

*Is there a Place for Ethical Considerations in Law? Protecting the Victims of War through  
the Principle of Humanity:*

*The Martens Clause and the Relationship between Morals and Positive Law*

In some areas of law, political will allows legal regimes to develop almost at the same pace as challenges arise. But without the will of lawmakers to react to new challenges by improving the available regulations, the already existing law seems to be the only available source of containment. This is especially true for the regime of International Humanitarian Law (IHL) where progress in positive law only seems possible in the aftermath of the most horrible experiences of mankind. Therefore, especially in the case of non-international armed conflicts, only a small set of norms is available to grant protection to the victims of the conflict. But should the international community wait for another catastrophe to happen in order to find the consensus to develop new treaties or the state practice which is necessary in order to develop customary international law? In this situation, one might be tempted to turn to moral principles in order to restrain the waging of war – and does morality not teach us that capture is preferable to kill an enemy or that the use of nuclear weapons can never be proportional?

The majority view in western legal theory is the separation of the positive law from moral considerations. Even the Radbruch formula solves the conflict of justice and the reliability of law in favor of the positive law – unless the discrepancy between them becomes unbearable. Therefore moral and ethical considerations seem to have influence on the positive law only in the most extreme cases.

But one of the most noteworthy regulations of IHL seems to be able to introduce the principles of humanity and the dictates of public conscience - and therefore moral principles with the ability to change in the course of time – as positive law principles. Is the so called Martens Clause able to integrate moral or ethical considerations into IHL and adapt the regime in order to meet new challenges without new treaties or state practice being necessary?

My paper will start from the traditional western viewpoint of the separation of morals and law (I). It will then turn to the regime of IHL (II) – a set of positive law hardly able to adjust to modern views of ethical warfare. It will go on exploring the Martens Clause (III) as a possible link between progress in ethical considerations and development in IHL aiming at better

protections of victims. It will analyze the extent of moral influence on IHL through the Martens Clause (IV.1) and ask, whether the moral views of our current societies can have impact on the existing law (IV.2).