63 (Cambridge Univ. Press, 2016).

259. The debate might be characterized as falling along four lines. The first questions whether customary law, as it currently stands, is a legitimate source of international law. *See, e.g.*, J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 451 (2000). The second engages in a debate over the elements necessary to form customary law. *See* Frederic L. Kirgis, *Custom on a Sliding Scale*,

ary law as a source of international law will remain outstanding for some time to come. This Article adopts the classic two-pronged approach to customary law for methodological clarity—recognizing that the role of custom in the international order is not limited solely to rule identification.[260] But before embarking on an examination of the relevant state practice and *opinio juris*, it is important to recognize the role that some have argued the Martens Clause may play in this inquiry.

Some scholars and judicial opinions posit that the Martens Clause itself may have an impact on the formation process of customary humanitarian law.[261] To be sure, this position is controversial.[262] Noting this controversy, this Article's contribution is to imagine what those judicial opinions and the scholarship *supporting* the position that the Martens Clause can affect the

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81 AM. J. INT'L L. 146, 149 (1987). The third sees the current rules-based conception of customary law as misguided and misrepresentative of customary law. *See* Monika Hakimi, *Making Sense of Customary International Law*, 118 MICH. L. REV. 1487, 1504 (2020). The fourth undertakes to develop a theory of customary international law that explains how customary law functions. *See, e.g.*, Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999). This broad classification does not engage with the intricacy and complexity of the "fault lines" presented above, nor does it give an exhaustive account of the vast scholarship on customary law. Nonetheless, depending on where one falls on these debates, different readers will find varying levels of persuasion from the description below of state practice and *opinio juris* regarding a *lex ferenda* mandating a global ceasefire amidst the uncontained future outbreak of a global pandemic.

260. Hakimi, *supra* note 259, at 1489, 1525 ("[CIL is] an amorphous kind of law that neither enters into force on a date certain nor derives from binding texts. It forms more organically, through an interactive and highly informal legal process." Further, "CIL derives what legitimacy it has not from any secondary rules but from the process through which it is developed and used.").

261. *See, e.g.*, Cassese *supra* note 24, at 214 ("[W]hen it comes to proof of the emergence of a principle or general rule reflecting the laws of humanity (or the dictates of public conscience), as a result of the clause the requirement of *usus* (*les usages establis entre nations civilisées*) may be less stringent than in other cases where the principle or rule may have emerged instead as a result of economic, political or military demands. Put differently, the requirement of *opinio iuris* or *opinio necessitatis* may take on a special prominence."); Meron, *supra* note 24, at 88 ("It reinforces a trend, which is already strong in international institutions and tribunals, toward basing the existence of customary law primarily on *opinio juris* (principles of humanity and dictates of public conscience) rather than actual battlefield practice."); Prosecutor v. Kaing Guek Eav "Duch," Appeal Judgement, No. 001/18-07-2007-ECCC/SC, A. Ch., 3 February 2012, ¶ 93 (The court "consider[ed] that in evaluating the emergence of a principle or general rule concerning conduct that offends the laws of humanity or the dictates of public conscience in particular, the traditional requirement of 'extensive and virtually uniform' state practice may actually be less stringent than in other areas of international law, and the requirement of opinio juris may take pre-eminence over the usus element of custom."); *Kupreškić*, *supra* note 24, ¶¶ 527–33 (Jan. 14, 2000) ("[P]rinciples of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent."). *But see* Schmitt, *Military Necessity and Humanity in International Humanitarian Law*, *supra* note 189, at 820–22 (outlining four reasons why the finding in *Kupreškić* went too far).

262. *See, e.g.*, Alexandre Skander Galand, *Approaching Custom Identification as a Conflict Avoidance Technique: Tadić and Kupreškić Revisited*, 31 LEIDEN J. INT'L L. 403, 413 (2018) ("[T]he Kupreškíc Trial Chamber's use of the Martens Clause is circular: The Martens Clause opens the door to a theory of custom that places the emphasis on *opinio juris*, and by the same token *opinio juris* against reprisals is demonstrated by the Martens Clause."); Steven R. Ratner, *War/Crimes and the Limits of the Doctrine of Sources*, *in* THE OXFORD HANDBOOK ON THE SOURCES OF INTERNATIONAL LAW 921-922 (Oxford Univ. Press, 2017) ("The ICTY's views on the elements of State practice in the Tadić Interlocutory Appeal, on IHL in NIAC in the Kupreškiæ case . . . are cited as examples of judicial flouting—or, more generously in Jean d'Aspremont and Jérôme de Hemptinne's view, 'activisme normatif'—of the sources doctrine.") (citations omitted).

formation process of humanitarian law might mean, if anything, for the possibility of a new custom forming regarding armed conflict amidst the outbreak of a global pandemic.

The view that the Martens Clause may impact the formation process of an emerging custom relates to both the ratio of ingredients in customary law's recipe and the time that the emerging rule must "bake" before it becomes law. Under this view, the "ratio of ingredients" may change because an emerging custom that reflects the principles of humanity and the dictates of the public conscience may require less widespread state practice and *opinio juris* may take on exceptional importance.[263] This approach is analogous to Professor Kirgis' custom on a sliding scale theory, which argues that "[t]he more destabilizing or morally distasteful the activity . . . the more readily international decision makers will substitute one element [state practice or *opinio juris*] for the other."[264] The lack of widespread state practice—or even possibly some conflicting state practice[265]—may not prevent an emerging norm supported by the Martens Clause from becoming customary law where abundant *opinio juris* nonetheless supports the rule, thus overcoming the dearth of state practice.

Similarly, the Martens Clause theoretically might affect not only the ratio of ingredients, but also the time that the emerging rule must "bake" before it becomes law. This viewpoint highlights the motivation to favor *opinio juris* over state practice since, "[t]o wait for the development of practice would mean, in substance, legally to step in only after thousands of civilians have been killed contrary to imperative humanitarian demands."[266] Therefore, less state practice would be necessary *because of* the reduction in time required for state practice to meet the required threshold. Under this view, *opinio juris* may again take on special importance in the formation process of customary law. While the International Law Commission originally stated that state practice must occur "over a considerable period of time"[267] before an emerging custom could become law, it is now generally agreed that customary law can, in certain circumstances, form more quickly.[268] Elementary considerations of humanity and the dictates of the public conscience, insofar as they reduce the prerequisite of widespread and consistent state practice

263. Cassese, *supra* note 24, at 214.

264. Kirgis, *supra* note 259, at 149. *But see* Roberts, *supra* note 257, at 774 (critiquing the sliding scale theory).

265. *See* SCHARF, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE, *supra* note 256, at 148 (noting "the great weight of authority at the time of the Tadić decision viewed war crimes liability as applicable only to international armed conflict.").

266. Cassese, *supra* note 24, at 215.

267. Manley O. Hudson (Special Rapporteur on Article 24 of the Statute of the Int'l Law Comm'n), *Working Paper on Ways and Means for Making the Evidence of Customary International Law More Readily Available*, U.N. Doc. A/CN.4/16 (Mar. 3, 1950).

268. North Sea Continental Shelf (Ger./Den., Ger./Neth.), Judgment, 1969 I.C.J. 3, 42, ¶¶ 71, 73–74 (Feb. 20) ("[T]he passage of only a short period of time is not necessarily . . . a bar to the formation of a new rule of customary international law").

occurring over a prolonged period of time, may reduce the required time "in the oven" of the emerging rule. Needless to say, this is not an exact science and depends in large part on the content of the rule, the context of its creation, and the conduct (words and actions) of the states to eventually be bound by the rule.

The view illustrated above therefore considers that, in humanitarian law, the principles of humanity and the dictates of the public conscience may reduce the traditional requirement of widespread and consistent state practice over a long period of time necessary to show the existence of a customary rule.[269] Effectively, where the emerging humanitarian custom is based on the principles of humanity and the prevailing dictates of the public conscience, that custom could materialize in much the same way as during what Professor Scharf calls a "Grotian moment"[270]—quickly and with less widespread state practice. As argued by Professor Scharf, a third factor *may* influence the formation of customary law: "a context of fundamental change—that can serve as an accelerating agent, enabling customary international law to form much more rapidly and with less State practice than is normally thought to be possible."[271] Building on this, some argue that the current COVID-19 pandemic represents a context of fundamental change.[272] Therefore, under the "Grotian Moment" paradigm, customary law may form in response to the COVID-19 pandemic more quickly and with less widespread State practice than is traditionally expected in international law. Scholarship has not yet identified how the Martens Clause might interact with the concept of a "Grotian moment." However, Professor Scharf identifies the *Tadić* decision as a "Grotian moment" for holding that war crimes liability extends to non-international armed conflict, despite contrary views at the time.[273] In so holding, the Tribunal referenced the elementary considera-

269. Cassese, *supra* note 24, at 214.

270. *See* Michael P. Scharf, *Seizing the "Grotian Moment": Accelerated Formation of Customary International Law in Times of Fundamental Change*, 43 Cornell Int'l L.J. 439, 440 (2010) (defining a Grotian moment as "a paradigm-shifting development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance"); *see generally* Scharf, Customary International Law In Times Of Fundamental Change, *supra* note 256.

271. Michael Scharf, *Accelerated Formation of Customary International Law*, 20 ILSA J. Int'l & Comp. L. 305, 306 (2014). *But see* Jonathan Worboys, *Customary International Law in Fundamental Times of Change: Recognizing Grotian Moments by Michael Scharf*, 25 King's L. J. 313, 316 (2014) ("The definition of 'fundamental change' requires further elaboration. Although Professor Scharf defines fundamental change generally, the concept is somewhat elusive.").

272. *See, e.g.*, Catherine Philp, *How Coronavirus Will Change the World Forever*, Sunday Times (Apr. 10, 2020, 12:01 AM), https://www.thetimes.co.uk/article/how-coronavirus-will-change-the-world-for-ever-2fj5h5f8p [https://perma.cc/4QWY-WVTQ]; *Coronavirus Will Change the World Permanently. Here's How.*, Politico (Mar. 19, 2020, 7:30 PM), https://www.politico.com/news/magazine/2020/03/19/coronavirus-effect-economy-life-society-analysis-covid-135579 [https://perma.cc/Y9VV-FPQC]; Martin Wolf, *How Covid-19 Will Change the World*, Financial Times (June 16, 2020), https://www.ft.com/content/9b8223bb-c5e4-4c11-944d-94ff5d33a909 [https://perma.cc/GQG8-Q895].

273. Scharf, Customary International Law in Times of Fundamental Change, *supra* note 256, at 147–53.

tions of humanity,[274] suggesting some association between the concept of a "Grotian moment" and the Martens Clause regarding customary law formation. A precise explanation of how and to what extent this interaction—if at all—might influence the ratio of constituent elements of customary law remains outstanding. Nonetheless, proponents of this view suggest that both "Grotian moments" and norms forming "under the pressure of the demands of humanity and the dictates of the public conscience"[275] have the ability to form with some reduction in the level of widespread state practice and time traditionally necessary before an emerging norm may crystallize into customary law.

Does a rule regulating the conduct of armed conflict during the uncontained outbreak of a global pandemic fit within this framework according to which the Martens Clause can affect the formation process of customary law?

### *B. The Principles of Humanity, the Dictates of the Public Conscience, and Armed Conflict during a Global Pandemic*

There are four reasons why the principles of humanity and the dictates of the public conscience might put "pressure" on the formation process of a new customary international law mandating a global ceasefire during the uncontained outbreak of a global pandemic. First, as discussed above, noteworthy evidence exists indicating the current public conscience's stance—as delineated by "authoritative acts of representative international bodies"[276]—regarding armed conflict amidst a global pandemic. On July 1, 2020, the U.N. Security Council issued a resolution demanding a general and immediate cessation of hostilities due to COVID-19.[277] General Assembly Resolution 74/306 unequivocally supported the call for a global ceasefire,[278] and General Assembly Resolution 74/270 expressed support for the Secretary-General's call, a commitment to the weakest and most vulnerable, and the importance of international cooperation and full respect of human rights in fighting the COVID-19 pandemic.[279] Further indication of the dictates of the public conscience with regard to armed conflict during a global pandemic appears from a statement of support of 171 countries around the world strongly supporting the U.N. Secretary-General's appeal for a global ceasefire.[280] Moreover, though perhaps less authoritative, the United Na-

274. *Tadić*, *supra* note 27, ¶ 119 ("[E]lementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.").

275. *Kupreškić*, *supra* note 24, ¶ 527.

276. Cassese, *supra* note 24, at 212.

277. S. C. Res. 2532, *supra* note 6.

278. G.A. Res. 74/306, *supra* note 7.

279. G.A. Res. 74/270 (Apr. 2, 2020).

280. *See* Statement of Support by 171 U.N. Member States, *supra* note 5.

tions and the ICRC also signed a joint statement calling for a pause between warring parties to fight the global pandemic,[281] and the African Union[282] and the European Union have expressed support for a global ceasefire.[283] Less authoritative still, and perhaps with little relevance to the dictates of the public conscience, are the numerous influential individuals who have backed the call for a global ceasefire, including the U.N. Messengers of Peace—which include Yo-Yo Ma, Jane Goodall, and Stevie Wonder[284]—the High Representative of the E.U.,[285] and Pope Francis.[286]

Second, as Judge Weeramantry stated in his dissenting opinion in *Nuclear Weapons*, "[t]he enormous developments in the field of human rights in the post-war years, commencing with the Universal Declaration of Human Rights in 1948, must necessarily make their impact on assessments of such concepts as "considerations of humanity" and "dictates of the public conscience."[287] It is well-recognized that armed conflict has a catastrophic effect on both individual and community health.[288] Pandemics also stress health care systems, sometimes to their breaking point.[289] While both armed conflict and pandemics can, on their own, result in disastrous consequences for "each individual's right to the highest attainment of human health,"[290] their combined effect can prove crippling, as is the case regarding COVID-19 in Yemen.[291] As such, some scholars have advocated for a greater role for

281. *Joint UN/ICRC Op-Ed on Explosive Weapons in Populated Areas and COVID-19*, Int'l Comm. of the Red Cross (May 27, 2020), https://www.icrc.org/en/document/joint-unicrc-op-ed-explosive-weapons-populated-areas-and-covid-19 [https://perma.cc/AAE4-SXKC].

282. African Union Peace and Security Council, Res. PSC/PR/COMM.(CMXXIX) (June 2, 2020), https://www.peaceau.org/uploads/com-929th-psc-meeting-on-cessation-of-hostilities-eng-.pdf [https://perma.cc/U376-SX7C].

283. Statement of Support by 171 U.N. Member States, *supra* note 5.

284. *UN Messengers of Peace Support the Secretary-General's Appeal for a Global Ceasefire*, United Nations, https://www.un.org/en/un-coronavirus-communications-team/un-messengers-peace-support-secretary-general%E2%80%99s-appeal-global [https://perma.cc/D585-7ARK] (last visited Feb. 2, 2021).

285. Press Release, Declaration by the High Representative Josep Borrell on Behalf of the EU on the UN Secretary-General's Appeal for an Immediate Global Ceasefire (Apr. 3, 2020).

286. *Angelus: Pope Appeals for Global Ceasefire amid Covid Pandemic*, Vatican News (Mar. 29, 2020, 12:20PM), https://www.vaticannews.va/en/pope/news/2020-03/angelus-pope-appeals-for-globalceasefire-amid-covid-pandemic.html [https://perma.cc/HB28-WVWW].

287. *Nuclear Weapons Weeramantry Dissent*, *supra* note 25, at 490.

288. *See* Lidiya Teklemariam, *What Does International Humanitarian Law Has {sic} to Offer to Public Health in Situations of Armed Conflict?* O'Neill Inst. for Nat'l and Glob. Health L. (Sept. 1, 2020), https://oneill.law.georgetown.edu/what-does-international-humanitarian-law-has-to-offer-to-public-health-in-situations-of-armed-conflict/ [https://perma.cc/M7NU-55UN].

289. *See, e.g.*, Simone Fanelli, Gianluca Lanza, Andrea Francesconi & Antonello Zangrandi, *Facing the Pandemic: The Italian Experience From Health Management Experts' Perspective*, 50 Am. Rev. Pub. Admin. 753 (2020); *see also* Debarshi Dasgupta, *Covid-19 Strains India's Overburdened Healthcare System*, Straits Times (Apr. 26, 2020, 4:55PM), https://www.straitstimes.com/asia/south-asia/covid-19-strains-indias-overburdened-healthcare-system [https://perma.cc/F6GA-9YDJ].

290. International Covenant on Economic, Social and Cultural Rights art. 12, Jan. 3 1976, 993 U.N.T.S. 3.

291. *See*, *e.g.*, Mousavi & Anjomshoa, *supra* note 184.

health-based human rights in armed conflict,[292] or a human rights-based law of war.[293]

Building on Judge Weeramantry's approach, post-WWII principles of humanity and dictates of the public conscience—as evidenced by the number of human rights provisions on health in various regional[294] and international[295] human rights instruments—place a high degree of importance on the individual's right to health. Therefore, human rights provisions on health may indicate how the principles of humanity and the dictates of the public conscience characterize the potentially catastrophic effect on populations of armed conflict amidst a global pandemic. Particularly, insofar as armed conflict creates conditions which spread infectious disease among those most vulnerable populations, human rights provisions delineating the right to health suggest that a customary law based on preserving the precarious health of those most vulnerable populations may form under pressure of health-as-a-human-right-informed principles of humanity and public conscience.

Moreover, initial calls for a global ceasefire in response to the outbreak of COVID-19, while not explicitly referencing human rights provisions, signaled health was a significant motivating factor. The U.N. Secretary-General framed the pandemic outbreak, in part, as a healthcare access problem.[296] Similarly, the statement by 171 countries in support of the appeal for a global ceasefire, recognizing the global pandemic's impact on human rights, expressed "deep concern for the continuation of hostilities in various parts of the world, particularly in the midst of the global health crisis, and their devastating impact on the most vulnerable—especially on women and children."[297]

Third, this Article contends that one of the foundations of the U.N. Charter, the preservation of international peace and security, similarly comprises

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292. *See* Marie Claire Van Hout & John Wells, *The Right to Health, Public Health and COVID-19: A Discourse on the Importance of the Enforcement of Humanitarian and Human Rights Law in Conflict Settings for the Future Management of Zoonotic Pandemic Diseases*, 192 PUBLIC HEALTH 3 (2021).

293. David Koller, *The Moral Imperative: Toward A Human Rights-Based Law of War*, 46 HARV. INT'L L.J. 231 (2005).

294. *See* African Charter on Human and People's Rights art. 16, 1520 U.N.T.S. 217; American Declaration of the Rights and Duties of Man art. 11, *reprinted in* 43 AM. J. INT'L L. SUPP. 133 (1949); Additional Protocol to the American Convention on Human Rights on the Area of Economic, Social and Cultural Rights art. 10, 1144 U.N.T.S. 1978.

295. U.N. Charter art. 55; Constitution of the World Health Organization preamble, Apr. 7, 1948, 14 U.N.T.S. 185; International Covenant on Economic, Social and Cultural Rights art. 12, Jan. 3 1976, 993 U.N.T.S. 3; UDHR *supra* note 84, art. 25.

296. Guterres, *supra* note 1 ("The virus does not care about ethnicity or nationality, faction or faith. It attacks all, relentlessly. Meanwhile, armed conflict rages on around the world. The most vulnerable—women and children, people with disabilities, the marginalized and the displaced —pay the highest price. They are also at the highest risk of suffering devastating losses from COVID-19 . . . [*I*]*n war-ravaged countries, health systems have collapsed. Health professionals, already few in number, have often been targeted*. Refugees and others displaced by violent conflict are doubly vulnerable . . . Silence the guns; stop the artillery; end the airstrikes . . . [t]o help create corridors for life-saving aid.") (emphasis added).

297. Statement of Support by 171 U.N. Member States, *supra* note 5, ¶ 3.

one aspect of the post-WWII "public conscience."[298] The U.N. Security Council has repeatedly framed transnational health crises as endangering the maintenance of international peace and security.[299] Likewise, the Security Council Resolution calling for a cessation of hostilities directly cited the likelihood of the pandemic endangering the maintenance of international peace and security.[300] Finally, states framed their support for the global ceasefire in terms of the maintenance of international peace and security.[301] Because a customary law mandating a ceasefire in the outbreak of a global pandemic seeks to preserve the "public conscience's" concern with maintaining international peace and security, an argument exists that it may exert pressure on the formation process of such a rule in international law. Again, the argument relates only to the potential of such concepts as the principles of humanity and the dictates of the public conscience to affect the ratio of ingredients and baking time necessary to form customary law.

Fourth, invocations at the ICJ of the public conscience have occurred in the context of means and methods of warfare considered "repugnant to the sense of the international community."[302] For example, Australia, in its oral statement to the ICJ on the legality of nuclear weapons, likened nuclear weapons to biological and chemical weapons, claiming that they would be similarly "repugnant to the conscience of mankind and that no effort should be spared to minimize this risk . . . contrary to fundamental general principles of humanity."[303] While naturally occurring infectious disease amounting to a global pandemic is clearly different from the intentional use of biological weapons or nuclear weapons, as discussed above, the effect of continued hostilities amidst a pandemic outbreak portends similar difficulties for foundational principles of IHL. Moreover, the near-universal support for a global ceasefire appears to support the idea that the current public con-

298. *See Nuclear Weapons Weeramantry Dissent*, *supra* note 25, at 491 ("Charter provisions bearing on human rights, such as Articles 1, 55, 62 and 76, coupled with the Universal Declaration of 1948, the twin Covenants on Civil and Political Rights and Economic, Social and Cultural Rights of 1966, and the numerous specific conventions formulating human rights standards, such as the Convention against Torture—all of these, now part of the *public conscience of the global community*, make the violation of humanitarian standards a far more developed and definite concept than in the days when the Martens Clause emerged.") (emphasis added).

299. *See* Erin Pobjie, *Covid-19 As a Threat to International Peace and Security: The Role of the UN Security Council in Addressing the Pandemic*, EJIL: TALK! (July 27, 2020), https://www.ejiltalk.org/covid-19-as-a-threat-to-international-peace-and-security-the-role-of-the-un-security-council-in-addressing-the-pandemic/ [https://perma.cc/C8CT-885Y] ("Resolution 2532 builds on and solidifies the Council's practice of addressing transnational health crises as threats to international peace and security, which emerged in 2012 in response to the HIV/AIDS epidemic (Resolution 1983) and developed further in response to Ebola outbreaks in West Africa in 2014 (Resolution 2177) and in the DRC in 2018 (Resolution 2439.")).

300. S.C. Res. 2532, *supra* note 6.

301. *See* Statement of Support by 171 U.N. Member States, *supra* note 5 ("We recognize that the spread of the COVID-19 pandemic has profoundly impacted . . . peace and security").

302. *Nuclear Weapons Shahabuddeen Dissent*, *supra* note 26, at 399.

303. Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Verbatim Record, at 50, ¶ 40 (Oct. 30, 1995, 10 A.M.) https://www.icj-cij.org/public/files/case-related/95/095-19951030-ORA-01-00-BI.pdf [https://perma.cc/Z5VN-WC9Q].

science finds objectionable continued armed conflict during a global pandemic.

Thus, armed conflict during a global pandemic implicates both the principles of humanity and the dictates of the public conscience. Yet this does not imply that the Martens Clause can itself stand for new rules of international law. Such an approach would not respect the sources of international law articulated in article 38 of the Statute of the ICJ.[304] Rather, according to the strand of thought presented above, where emerging customary law reflects the principles of humanity and the dictates of the public conscience, the sources of law do not change but the ratio of its integral elements may. If one accepts this view, because the question of the legality of armed conflict during a global pandemic reflects the principles of humanity and the dictates of the public conscience, a new customary rule prohibiting such might form with less widespread state practice and more *opinio juris* than is standard in international law.

### C. *Current State of a* Lex Ferenda *Mandating a Global Ceasefire in the Aftermath of the Outbreak of a Global Pandemic*

#### 1. *State Practice*

What do the calls for a global ceasefire mean for the emergence of customary international law that compels hostilities to cease during pandemics? State practice is illustrative. Ceasefires in response to outbreaks of infectious diseases are not new. One study shows that between 1989 and 2018 there were more than twenty ceasefires in which infectious disease played a motivating role.[305] Many of these ceasefires dealt with polio vaccinations programs, but the "Guinea worm ceasefire" in Sudan lasted two months and allowed for a variety of treatments and vaccine administration.[306] At the same time, there have been relatively few opportunities for state practice to emerge in the context of truly global pandemics. The Spanish Flu of 1918 occurred in the wake of WWI, and there is no direct link between the end of

304. Statute of the International Court of Justice art. 38, ¶ 1 states:

"1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

305. Clayton, *supra* note 3.

306. *See* Mathew Smallman-Raynor and Andrew Cliff, War Epidemics: An Historical Geography of Infectious Disease in Military Conflict and Civil Strife 1865–2000, at 706 (2004).

WWI and the outbreak of Spanish Flu.[307] The fact that conflicts did continue in the aftermath of WWI indicates that state practice may well have been to continue armed conflict during a global pandemic.[308] Yet, the international legal landscape today is entirely different from that of post-WWI.[309] Despite the rare occurrence of global pandemic*s*, in the aftermath of the outbreak of COVID-19, state practice shows that many countries (and non-state parties to conflict) declared ceasefires following the Secretary-General's appeal.[310] Evidence confirms that at least twelve conflict parties heeded the call and declared ceasefires, including in Yemen,[311] Myanmar,[312] the Philippines,[313] Libya,[314] and Sudan.[315] It must be noted, though, that many of these ceasefires were unilateral, ineffective, or very short-lived.[316] Nevertheless, they occurred in a significant number of countries afflicted by armed conflict.[317] Additionally, taking a wider view of state practice to include state positions taken on the call for a global ceasefire,[318] 171 member states of the UN signed onto a statement supporting the Secretary-General's call for a global ceasefire, providing additional evidence of state practice.[319]

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307. *See*, *e.g.*, Daniel Dale, *Fact Check: Did the Spanish Flu End WWII?,* CNN (August 11, 2020), https://edition.cnn.com/2020/08/11/politics/trump-spanish-flu-end-wwii-fact-check/index.html [https://perma.cc/UK32-H3WU].

308. *See*, *e.g.*, *Continuing Conflict: Europe after the First World War*, Imperial War Museums, https://www.iwm.org.uk/history/continuing-conflict-europe-after-the-first-world-war [https://perma.cc/7FA5-X45B].

309. *See*, *e.g.*, Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance, supra* note 189, at 807 ("The carnage of the Second World War stimulated a major shift toward humanitarian protection of the civilian population.").

310. *See* John Allison et. al., *An Interactive Tracker for Ceasefires in the Time of COVID-19*, Lancet (Dec. 14, 2020), https://www.thelancet.com/journals/laninf/article/PIIS1473-3099(20)30932-4/fulltext [https://perma.cc/B56H-5XCC].

311. Ben Hubbard & Saeed Al-Batati, *Saudi Arabia Declares Cease-Fire in Yemen, Citing Fears of Coronavirus,* N.Y. Times (Apr. 8, 2020), https://www.nytimes.com/2020/04/08/world/middleeast/saudi-yemen-ceasefire-coronavirus.html [https://perma.cc/2UKG-VDET].

312. *See* Press Release, Republic of the Union of Myan. Off. of the Commander-in-Chief of Defence Services (May 9, 2020), https://www.politicalsettlements.org/wp-content/uploads/2020/08/Myanmar-Tatmadaw-ceasefire.pdf [https://perma.cc/T2DQ-YTKU].

313. Eimor Santos, *Duterte Declares Unilateral Ceasefire with CPP-NPA to Focus on COVID-19 Fight*, CNN Philippines (Mar. 18, 2020), https://www.cnnphilippines.com/news/2020/3/18/duterte-cpp-npa-ceasefire-covid-19.html [https://perma.cc/A4PR-A9H2].

314. *See Libya's Tripoli-based Government and Rival Parliament Take Steps to End Hostilities*, Reuters (Aug. 21, 2020), https://www.reuters.com/article/us-libya-security/libyas-tripoli-based-government-and-rival-parliament-take-steps-to-end-hostilities-idUSKBN25H1BG [https://perma.cc/5PCX-TS8E].

315. *Global Ceasefire Call Deserves UN Security Council's Full Support*, Int'l Crisis Grp. (Apr. 9, 2020), https://www.crisisgroup.org/global/global-ceasefire-call-deserves-un-security-councils-full-support [https://perma.cc/3Q6K-SVSJ].

316. *See* Economist, *supra* note 10.

317. *See* Roberts, *supra* note 257, at 767 ("[M]ost customs are found to exist on the basis of practice by fewer than a dozen States.") (citing the works of Charney, Chodosh, Schacter, and Weisburd).

318. State practice can include diplomatic correspondence; declarations of government policy; the advice of government legal advisers; press statements, military manuals, votes and explanation of votes in international organizations; the comments of governments on draft texts produced by the ILC; national legislation; domestic court decisions; and pleadings before international tribunals. *See* Ian Brownlie, Principles of Public International Law 5 (4th ed., 1990).

319. *See* Statement of 171 U.N. Member States, *supra* note 5.

Significantly, both state actors and non-state actors alike signed ceasefires.[320] Though non-state actors are not included in the traditional state practice analysis,[321] Professors Anthea Roberts and Sandesh Sivakumaran have argued for a limited role for non-state armed groups in the creation of new customary humanitarian law.[322] In the context of an emerging custom regulating armed conflict during a global pandemic, there are three reasons the inclusion of armed groups in such a discussion is a normatively positive step for customary law. First, the nature of transnational infectious disease would jeopardize such a rule if only states stop fighting and armed groups continue. The nature of pandemic transmission necessitates widespread support from the actors in armed conflict in order to achieve full effectiveness. Where non-state armed groups fail to adhere, the rule would lose its value. As Professors Roberts and Sivakumaran detail, "[g]iving armed groups a role in humanitarian law-making processes may increase the likelihood of those armed groups recognizing and abiding by humanitarian law norms."[323] Therefore, the nature of infectious disease and participant compliance theory supports including armed groups. Second, there has been widespread recognition of the security threat associated with pandemics.[324] Non-state armed groups that seek to disrupt peace and security may find an immense opportunity presented by a pandemic.[325] In this vein, eventual compliance by non-state actors with the rule is not a given, particularly for transnational terrorist groups. As Harold Koh stated, "[i]f transnational actors obey international law as a result of repeated interaction with other actors in the transnational legal process, a first step is to empower more

320. For example, the ELN rebel group in Colombia declared a unilateral ceasefire for one month, the Southern Transitional Council ("STC") agreed to a ceasefire with Yemen's government, and the Syrian Democratic Forces announced a suspension of all military activities other than self-defense. *See Colombia's ELN Rebels Call Ceasefire Over Coronavirus*, BBC NEWS (Mar. 30, 2020), https://www.bbc.com/news/world-latin-america-52090169 [https://perma.cc/7A5N-QP7D]; *Yemen Government, Southern Separatists Agree to Ceasefire*, AL-JAZEERA (June 22, 2020), https://www.aljazeera.com/news/2020/06/yemen-gov-southern-separatists-agree-ceasefire-arabia-200622152037838.html [https://perma.cc/ZU23-9EJW]; *A Statement to the Public Opinion*, SDF PRESS (Mar. 24, 2020), https://www.politicalsettlements.org/wp-content/uploads/2020/06/Syria-SDF-Ceasefire-Text.pdf [https://perma.cc/GU7W-2LF9].

321. *See* Michael N. Schmitt & Sean Watts, *The Decline of International Humanitarian Law* Opinio Juris *and the Law of Cyber Warfare*, 50 TEX. INT'L L.J. 189, 193 (2015) ("[I]t is essential to recall that States, *and only States*, 'make' IHL").

322. *See* Anthea Roberts & Sandesh Sivakumaran, *Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, 37 YALE J. INT'L L. 107, 108, 110 (2012) (setting "out the case for granting nonstate armed groups a limited role in the creation of international humanitarian law," outlining challenges to the traditional statist doctrine of international law creation, and arguing that the "perspective of the international community" presents a better framework than that of states alone as to the advantages of "recognizing a law-creating role for some nonstate actors").

323. *Id.* at 126.

324. *See, e.g.*, Marius Mehr & Paul W. Thurner, *The Effect of the Covid-19 Pandemic on Global Armed Conflict: Early Evidence*, POL. STUD. REV. 1, 2 (2020) (noting that "opposition groups intending to challenge the state may view coronavirus as a window of opportunity as their target is focused on taking measures against the pandemic").

325. *See, e.g.*, Mia Bloom, *How Terrorist Groups Will Try to Capitalize on the Coronavirus Crisis*, JUST SEC. (Apr. 3, 2020), https://www.justsecurity.org/69508/how-terrorist-groups-will-try-to-capitalize-on-the-coronavirus-crisis/ [https://perma.cc/69UC-39WE].

actors to participate."[326] Thus, in the absence of compliance, at the very least involvement in discussions and inclusive dialogue might shed light on future security threats occurring during pandemics. Similar to the first point, inclusion might not only foster compliance among non-state armed groups inclined to take advantage of insecurity, it might also yield insight into preserving security amidst pandemics. Finally, the *particulars* of any *lex ferenda* that might regulate the legality of armed conflict during a global pandemic will in all likelihood be difficult to ascertain. Therefore, involving non-state armed groups in the dialogue would likely improve the eventual rule by adding more diverse voices to the discussion and expanding a dialogue over the details of a global ceasefire, such as timing, the threshold for classification of a global pandemic, and the duration of a pause in hostilities.

In light of the above, state practice exists indicating that states tend toward pausing hostilities during pandemic outbreak in their territory. Moreover, practice by a number of non-state armed groups also indicates a willingness to pause hostilities in the aftermath of pandemic outbreak. While state practice during the Spanish Flu outbreak following WWI indicates a reluctance by states to forgo hostilities during a global pandemic, states' response to COVID-19 has indicated remarkable contemporary support for a mandatory ceasefire amidst the outbreak of a global pandemic.

### 2. *Opinio Juris*

The second element necessary for the formation of customary law is *opinio juris*—the subjective element of the equation. To meet this criterion, a particular "practice must have been applied in the conviction that it is legally binding."[327] However, determining what was in the mind of any legal actor is characteristically a thorny question. This may be especially true regarding the subjective element of customary law formation, to the extent that Judge Lachs has cautioned against an overly stringent approach toward *opinio juris* at early stages of customary law formation:

> To postulate that all States, even those which initiate a given practice, believe themselves to be acting under a legal obligation is to resort to a fiction—and in fact to deny the possibility of developing such rules . . . In view of the complexity of this formative process and the differing motivations possible at its various stages, it is surely over-exacting to require proof that every State having applied a given rule did so because it was conscious of an obligation to do so.[328]

326. Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2656 (1997).
327. Josef L. Kunz, *The Nature of Customary International Law*, 47 AM. J. INT'L. L. 662, 667 (1953).
328. North Sea Continental Shelf, 1969 I.C.J. 218, 231 (Feb. 20) (Lachs, J., dissenting).

Similarly, another view posits differing views of *acceptance* of an emerging rule depending on the relevant stage of formation.[329] On that view, early-stage acceptance of a rule relates to consent, while later stage acceptance relates to recognition of the binding force of the rule.[330] Thus, at this early stage, indeed considering that the COVID-19 pandemic is still ongoing, there are difficulties regarding an exact delineation of why several states engaged in ceasefires following Guterres' call. Humanitarian concerns appear to have guided many. A desire to gain good-faith credibility in the eyes of the international community may have compelled others. Perhaps the declaration by the U.N. Secretary-General, other high-level diplomats, over 200 NGOs and an official statement signed by 171 countries was enough for some parties to pause hostilities, either out of a sense of legal obligation or out of fear of sanctions or admonishment that might come from the international community should they fail to oblige. What is clear is that at this moment, the *opinio juris* element is lacking for the development of a new customary law regarding a mandatory ceasefire during a global pandemic outbreak. The U.N. General Assembly[331] and courts[332] will likely shed further light on the *opinio juris* element of the proposed *lex ferenda* in the aftermath of the COVID-19 pandemic.

Evidently, there are a number of difficulties regarding the exact contours of what such a rule might look like. The duration and definition of a global pandemic, when it begins, and exceptions for terrorism or self-defense are but a few unanswered questions regarding such a rule. These uncertainties do not present insurmountable barriers, and courts' very *raison d'être* is to interpret rules. This Article suggests that the rule might look something like this: when the WHO declares a public health emergency of international concern, and more than eighty percent of the international community is on some form of legally imposed quarantine, a global ceasefire shall come into effect and last a minimum of ninety days, though states may continue to carry out anti-terrorist operations in the face of imminent threats. Such a rule would make significant progress towards the recognition of the principles of humanity and the current dictates of the public conscience in IHL during a global pandemic.

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329. *See* MAURICE H. MENDELSON, THE FORMATION OF CUSTOMARY INTERNATIONAL LAW 195, 283 (1998).

330. *See id.*

331. Regardless of one's stance on the sway that U.N. General Assembly Resolutions hold on customary law formation, the fact remains that the General Assembly presents an opportunity for States to express the reasons why they acted the way that they did, thus bearing on the *opinio juris* element of customary law formation.

332. *See, e.g.*, Scharf, *Accelerated Formation of Customary International Law supra* note 271, at 320 n.85 ("[I]nternational courts and tribunals can assess the existence and contents of customary rules on the basis of an unparalleled amount of materials, represented to them through written and oral pleadings, including annexes of relevant materials, very often unearthed from archives for the purpose of the case." (citing Tullio Treves, *Customary International Law*, *in* MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L. ¶ 25 (2006))).

### *D. Why the* Lex Ferenda *Would Be a Normatively Positive Step for IHL in the 21st Century*

As a final observation, although the latent customary law regulating armed conflict during a global pandemic explored above lacks important elements to date, there are three advantages of a customary law regulating armed conflict during a global pandemic rather than either new treaty law or *sui generis* global responses, such as individually negotiated ceasefires or a U.N. Security Council-mandated global ceasefire. First, customary law has universal application.[333] Indeed, once a customary law forms, it binds all states equally. Unlike treaties, where states can withdraw from negotiations or issue a reservation on particular provisions, one of the three design features of customary law is its universal application,[334] in addition to its being unwritten and non-negotiated.[335] In order to effectively battle a global pandemic, contain its spread, and prevent calamitous humanitarian consequences, universal cooperation is a must.[336] A global pandemic presents a transnational threat, with one state's sovereign choice affecting other states' ability to combat the disease. For example, where one state continues its civil war amidst the outbreak of a global pandemic causing refugees to cross over the border into a neighboring state, that state now must, under the Refugee Convention of 1951, provide those people with access to healthcare.[337] Yet, a global pandemic may stretch the healthcare capacity of individual states, even those that are not otherwise afflicted by conflict or another calamity.[338] Fulfilling its duties under international law may thus jeopardize a country's ability to provide healthcare to its own citizens. Additionally, as outlined above, international travel of soldiers, journalists, humanitarian workers, negotiators, and diplomats, may worsen the spread of

333. *See* Laurence R. Helfer & Ingrid B. Wuerth, *Customary International Law: An Instrument Choice Perspective*, 37 MICH. J. INT'L L. 563, 569–72 (2016).

334. *But see* Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457, 458 (1985) ("[A] state that has persistently objected to a rule of customary international law during the course of the rule's emergence is not bound by the rule.").

335. Helfer & Wuerth, *supra* note 333, at 582.

336. *See, e.g.*, Chiara Giorgetti, *International Health Emergencies in Failed and Failing States*, 44 GEO. J. INT'L L. 1347, 1350–51 (2013) ("Globalization has, to a certain extent, undermined the ability of one State, acting alone, to protect its people from the spread of infectious diseases. As a result, it has become clear that only collective efforts can efficiently address public health emergencies . . . [N]ew infectious diseases, such as SARS and Ebola haemorrhagic fever, typically have trans-boundary effects, and thus can only be properly handled by the coordinated actions of multiple national and international actors."); *see also* David P Fidler, *To Fight a New Coronavirus: The COVID-19 Pandemic, Political Herd Immunity, and Global Health Jurisprudence*, 19 CHINESE J. INT'L L. 207, 207 (2020) ("Germs do not recognize borders, but, in a world where borders define the exercise of political power, international cooperation is critical to combatting pathogenic threats.").

337. Convention Relating to the Status of Refugees, art. 24, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150.

338. *See, e.g.*, Jason Horowitz, *Italy's Health Care System Groans Under Coronavirus — A Warning to the World*, N.Y. TIMES (Mar. 12, 2020), https://www.nytimes.com/2020/03/12/world/europe/12italy-coronavirus-health-care.html [https://perma.cc/GT3Z-LFWZ].

the disease. Therefore, custom's universality fulfills the need for universal cooperation and coordination in the face of a global pandemic.

Second, the unwritten character of custom yields advantages in its flexibility. An "amorphous and malleable" rule would allow pervasive initial agreement among countries, while maintaining states' "leeway to assert their preferred interpretation when applying that rule to specific contexts or new circumstances."[339] Unlike in the negotiations over the Security Council Resolution supporting the call for a global ceasefire, during which the United States and China quibbled over the inclusion of the World Health Organization in the final draft,[340] semantics would not prevent the rule's creation where widespread agreement exists on the core of the rule. The difficulty inherent in the *details* of a legal rule mandating a ceasefire during a global pandemic would not prevent the rule's formation.

Third, the timeframe needed for international bodies like the U.N. Security Council to act presents a drawback. Whereas a contagious infectious disease can spread to the four corners of the globe in a few months, inherently political negotiations tend to be measured. A rule that kicks in automatically when relevant criteria are present would be more efficient than drawn-out negotiations. In short, from an instrument choice perspective, customary law may be the most effective way of regulating armed conflict during a global pandemic.

To conclude, while such a custom regulating armed conflict during a global pandemic would in all likelihood be a very narrow rule that only kicks into effect during extraordinary and internationally challenging scenarios, such a rule would offer a powerful signaling effect. It would be a recognition of the devastation that can, has, and will occur when infectious disease intertwines with armed conflict. It would signal the international community's commitment to peace and security during a time when the globe is at its most unstable; a situation which some have deemed a perfect time to take advantage of the chaos. Finally, such a customary rule would signal the continuing vitality of the principles of humanity and the dictates of the public conscience in international law.

## Conclusion

This Article has laid out the various interactions among the Martens Clause, pandemics, and the law of armed conflict. In doing so, it has explored how various interpretations of the Martens Clause may affect understandings of how humanitarian law applies during a global pandemic in general and the formation process of a rule regulating armed conflict during

339. Helfer & Wuerth, *supra* note 333, at 583.

340. Julian Borger, *US Blocks Vote on UN's Bid for Global Ceasefire Over Reference to WHO*, Guardian (May 8, 2020), https://www.theguardian.com/world/2020/may/08/un-ceasefire-resolution-us-blocks-who [https://perma.cc/QZ3E-CTUM].

a global pandemic in particular, as well as where such a *lex ferenda* might be in its development process. This Article has laid the foundation for more in-depth discussions regarding how IHL functions with respect to infectious disease outbreaks, as well as what the COVID-19 pandemic and its global response mean for the future of humanitarian law.

Military manuals of armed forces would do well to include further guidance as to how the longstanding principles of humanitarian law apply during infectious disease outbreaks, particularly pandemics. Humanitarian law scholarship too might contend more with the difficult nexus between humanitarian law and infectious disease. Doing so will recognize the important interaction between armed conflict and the "third army," and contribute to furthering the purpose of the body of IHL—to preserve the principles of humanity during, limit unnecessary harm and suffering from, and mitigate the destructive effects of, armed conflict.