

FRIEDRICH MARTENS: A FOUNDING FATHER OF THE HAGUE TRADITION

The Fourth Friedrich Martens Memorial Lecture

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1. The Backdrop

The centenary of Friedrich Martens' demise recalls that complex and highly troubled period in international affairs which, in one of history's great misnomers, was called *La Belle Epoque*. During these decades the Old Continent, not for the first time, lost control of its destiny. This time, however, in ignoring the pulse of time and the winds of change, it outplayed its hand. Letting clashing ideologies run wild and unable to put a check on dynastic rivalry, military contest or commercial competition, it gambled away its time-honoured primacy of directing world events.

Friedrich Martens was a keen witness of these fatal events, indeed a public figure of that day and age, and a leading "internationalist" as the jargon of the time ran. Easily migrating between disciplines, he seemed to be the man for all seasons, who aspired at bridging social gaps. Alarmed by the onmarch of socialism, and putting all his hopes on an enlightened Czar, he invested all his bursting energy in reconciling the world of high diplomacy – that bastion of the reactionary –, the emerging discipline of international law and those fascinating if controversial *gremia* of pacifism and interparliamentarism. Within the crucible of social turmoil throughout Europe, and while representing the most conservative of societies and the most formidable of autocrats, Martens earned himself a reputation of keen advocate of humanitarian thought and renowned arbitrator. Around 1900, Martens, in short, stood out as a guiding light in refurbishing international society. His celebrated epithets of "Chief Justice of Christianity" or "Soul of the Hague Peace Conference" attest to his prestige during his lifetime, as do his many honorary doctorates abroad. Upon the news of Martens' death, the renowned Professor Holland at Oxford opened his obituary with the words "*Magnus vir cecidit!*" The quote from one of Seneca's moral treatises may have lost much of its ring in our day and age. Still, the implied reference to the great

Greek judge Aristides, that epitome of integrity to the classical world, reads as a landmark of Martens' reputé.

This is not to say that Martens' views, or for that matter his personality, went uncontested – on the contrary, one is bound to say. If Martens was highly influential among his peers, this was, as many contemporaries would argue, as likely on account of his assertiveness, powers of persuasion and domineering character as by grace of his refined thought or subtle diplomacy. Scholars never failed to point out inconsistencies in his works. The gist of his thought and the drive of his tenets were often found confusing, to the point of compromising his position, as was the case notably with his interpretation of arbitration as a mechanism of peace, rather than an instrument of law. While lawyers often labelled him as first and foremost a politician, diplomats on their part took him for a representative of that suspect group of newcomers and intruders called international lawyers. Martens' clashes and polemics with luminaries such as Rui Barboza, John Westlake, or Bulmerinck were notorious.

However, no doubt about it, for all his eventual shortcomings, Friedrich Martens was one of the most influential men of his day and age, who truly made a difference. At the end of the day, Martens, more than most of his colleagues, knew how to bring ideas from the domain of pure academic speculation to bear on the sphere of down-to-earth politics. There is no coincidence if Martens, for years on end, was considered the most likely recipient of the Nobel Peace Prize. Martens' origins, to be sure, were in Estonia; his career was made at St. Petersburg; yet his indelible imprint was made in The Hague. It is The Hague that, in the long run, profited most from this rare talent.

To his contemporaries Martens' reputation hinged on three issues: his advocacy of international arbitration; his crusade for implementing humanitarian concepts, epitomised in the famous “Martens Clause”; finally, his pivotal role in creating *L’Oeuvre de la Haye* or “The Hague Tradition”, first, by heralding the concept of a Permanent Court of Arbitration (PCA), secondly by luring Carnegie into bestowing a Court House to serve this PCA – the venue which today stands out as the icon of International The Hague: the Peace Palace.

Meanwhile, the reception of Martens' character and intellectual legacy over the past century has been less than benign. For this, there are various reasons. The world as Martens had known it came to an abrupt end in the cataclysm of World War I. All optimism that had clung to the idea of arbitration as escutcheon of the weak and as panacea to help ban war as a mechanism of national policy was swept away in the maelstrom of Verdun and the Somme.

All former promise of the all too non-committal PCA had been belied. For four devastating years all concepts of humanitarian relief enshrined in the 1899 and notably the 1907 Hague Conventions were trodden underfoot by all belligerents indiscriminately. The very notions of “public conscience”, “laws of humanity” and “civilised nations”, the legacy of a century that was virtually encapsulated in Martens’ famous Clause, had been put to shame by the nations. Martens’ championship of these tenets seemed all but refuted by history.

The American President who, in 1919, wrought a new beginning from the wreckage hated lawyers with a vengeance and keenly perceived the inadequacy of the pre-war Hague System. Woodrow Wilson institutionalized the idea of congress diplomacy in his essentially political brainchild of the League of Nations. If, at that juncture, the Hague Tradition was salvaged at all, it was not thanks to the Netherlands. That nation had discredited itself in the eyes of the world by its profitable neutrality and by giving shelter to the foremost agent of crime, *der Kaiser*, in flagrant violation of the old adage *dedere aut iudicare*. It was Martens’ co-militant Léon Bourgeois, the French politician, who urged Wilson to reconsider and redirect the tradition of voluntary arbitration towards compulsive jurisdiction by installing a permanent judiciary along the lines staunchly advocated by Martens in 1907. Still, the failure of the mechanism of arbitration and the inconsequential humanitarian codes had inevitably affected the reputation of their foremost protagonist. The *décomfiture* of the pre-war Hague System likewise brought the name of her champion into disrepute.

And there was more to it. At home, in Russia, the Revolution made short shrift with all Romanov ideology. In Moscow, Martens was dismissed as a Czarist Old Hand and reactionary opportunist. During the interbellum period he was perfectly ignored by Communist legal literature. Yet the worst was still to come. In 1949, in the opening years of the Cold War, the *American Journal of International Law* published a most incriminating article accusing Martens of having mishandled his umpireship of the 1899 *Orinoco* case by intimidating the members of its arbitration panel into sharing his views. In 1952, no lesser authority than Arthur Nussbaum rendered a devastating verdict on Martens as the apologist of cynical Russian expansionism and the advocate of political expediency, whose writings were invariably suffering from distortions of facts and inveterate bias, and whose grandiloquent but insincere rhetoric put the law to shame.

Coming from this high authority, these allegations were hard to ignore – or die. It was only in the decade leading up to the centenary of Martens’ finest hour, the 1899 Hague Peace Conference, that authors like Pustogarov and

Butler put these mostly unfounded critics in perspective and Martens back into focus. A great help in that recantation was the revival of the mechanism of arbitration itself, the new boost of the PCA, and the increasing reference by the Hague international benches to the Martens Clause, that “elusive gem of diplomacy” which, with the rise of the Hague international criminal tribunals in the mid-1990s, soon reached the status of *mantra* among judges. In 1999, Martens’ repute as *auctor intellectualis* of both PCA and Peace Palace was vindicated with the unveiling of his bust in Carnegie’s Temple. For, no use denying, in the material sphere, no single man, with the possible exceptions of Tobias Asser or Léon Bourgeois, can be deemed to have been more instrumental in creating *L’Oeuvre de la Haye*.

My intention in having the privilege of addressing you in this Fourth Martens Memorial Lecture, is not to lay stress on the above-mentioned material element, which I have discussed in various writings. Rather, I will try and put Martens’ views on the future of international society into perspective by illustrating the problems that were facing that society and exploring the available remedies. There is no denying that the way international relations were to develop in the decades following Martens’ demise varied in many respects from the way Martens had anticipated or hoped for. With the hindsight of a century, however, it might just be that this weather-beaten diplomat and accomplished lawyer, in proposing his alternative views, did have a point which to our benefit we may take at heart even today. Therefore, let us first recapitulate the genesis and gist of Martens’ views.

2. A Career in the Making

Martens made his career against all odds, one might say. His span of life opened dramatically when, raised in German Lutheran surroundings in Pernov, he became an orphan at nine. The boy who was born in 1845, a single month after Hugo Treffner, and might have become a leading light in the Estonian national movement, instead found shelter with the Lutheran Church gymnasium in St. Petersburg, there to witness from close quarters the social upheaval and revolt following Alexander II’s famous manifesto. To Martens, this Czar would forever remain the epitome of the enlightened ruler. Later on, in his capacity of member of the Privy Council, Martens vainly sought to instil Alexander’s concepts of social reform in Nicholas II.

Friedrich’s relatively uneventful years at the St. Petersburg law faculty were capped by his *peregrinatio* to Leipzig, Heidelberg and Vienna. During this year abroad, in 1867–68, the teachings of Caspar Bluntschli and Lorenz von Stein made a lasting mark on his receptive mind, as we will have

occasion to see later on. These two scholars also secured his move towards international law and diplomacy. Back home, in 1869, Martens embarked on a career at the Foreign Ministry. In all, he would serve no less than six foreign ministers, from Gorchakov to Witte, and help shape Russian foreign policy from Brussels 1874 to The Hague 1907. Throughout these decades, Martens attended virtually all major international congresses from San Stefano and Berlin to The Hague 1907, including all Red Cross conferences and Tobias Asser's private international law meetings.

Still, in Martens' own perception, throughout his official career, his humble German-Estonian pedigree remained a severe handicap which fore stalled acceptance among elitist aristocratic circles at the Romanov court. It was a setback which even his change of name from Friedrich Fromhold to Fedor Fedorovich could not help repair. The same held good – Martens claimed – for his legal training, which among reactionary diplomats marked him out as a mere technician, a working horse to be applied or ignored at will. Complaints of maltreatment and disrespect abound throughout his life, in spite of his membership of the Privy Council ever since 1881. In this, we have to take into account that his overt ambition as *homo novus* and his reputed zeal and energy made him a willing tool in the hands of easy-going diplomats like Muraviev and the kind.

Be this as it may, Martens' hierarchic downgrading at international conferences was commented on by foreign diplomats as curiously at odds with his superior intellectual standing. At the Hague Conferences most Russian technical delegates could be relied upon, with just a little help from their British or German counterparts, to let themselves lured into the quick-sands of detail and thus miscarry their own propositions. Having no experience whatsoever with parliamentary procedure, Russian diplomats, even of the calibre of De Staal (1899) or De Nelidov (1907) often enough found themselves perfectly at a loss in the international arena. As it is, Martens' assets for his superiors were indeed numerous. His command of foreign languages was unprecedented, his learning, expertise in the history of diplomacy and command of facts and figures were unparalleled, while his willpower, domineering presence and eloquence never failed to impress his audience.

It was a major disillusion in the sphere of diplomacy in the early years of his career that was to remain of lasting impact on Martens' intellectual outlook. In appreciating this, one has to consider that, throughout his career, Martens expressed sincere pride in the Russian tradition of humanitarian law. At The Hague, he never felt tired – indeed to the amusement of foreign observers – extolling the virtues of Czarina Catharina the Great, who in his perception had been first to formulate the rights and obligations of neutrals;

of Czar Alexander I's policy of peace in the Napoleonic Wars; or of the merits of Alexander II (the "Liberator" and his life-long model) in launching the St. Petersburg Declaration. Against this backdrop, Martens in 1874, at Brussels, seconded Baron Jomini into drafting a Declaration meant to put a halt to endless reprisals and protect civilians from the worst consequences of war. The obstinacy of British resistance on that occasion, which precluded ratification of the Brussels Declaration, turned Martens into a life-long and overzealous missionary of the cause of humanitarianism. To this personal commitment attest his steadfast advocacy of these principles from the San Stefano and Berlin conferences, which concluded the Crimean War, to his presidency of the Second Commission at The Hague in 1899 and the Fourth Commission in 1907.

The same year, 1874, a crucial juncture in his life, saw Martens' election to that selected panel of scholars who constituted the *Institut de droit international*, founded in Ghent the previous year. At these informal gatherings, which did much to develop and test Martens' ideas and tenets, he made the acquaintance of that remarkable generation of lawyers who, within a matter of decades, would overhaul the tradition of Austin's "command" law, thus to develop the discipline of international law as we know it. It was a quite remarkable innovating process indeed, instigated by men like Mancini, Bluntschli, Rolin-Jacquemyns and Asser, the same men who, a mere five years before, had initiated the first proper journal in the field, the *Revue de droit international et de législation comparée*. At the heart of this journal, as its title duly intimates, was the widely felt need for coordination and integration of national legislative traditions, thus to cope with the demands of the Industrial Revolution and transboundary commerce. The agreements on the legal regimes of Rhine and Danube were among the first signal successes of these scholars, who, often enough, were to occupy the first chairs of international law in their home countries.

From early on, however, the *membres* also addressed other topical issues such as humanitarian thought or arbitral procedure. In this, they fought an uphill battle for recognition against the conservative legal departments of foreign ministries. In the quest for help against these reactionary bulwarks of diplomacy, they found ready allies in like-minded parliamentarians and pacifists. Actually, it was the cross-fertilization of these currents, spearheaded by the *Institut*, the Interparliamentary Union and the International Peace Bureau which, towards the end of the century and on account of massive conferences, scores of reports and hosts of publications, made these innovating views, often referred to by the generic title of "internationalism", *salon-fähig*, and an effective counterpoise against the vibrant nationalism and jingoism

of the period. In many respects, the 1899 and 1907 Hague Conferences were the zenith of these aspirations and the intellectual legacy of this generation.

Friedrich Martens felt very much at home in these circles, where over the years he came to cherish many friends. In 1880 he was on the small committee that met at Bluntschli's house in Heidelberg to finalize Moynier's draft of a code on the laws of war, from which the celebrated 1888 Oxford Manual was developed. He was a steadfast member of annual meetings, submitted reports on such topical issues as the Suez Canal, consular procedure, the slave trade, international waterways and the concept of an International Bureau, and twice, in 1885 and 1894, acted as vice-president of the *Institut*. This in itself is fairly remarkable, given his upbringing and legal training within a climate of strictest absolutism and autocracy. By the same token, contemporary scholars such as Westlake, Holland, or Lammash often expressed reservations with regard to Martens' contributions to the *Revue* and what they claimed to be his apology of Russian foreign policy, notably its expansionism in the Balkan, Persian Gulf and Asia. In now turning to assessing Martens' views on the law, we therefore do well to appreciate his *status aparte* among his peers.

3. Martens' Views on the Law

At St. Petersburg, Martens started out as a teacher of constitutional law. However, starting from 1871 he gradually replaced the fragile Ivanovski at the chair of international law, which he would officially occupy for a full three decades (1876–1905). From the start, his approach was provocatively innovative. In many ways, Martens may count as the founder of the St. Petersburg school of international law. In his view, it was diplomatic practice which, more than anything else, rendered a legal structure to the international arena. Appreciating the role of national tradition, Martens embarked on a lifetime project to compile a comprehensive survey of all treaties concluded by Russia from Westphalia (1648) onwards. The 15 volumes, published from 1874–1909, stand out as a real encyclopaedia of Russian foreign relations and the counterpart to the German collection compiled by his namesake (Georg Friedrich) Martens. In 1880, Martens co-founded the Russian Association of International Law.

The impact of his contacts abroad became first known to the world at large with the publication of his two-volume *The Contemporary International Law of the Civilized Nations*, which appeared in Russian in 1882/3. The work was soon translated into German and French – and subsequently into Serbian, Persian, Chinese and Japanese, or, as opponents subtly pointed out, the

languages of the non-civilized nations, thus to aptly export Russian foreign policy. The manual was never uncontroversial, but was remarkable in many ways. Undisputed was its superb historical introduction, which distinguished three phases of development in the history of international law: the pre-Westphalian natural law period (–1648); the pre-Vienna age of naïve positivism (–1815); finally, the modern age of synthesis (1815–).

Martens' philosophical position at this juncture was a far cry from utopianism. He categorically rejected Kant's proposition of the natural historical process towards perpetual peace. From the sobering observation of the relations of the nations over the centuries, the endless contradictions and inconsistencies, the opportunism and *ad hoc* remedies, Martens had concluded upon the innate, unequivocal status of conflict and dispute in the international arena and the inadequacy of all speculative theory. Diplomacy, he felt, was the key to the riddle. To that extent at least he made himself known as a positivist *pur sang*. Also, the State's autonomy and territoriality he deemed sacrosanct and military intervention he held for unacceptable, within the brotherhood of "civilised nations" that is: the interference with the domestic affairs of barbaric realms, for instance with a view to forestalling the persecution of Christians, he deemed perfectly legitimate.

On the other hand, Martens insisted that modern international exchange and communications of the Industrial Era made compliance, self-constraint and consensus imperative. As he saw it, the imposing of the Rule of Law was a prerequisite to the future of international society. Conflict and excesses had to be anticipated through international organization and regulated through codification, arbitral procedure and humanitarian concepts. Remarkably enough, at this early stage, he still dismissed the call for international tribunals as chasing moonbeams. Nor did he fall in with the prevailing cry for World Federalism or a United States of Europe. His major objection to these concepts concerned their unbalancing repercussions on the international society. Throughout his career, Martens, being the child of his age and of a revolt-ridden empire, urgently voiced his anxiety for social upheaval. He envisaged the future of Europe in a free alliance of autonomous State-entities. The growth of international administration – which in itself he welcomed, indeed took for an unstoppable process – should, in his perception, be implemented in a gradual process spurred by international conferences and a progressive network of international agencies on a voluntary basis.

Highly intriguing were his views with regard to the nature and identity of the State and the obligations to be imposed on it. The State entity, in his perception, was not a national but an essentially cultural concept. Its

policy and constitution were to reflect the people's shared social norms, values and ideals. Its *raison d'être* was the propagation of human rights and self-determination in precluding Hobbesian and Darwinian powerplay. In his perception, a State's level of "civilisation" was actually best deduced from its success in warranting the legal rights of the individual. With the multi-national Austrian Empire at jeopardy at the hand of (Russia's backing of) Pan-Slavism, these were noteworthy propositions to say the least.

No less intriguing were the views Martens exposed in 1883 with regard to the interplay between the domestic and international spheres. Insisting on the normative value of organic historical processes, he made himself known as the outspoken dualist in categorically dismissing any parallelism of the two spheres on account of their independent and incomparable processes of genesis. By the same token, a nation's cultural advancement, as he saw it, was measured with respect to its openness to international trade and commerce. In much the same way, the ultimate criterion from which to read its status in international law was the role it allotted to human rights.

Meanwhile, widely criticised was the work's outdated structure, based on Grotius' dichotomy of the laws of war and peace rather than on the contemporary dichotomy of formal and material sources of law. More pertinent, the work's basic concept was felt to be neither Russian nor inherent to international law *in stricto sensu*, but rather to have been borrowed from the concept of *Verwaltungsrecht* as advocated by his teachers at Heidelberg and Vienna, Bluntschli and Von Stein. To that extent, the very title of Martens' work, in its reference to "civilised nations", was tale-telling.

The idea itself had first been coined by Bluntschli in his *Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt* (1868). The work was an ardent plea on behalf of the historic role and sacred duty of the European nations to guide the non-Western world towards a higher level of civilization. In a gradual process, the normative canon of customs and legal norms traditionally prevailing within the cultural and religious cauldron of the European commonwealth should be expanded worldwide. As, from 1800 onwards, this legal sphere gradually had come to embrace the Americas as well, its former label "European" had gradually been replaced with "Christian". Subsequently, the entrance, at least in formal terms, of the Ottoman Empire into the privileged circle of the European Concert at the 1856 Paris Treaty, in turn outdated this term Christian, which was then replaced with "civilised". This concept duly reflected not just the generally professed European superiority in upholding international legal norms but likewise their independence from all religious connotations. In 1884 James Lorimer divided the world into a *humanité civilisée, à demi barbare, et sauvage*. Only

a decade later purely legal norms, rather than cultural, were first laid down as criteria for a nation's entrance in the *Völkerrechtsgemeinschaft* and for its verification as a subject and sovereign actor of international law. By 1905 Oppenheim would complete this process in identifying "civilisation" with the capacity to understand and act in conformity with the principles of the Law of Nations.

Around 1880, Martens clearly was still struggling with the concept, dropping the reference to "civilised nations" in the French translation, referring to "*nations civilisées ou chrétiennes*" in the *Préface*, and mirroring his definition of the Society of Nations after the criteria he had laid down for verification of the State itself: "*die Gemeinsamkeit der socialen, culturellen und rechtlichen Interessen der durch sie verbundeten civilisierten Nationen*", as the German edition read. In his 1901 *La paix et la guerre* he refers to *nations civilisées* and *le monde civilisé* on every second page. To Martens, as with Bluntschli, "civilised" still had strong cultural connotations: "*das moderne Völkerrecht ist ein Product des Culturlebens und Rechtsbewusstseins der Nationen europäischer Civilisation*", he wrote in 1883. Even religious concepts he did not rule out entirely, witness his exclusion of the Ottoman Empire on account of the *entwicklungshemmende* doctrine of the Islam. As against Bluntschli's *edler und erhabener Kosmopolitismus*, however, and less idealistic, Martens excluded the non-civilised nations from the sphere of positive international law. Their inclusion, he held, would violate the legal principle of reciprocity and thereby devoid the law of all practical value. It was satisfied with these views that Martens entered the 1899 Hague debate.

4. The 1899 Hague Peace Conference

The origin of the Peace Conference, its rationale and its location have always invited much speculation. Let us open our discussion by stating that, on account of its few palpable results in the short-term, the long-term impact of the Conference (and notably of its successor of 1907) in opening the International Era has often been grossly underestimated. Again, that the initiative was a very sensible move indeed, and the later abuse of the idea regrettable but wholly in the line of power politics; finally, that its programme was a most ingenious compromise on Martens' part and that the location, again Martens' choice, was a haven of last resort. Let us briefly recapitulate the story.

Half a century of durable peace in Western Europe after the Napoleonic Wars ended abruptly with the Franco-Prussian clash of 1870 which, after Napoleon III's earlier aspirations in the Crimea and his Mexican adventure in

the previous decade, clearly belied his claims of being the Napoleon of Peace. The foolish invasion of Germany under the slightest of pretences undid centuries of successful French diplomacy to forestall German Unification. The proclamation of the German Empire at Versailles in 1871 left France crippled and mentally disoriented. It was only thanks to Bismarck's superior diplomacy that, in the next two decades, peace was maintained and tension, notably due to French calls for *revanche*, canalized into a chain of skirmishes, mostly in the colonial sphere and on African territory. However, with the installing of the impetuous Wilhelm II in Berlin in 1888 and his dropping of the almighty *Reichskanzler* two years later, Bismarck's ingenious policy to balance the powerblocks soon gave way to a dangerous powerplay of the Triple and Dual Alliances (Germany, Austria-Hungary, Italy vs. France and Russia) that left Europe a powder keg at the whim of despots who were unwisely charmed by the expanding military machinery which was the boast of the Industrial Age.

It was in this context that Lord Salisbury, in a famous speech in the London Guild Hall, called upon Czar Alexander III, the then Head of Christianity, to invite the nations to a Conference to discuss the fragile political balance, alarming armaments race, and wide-spread social turmoil in Europe. Forestalled by the Czar's untimely death, it was this Russian "claim" that was forwarded by Alexander's far less authoritative successor Nicholas II a decade later in his cryptic *Rescript* of summer 1898, in which he invited the nations to a disarmament conference in St. Petersburg.

Foreign observers were quick to pierce the alleged lofty notions of this move. Cartoonists of the period invariably presented Russia as an octopus spreading its tentacles all over the globe. And although this was doing injustice to the precision of the master plan of Russia's foreign policy, the overall tenor of its overt expansionism was never in doubt. Modern research has long verified the move for a Peace Conference as a clever bid for a military moratorium, thus to better implement Russia's ambitious schemes for upgrading the huge Empire's dramatic infrastructure. Needless to say, these investments, in which the Trans-Siberian Railway and the linking of Baltic and Bosphorus through a chain of canals featured prominently, first and foremost served military and economic purposes, as the subsequent Russo-Japanese war would readily prove.

However, unwisely hailed by the media and pacifists as a World Peace Conference, cabinets were hesitant to obstruct the project on principle. Still, they were adamant in declining St. Petersburg as the proposed venue. From the ensuing deadlock among the major powers resulted the invitation to smaller, mostly neutral nations, to serve as host. Once Switzerland,

Scandinavia and Belgium had been dismissed – on account of anarchism, lack of interest, and the stalemate between King and Parliament respectively – it was Martens, who first drew his superiors' attention to The Hague, the somnolent political centre of a then backwards nation. In advocating the unlikely venue, he insisted on his intimate friend Tobias Asser's talents of organization and diplomacy, as exemplified in his successful series of *Conférences de La Haye* that had first been launched in 1893. It was a masterstroke on Martens' part, if not one that was duly appreciated in governmental circles at The Hague, where anxiety to put the nation's time-honoured neutrality at risk prevailed.

Subsequently, Martens was lured into accepting the organization of the Conference programme. Although the solemn promises given at the time were never to come true (the position as his nation's First Delegate at the Conference and a subsequent ambassadorship in The Hague), Martens fully exploited the free hand given to him to extrapolate the doomed disarmament scenario into an agenda which foresaw a comprehensive debate on the rules and customs of war and addressed the institutionalization of the concept of arbitration, in proposing to turn the instrument into a compulsory mechanism and launch a first ever permanent arbitration tribunal. In this way, Martens not only put on the agenda the two most topical issues of the day in circles of the *Institut* and the Interparliamentary Union, but definitely served his own hobby-horses as well. More than anything, The Hague 1899 was to be Martens' sweet revenge for Brussels 1874. In personally chairing the Second Commission he made perfectly sure that no second failure was to occur.

Again, in the course of the previous decade, Martens had won himself a reputation as arbitrator. He had served on the panels of the 1891 *Newfoundland* dispute, the 1893 *Bering Sea* case, and the 1895 *Costa Rica Packet* dispute. Even during the Hague Conference he travelled back and forth to Paris to preside over the panel in the *Orinoco* case (1897–99). Martens' prominence in this domain was perhaps best exemplified by the great mural occasioned by this last case: *Les grands artisans de l'arbitrage*, a glorious survey of 106 historical figures, the world-wide advocates of arbitration through the centuries, produced in 1897 by a French painter. The ambitious mural was reminiscent of Raphael's *School of Athens* in the Vatican (1509). Recently lost by a fire in its Moscow museum, the mural in its centre presented the dedicatee, Czar Alexander III, flanked by Count Orloff and – Feodor Martens. Martens, in short, was from first to last at the heart of the Conference. His pioneering initiatives and successes at conciliation and mediation proved pivotal to the success of the debate and made his well-deserved name in the world.

5. The Martens Clause

At The Hague, Martens' way of steering the 1874 Brussels Declaration virtually unscathed through a prolonged debate was acclaimed by the plenary with a thunderous applause. The Hague Convention was the first stepping-stone along that winding road that would bring the nations to ICC Headquarters a full century later. The first historic moment along that path took place on 20 June 1899, when Martens single-handedly managed to forestall imminent crisis by formulating his conciliatory "Clause", which has not stopped to raise debate ever since:

Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among the civilized peoples, from the laws of humanity, and from the dictates of the public conscience.

To some the formula stands out as a veritable mantra, to others as just a convenient safety-valve with no palpable purport and to be invoked at no cost. By some the Clause is hailed as a paramount interpretative guideline, bearing a veritable norm-creating character, a historic juncture in the history of the discipline. By others, again, it is downgraded as a formula of, possibly, some moral value, yet devoid of any proper legal impact.

Over the decades, the Clause's constituting elements of *usages établis*, *nations civilisées*, *lois de l'humanité* and *conscience publique* have been interpreted by scholars from a variety of disciplines. The outcome of this in-depth research has been far from unequivocal. There would be nothing dramatic here, if not that a durable lack of consistency in terms of reference in State practice, or in the rulings by some of the highest judicial organs in the world, may eventually turn the Clause into a less innocent instrument. Against this backdrop, reference to the historical context may perhaps be of some interest, if only to counterpoise the Clause's forthright dismissal as a "diplomatic gimmick", intrinsically, if not deliberately "vague", "evasive", "ambiguous", or at least "very loosely worded", in short as "pie in the sky", as one prominent debater has coined it. In this author's perception, nothing could have run more against Martens' intentions – or interests.

The Clause was formulated in the course of a vexed debate within the body of the Second Commission's second sub-commission (which was chaired by Martens himself) concerning the status of belligerents and the reciprocal rights and duties of invading forces *vis-à-vis* defending levies and

the population. These issues were encapsulated in the later Articles 1 and 2 of the Hague Convention. They were a well-known bone of contention, for these were the very articles which had blocked ratification in Brussels back in 1874. At The Hague, their discussion had therefore been postponed and reserved to the very last. The object of the articles, imbued with the best of humanitarian considerations, was to reduce the evils of war for the harmless population of invaded countries. To minimize civil unrest the invaded country was advised to acknowledge *in limine* all rights and claims advanced by the invader, while its population was ordered to abstain from participating in hostilities.

It was Auguste Beernaert, first delegate on behalf of the neutral Belgium, who right from the outset declared himself vehemently opposed to the adoption of the articles, which he felt ran to the exclusive benefit of the major powers when invading small ones. As Beernaert advanced, being compelled by Convention to automatic compliance with the law imposed by the invading army, for the sake of upholding civil order and in order to prevent unnecessary suffering, was identical to acknowledging as *legal right* what was a mere *fact of force*. Beernaert was prepared to fall in with dispositions which accepted the *fact of conquest* – but not the *right* of the conqueror. He wished to see specific obligations drawn up to bind invading armies, so as to warrant moderation on their part – or otherwise leave the rights of the defendant untouched. The proposed articles, as he read them, were militating against all moral notions and the very idea of patriotism. He preferred to leave the matter to

the domain of the law of nations, however vague it may be. ... There are certain points which cannot be the subject of a convention and which it would be better to leave, as at present, under the governance of that tacit and common law which arises from the principles of the law of nations and ... that incessant progress of ideas.

It was a booby-trap undermining the whole undertaking: the Brussels nightmare revived by the Belgians of all people! Martens' reply came immediate. It was to the point, consistent, and eminently eloquent, and it can be summed up under the heading "*Cui bono?*" Who were the ones to profit from leaving these issues

in a vague state and in the exclusive domain of the law of nations? ... Do the weak become stronger because the duties of the strong are not defined? Do the strong become weaker because their rights are specially defined and consequently limited? I do not think so. In the midst of combat the more noble sentiments of the human heart very often remain a closed book.

If there were laws of war, Martens argued, one must determine them. Commanders and armies should be given very strict instructions. This was what the proposed Convention was all about.

One repetitive aspect of Martens' speech should be stressed here: "it would be a pity to leave in a vague condition"; "leaving utter vagueness for all these questions"; "in a state of vagueness and in the domain of the law of nations"; "to leave uncertainty hovering over these questions". Martens' *peroratio* read: "It is for you to answer the question: to whom will doubt and uncertainty be of advantage, to the weak or to the strong?" Vagueness was indeed the last thing Martens had in mind. Nor was his intervention meant to reach a futile compromise.

Then a new bomb was planted by the British delegate, Sir John Ardagh. As in 1874 (he observed laconically) his government was prepared to accept the range of articles as a non-committal set of instructions, to be applied, modified, or abandoned at discretion, but the United Kingdom felt unwilling to bind itself to a Convention. Martens must have seen Lord Derby wink from the grave, the British delegate who, in 1874, had been instructed not to commit himself at the conference table and had stuck to that literally by not uttering a single word for days on end. Once more, Martens personally intervened. There could be no question of non-commitment or modification at will. Regulations between contracting and acceding parties needed to be uniform and binding. It was on this occasion that he made his famous comparison with "a mutual insurance association" on terms which were reciprocally binding. "None of the draft articles sanctions the disasters of war which do and always will exist. What the provisions have in view is to bear relief to peaceful and unarmed populations during the calamities of war."

Thus, two perfectly irreconcilable viewpoints were advanced. Martens despaired – momentarily at least. It all but seemed as if there was no alternative left but to leave "to the progress of civilization and to the humanitarian sentiments of heads of armies the task of looking after the interests of the inhabitants." But then, on 20 June, he came up with a formal declaration. He stressed the extreme importance of the articles' "sublime objective" of embodying the sacred duty of governments to diminish the evils and calamities of war. If the right of self-defence of the population was sacred, so was the duty of governments not to sacrifice unnecessary victims in the interest of war. For this reason the forces of the defence should be organised and disciplined. The Brussels code was meant to afford the population more guarantees, not to set limits to patriotism. Heroes were not created by codes, their only code was their self-abnegation, they were in fact above the code. Martens then proposed to have inserted into the *procès-verbal* a Declaration

to the following effect. The Conference was unanimous in advocating the definition and regulation of the usages of war and in that spirit had adopted a great number of provisions. Still, a comprehensive code was as yet unattainable. On the other hand, the Conference did not wish to leave eventualities not anticipated or covered by the written code to the discretion of the commanders of armies. Therefore – followed the “Clause”.

Beernaert immediately accepted the proposition with gusto.

To-morrow as today the rights of the victor, far from being unlimited, will be restricted by the laws of the universal conscience, and no nation, no general would dare violate them, for he would thereby place himself under the ban of the civilized nations.

On 27 July Martens’ Declaration was accepted by the Plenary of the Conference as a *peroratio* to the Preamble of the Convention. On 20 June Martens wrote in his diary: “I myself did not expect such a brilliant success. The Brussels Declaration – my beloved child – has been adopted.” In an article in the *North American Review* of November 1899 he stated: “The treaty on the laws and customs of war will certainly be as notable as the treaty on arbitration.”

The Clause was not a “diplomatic gimmick” and only to a very limited extent a compromise. It did not affect the Convention and Regulations, but offered the maximum of legal warrant subsidiary to these. Bearing a distinct legal basis and character, the Clause filled a vacuum between international humanitarian law as codified in the Convention and Regulations, and the arbitrariness of the “victor’s law”. The Clause was nothing new in itself, but simply recalled well-established principles of international law. It is, for that matter, extremely unlikely that a body of lawyers including prominent *membres* of the *Institut* (Lammasch, Nigra, Rolin, Renault, Descamps, Stancioff) who through their efforts, notably the *Oxford Manual*, were well versed in the substance-matter, would have accepted the introduction of “new sources of law” without any comment. Again, Beernaert on the spot accepted the Clause as relying on the solid basis of well-established principles. Finally, Martens on his part never claimed the Clause as “his own”, neither in later publications nor in his private correspondence.

6. Arbitration

Around the turn of the century, Martens, along with Lammasch and Renault, was among the figures most in demand with nations in search of appeasing disputes in an amicable way. Apart from the cases recorded above, Martens

was invited to act as arbitrator or umpire on many other occasions, in proceedings which either did not materialize or in which he was prevented from assisting by distinct orders of his superiors. His decade of experience with arbitration panels made him a generally acknowledged authority in the scholarly debate at The Hague on the constitution of the Court of Arbitration. This is not to say that he represented the *communis opinio* among lawyers, far from it. Actually, it is on these issues that he incurred the most heated opposition during both Peace Conferences. Still, he expressed his views with admirable lucidity and pertinence.

What Martens had noticed over the past decade was a stealthy “relapse” into that old tradition of submitting disputes not to arbitration panels, but to heads of state, or the Holy See. Thus, in acknowledging defeat in the Italian political arena, Pope Leo XIII had, in past years, successfully mustered all his allies to recapture moral prestige precisely through this mechanism. Martens was categorically opposed to any such relapse. Heads of State were *ipso facto* “under no control and above all contestation”, and therefore unsuited as arbitrators. Martens’ primary goal, therefore, was to check this unwelcome development and bend procedure back from the political towards the legal sphere. However, as he knew all too well, for all the legal niceties, with governments it was *quid pro quo*. The concept of arbitration was to succeed only if it was tailor-made to the stern reality of international relations. Martens’ absolute priority was to offer governments the guarantees of reliability and inviolability of the mechanism. Arbitration should settle disputes for once and for all, and governments had to be sure to rely on this. This made him insist on the finality of awards, and militate against the concept of revision.

For much similar reasons he entertained reservations against the prevailing view among his colleagues of mandatory publication of the substantiation and of the train of reasoning which had brought about the award, including the objections raised by dissenting arbitrators. In Martens’ view, this demand severely impaired the latitude of arbitrators and consequently hamper compromise. Arbitrators, he held, for all their legal learning, also represented Governments. They should protect their nation’s honour and prestige, and not have to feel embarrassed on their return home. In this, Martens’ views may well have been inspired by his own precarious position at home. The same held good, probably, for his preference to have the Peace Conference itself proceed *à huis clos*. Exposure to media attendance would restrain the latitude of delegates, make them hesitant to speak up, and would inevitably affect the results. Many were the lawyers who found Martens’ views hard to swallow. Yet in all of these considerations, Martens definitely

had a point. His approach attests to the weather-beaten diplomat, rather than the legal technician. Experience had made him very pragmatic, a man who was not fooled by learning into losing sight of reality.

Meanwhile, to Martens, the two major objectives at stake at the Hague with regard to arbitration, *viz.* the constitution of a Court of Arbitration and to render the mechanism obligatory, were two parts of the same issue – just like, in his opinion, the obligatory submittal of disputes to a Court and the binding verdict were flip-sides of the same medal. In advocating the obligatory element, Martens found himself summarily checked by an adamant German *Nein* – with other opposing nations gratefully taking shelter behind this formidable shield. On the other hand, the success of the Convention which secured the institution of the Permanent Court of Arbitration was hailed by Martens as a major triumph wrung from prolonged trial. To be sure, he saw the many imperfections of the institution and clearly took the Convention for a first step. As we will see later on, in 1907 he confidently reopened the debate.

At The Hague in 1899, Martens successfully launched yet another brain-child of his, the concept of Commissions of Inquiry. He catapulted the mechanism into the Committee, in his inimitable way, as a safety-valve in emergency situations, to help cool-off emotions by factual examination. The reactions to this proposition varied to the extreme. Some saw it as yet another tool at the hand of the major powers to interfere with the domestic affairs of smaller nations. Still, in this arena Martens obtained an unqualified victory which, much to the surprise of sceptical commentators, soon afterwards proved justified by events following the *Dogger Bank* incident (1904). In his final evaluation, Martens deemed his mission at The Hague an almost unqualified success. He trusted 1899 to be the opening move, the first stage in a series of encounters.

7. The Permanent Court of Arbitration

In 1900, Martens, predictably, was among the first “Members” to be put on the list of the PCA. Indeed, he was elected on the panel of the first two cases submitted to that Court, the *Pious Fund* case of 1902 and the *Preferential Claims* case of 1904. His reputation as an arbitrator was never questioned in his day and age. As stipulated above, all this changed in 1949 with the publication in the *American Journal* of incriminating recollections concerning his chairmanship of the 1899 *Orinoco* dispute. With hindsight, his policy at the time seems very plausible – from his perspective, that is. The *Orinoco* case concerned a boundary dispute that had to be interpreted on the basis

of controversial and hardly verifiable 16th-century maps. Faced with four arbitrators who submitted distinctly different propositions, Martens availed himself of his prerogative as umpire to draw up a line which he felt did justice to both parties.

Whether he based his proposition on legal reasoning, diplomatic experience, or common sense will forever remain debatable. The fact is that, at the time, parties showed themselves extremely pleased with the outcome. So much for certain, Martens will have aimed at attaining a definite settlement of the dispute and at securing consensus. Likewise, the lack of substantiation of the *Orinoco* award, much contested by later scholars, may seem curious to us as running contrary to prevailing practice. However, as Martens himself was to point out during a session in The Hague in 1907, such procedure was well documented. More than this, Martens' position and role in the 1899 case can be easily verified to have been in perfect agreement with the numerous statements on the role of the umpire, the substantiation of the award and the publishing of dissenting opinions which he consistently made during both the 1899 and 1907 Conferences. To that extent at least, it was all well above board. Martens saw the outward radiation of harmony from within the panel as foremost prerequisite for the authority and public acceptance of the award. Again, he urged for legal reasoning not *in abstracto*, but in a political context.

8. The Peace Palace

Much to Martens' distress, the Dutch Government did not incur the risk of investing too deeply in the uncertain undertaking of a first ever international bench. PCA headquarters, established in The Hague city centre, were lodged in fairly modest quarters. On various occasions, Martens in no uncertain terms expressed his discontent with the "utterly inadequate and poorly situated" housing. Now it so happened that, those very months, the American steel tycoon Andrew Carnegie sold out his imperium to Pierpont Morgan and retired from business. The transaction left him the Croesus of his times. In an interview with the English journalist and pacifist William Stead – a prominent member of that colourful coterie of peace apostles that attended the Hague Conference – Carnegie mused on his *Gospel of Wealth*, welcoming any ideas that might help solve his "conundrum" of how to put his amassed wealth to the benefit of the world. Martens, an intimate of Stead, promptly suggested Carnegie's sponsoring a court house with a library of international law to help out the PCA and do justice to the prestige of the institution. It took a while but, with the help of Carnegie's "old shoe", Andrew Dickson White, the US first delegate at the Hague Conference, Martens in

the end persuaded Carnegie to invest deeply in appropriate headquarters for the PCA which should also serve as a centre of studies, a symbol of internationalism and venue for future Peace Conferences. In May 1903, in the very weeks Martens took up his task in the Venezuelan *Preferential Claims* case, his efforts bore fruit when Carnegie awarded 1.5 million US dollars for the establishment of his “Temple of Peace”.

The next month, a government-steered Dutch Carnegie Foundation embarked on a veritable tale of misery to implement the gift. The project proved not all that popular in the Netherlands. A full eighteen months later, in December 1904, no palpable progress had been made yet. Some fifteen locations in The Hague had been amply considered and dismissed on account of protests from all quarters of Dutch society. At a loss what to do, and with an infuriated Carnegie insisting on having the project transferred to Brussels, the Carnegie Foundation finally settled for contracting a rather questionable spot, introduced a bill to Parliament, and virtually had the Royal Decree passed, when Martens once more visited The Hague to attend a meeting concerning the Geneva Convention on Hospital Ships. Of his own accord Martens went visiting the allocated spot, felt appalled at identifying what he called a perfect swamp, and wrote a characteristic four-page letter in no uncertain terms to the Carnegie Foundation to have the Board retrace its steps. Astonishingly enough, this is what actually happened. A few months later a new bill was passed allocating the Palace to its present spot, with Martens’ approval. All this serves merely to illustrate the length of his arm.

In those very weeks the Hull incident took place. Within a matter of months, Martens saw another brainchild of his, that of the International Commissions of Inquiry, gloriously pass a first test. The incident that triggered the inquiry was dramatic enough. In the early phase of the Russo-Japanese War, the Russian Baltic Fleet, on its doomed way to the war theatre in the Pacific, in the pit of night and alarmed by false rumours of Japanese presence in the area, off the coast of Hull erroneously sank a flotilla of English fishing trawlers. British indignation ran high, yet was appeased by a committee of admirals under the auspices of the PCA.

The outcome of this war, for that matter, was just one of the many unsettling events that would irrevocably change global political horizons in the interval between the 1899 and 1907 Hague Peace Conferences. The successful Boer Revolt against British rule in South-Africa, mere months after the Hague peace talks, had been a first token of the waning supremacy of the European colonial powers. The Boxer revolt and the Venezuela incident were soon to follow. Then, Port Arthur, Mukden and Tsushima Straits, and Russia’s clean defeat, both in the military and naval spheres, at the hand

of a rising Asian power, perfectly shocked the world. Martens personally attended the humiliating peace talks at Portsmouth which left a bitter tinge.

Meanwhile, in the world of diplomacy an even more unbalancing revolution was taking place when Britain in 1902 abandoned its time-honoured policy of “splendid isolation”, first to enter into alliances with Japan and Italy, then in 1904 to conclude its epochal *Entente Cordiale* with France, which put an end to centuries of rivalry. This reshuffling of power blocs left Germany out in the cold. Its fear of *Einkreizung* triggered the Algeciras incident and, more pertinent, the naval competition with the British that was to cloud political horizons for the next decade.

And then there was this other unstoppable development, the rise to power of the USA. Ever after, in 1898, it had swept the remnants of Spanish power from its hemisphere, the Glorious Young Republic assertively took over command in the New World. When, prompted by the World Fair, the Interparliamentary Union in 1904 for the first time crossed the oceans for its annual meeting, it paid tribute to the rising power in inviting President Roosevelt, much to Russia’s discomfort, to raise a call for a Second Hague Peace Conference. In the end, Roosevelt courteously obliged Russia in formally abandoning the initiative, but the man who rallied the Pan-American movement under his banners, mediated peace between Russia and Japan at Portsmouth, and won the Nobel Peace Prize for it, made it clear to the world that a new era had opened up, in which Europe’s lead went uncontested no longer.

On the eve of the Second Hague Conference, which was postponed twice on account of a Pan-American Conference in 1905 and the Geneva Red Cross Conference of 1906, the unsettling consequences of the above cavalcade of changes manifested themselves in revolt and social uproar worldwide, which put at jeopardy colonial conquests abroad as much as parliamentary traditions at home. In 1906, the world was definitely not a happy place. It was against this backdrop, and with Bloody Sunday, bread revolts and the disbanding of the Douma in the forefront of his mind, that Martens started preparing a sequel to 1899.

9. The Second Hague Conference (1907)

As before, Martens’ task was precarious: he was hampered by lukewarm Petersburg officials, a wavering Czar, a change of Foreign Minister, and opposition to his person. Still, in January 1907, at the Czar’s invitation and full of optimism, he embarked on a European tour of “shuttle diplomacy” to sound out the position of the respective powers with regard to the conference

programme. His personal authority and the nature of his mission warranted official receptions wherever he came. Wilhelm II, Edward VII, the French Prime-Minister, Franz-Joseph and Queen Wilhelmina all received him in personal audience. Criss-crossing Europe, by early February and on his way to Vienna and Rome, he passed The Hague, where he was “fed from morning to night”. Foreign Minister De Beaufort noted that Martens was in good health and spirit, but had definitely gained weight. On his return home, Martens was in for a serious disillusion. He was duped by the Wilhelmstrasse and grinded between “Nicky and Willy”. Personal resentment in St. Petersburg at his international prominence invited obstructionism and caused ever new delays and irritation.

More pertinently, in preceding years the skies over Europe had darkened beyond compare, to completely change the outlook of the prospective debate. With Britain and Germany engaged in a keen naval rivalry, Russia itself, still licking its wounds, was adamant to repair its former prestige and military power and unwilling to entertain any disarmament propositions. On the eve of the Conference, British proposals for arms reduction were wrecked on Russian reservations and a resolute German *Nein*. As a consequence, all peace and disarmament talks were banned from the Conference beforehand. It was the upgrading of the 1899 Convention on the Laws and Customs of War, and notably its extension to the naval sphere, precisely (and most embarrassingly to Russia) in the wake of gross humanitarian trespassing in the Russo-Japanese War, which dictated the agenda, along with the objective to give the PCA claws and teeth.

In June, at the opening of the Conference, Martens travelled to The Hague outwardly still full of expectations. This in itself was an achievement. At 62, a veteran diplomat, legal luminary, and radiating authority, he had once more swallowed a distinct humiliation. To the embarrassment of all and sundry he had again been passed over as head of his nation’s delegation in favour of Russia’s ambassador in Paris, De Nelidov, otherwise a gentle and intelligent diplomat. Unperturbedly, Martens took up his duties with all the energy and zeal he was known for. His preoccupation was the presidency of the Fourth Committee on the laws and customs of maritime warfare. It was to be his last bow, and it was not to be an unqualified success.

To start with, the Commission worked under a cloud: German-British rivalry and suspicion, such as with regards to the conversion of merchant-vessels into war-ships, precluded all compromise from day one. However, there was also a personal aspect to it. Within a matter of weeks Martens’ wavering health became apparent. It soon dawned on his intimates that this was no longer the Martens of old. Faced with a deadlock within the Commission,

and all too eager to impose his ideas on the Conference, his failing forces, rheumatism and mental depressions made him irritable. In the months to follow, his impatience started to affect his personal contacts. Also, as was plain to see, the Russian delegation was utterly divided. Charykov consistently undermined Martens' authority. Martens, in turn, had some skirmishes with President De Neligov and henceforward proceeded on his own authority. In doing so, he ignored susceptibilities of colleagues, introduced ill-prepared propositions, embarrassed delegates with untypical rigidity, entered into fierce polemics with the inflammable Rui Barbosa, and, in the eyes of many, among these the Dutch delegation, mishandled a number of propositions with predictable failure to follow. On 17 July Dutch delegate De Beaufort's diaries refer to his handling an American proposition regarding *contrabande* as a "highly biased presentation" by "the most partial chairman I have ever seen".

Unable to bend matters his way in the Fourth Commission, Martens, one may say, took refuge in the First Commission, which dealt with improving the 1899 Convention on the Peaceful Settlement of Disputes. Intent on succeeding this time in advancing his "hobby horses" which we discussed above, Martens' attendance prompted heated debate in all matters which were so close to his heart: his desire to make the instrument of arbitration obligatory; to turn the PCA into a Standing Court with teeth and claws; to enforce the finality of arbitration awards; and to upgrade the role of Commissions of Inquiry and entwine these into the regular dispute settlement procedure. He fought like a lion, one must grant him that.

As in 1899, Martens repeatedly, and in the most eloquent terms, declared himself a staunch opponent of the concept of revision as contrary to the very idea of arbitration. In reply, Beernaert and the American delegate Choate militated strongly in favour of having the revision formula ready at hand in case new facts emerged or an apparent error on the part of the tribunal came to light. As Choate concluded: "The sole object of arbitration is to do justice", to which Martens replied: "No, its sole object is to settle a dispute – for once and for good." On which Barbosa riposted: "Revision is of the essence in arbitration. Arbitration is a means of peace only because it is an instrument of justice." The stalemate was apparent. To Martens, the instrument, more than anything, was an avenue to settle dispute and secure peace. Revision, in his eyes, would open the gates for politicians to "perpetuate" dispute and would involve endless procedural complications. A much similar discussion on principle was entered with respect to the substantiation of the award and the explicit reference to dissenting opinions of arbitrators.

To Martens, 1899 had been sowing-time. In the intervening years various germs had proven their potential of sprouting. Now he intended to reap.

It was not to be. The major powers, feeling to have been taken unaware in 1899, for all their disagreements, easily agreed on putting strict boundaries to these innovative mechanisms which, for all their intransparencies, were sure to intrude on their sovereignty. A good example was the debate regarding Martens' brainchild, the Commissions of Inquiry, first put to the test in the celebrated *Dogger Bank* incident of October 1904.

Tension had run high those days and it was generally felt that the Commission's intervention had probably precluded war. Still, the incident had clearly demonstrated the twilight-zone of the mechanism. According to many political observers, the Commission had distinctly created anomalies by overstepping its boundaries. Firstly, it had not just inquired as to the facts but also spoken up on issues of responsibility, and had actually apportioned blame. Martens, quick in exploiting this experience, proposed to upgrade the status of the Commissions by insisting on their *duty* of fixing responsibility. It was this idea precisely which the major powers disliked heartily. The more so as the Dogger Bank Commission had addressed a dispute which had involved the "honour and vital interests" of States, expressly excluded from its competence by Convention. Again, the "logical" consequences, as Martens held it, to be drawn from this precedent were cleverly probed by him – still, again to no avail. Nor were the nations particularly charmed by Martens' proposition to formally link recourse to the PCA for final settlement of the dispute as the "only natural sequel" to the preliminary establishment of facts by a Commission of Inquiry. At The Hague in 1907, the slightest of references to "obligatory" compromised any issue. The commissions, it was decided, were to operate with a strictly factual mandate without binding verdict or legal consequences to parties. It was clear that the compliance of powers had been stretched to its limits.

It was the same lack of political will on the part of the prominent nations to engage themselves in any form of obligation which, much to Martens' frustration, undermined the debate on the launching of two innovative institutions that were put on the agenda in The Hague in 1907: a truly standing court of arbitration, the so-called Permanent Court of Arbitral Justice, and an International Prize Court. For all the striking achievements of the PCA in preceding years, the shortcomings of its system were felt by many to be actually counter-productive to the development of a solid, consistent body of international law. The institution, at the end of the day, was neither a court nor permanent. Its cases were isolated occurrences, dealt with by different bodies of arbitrators, separated in time and disconnected in substance. This lack of continuity and consistency was felt by its advocates to be the major hindrance to the long-term success of the institution. What was required,

therefore, was a true court warranting permanency of organization, consistency of jurisprudence, and impartiality of arbitrators. As the PCA was an instrument deemed competent to deal with disputes of a judicial nature, such as the interpretation of treaties, anyway, the idea imposed itself of creating a permanent bench, made up of competent lawyers (rather than diplomats) who based their decisions on law, not on bargaining.

To that purpose drafts for a “Court of Arbitral Justice” or a “Judicial Arbitral Court” had been submitted by Russia and the US. What Martens proposed on behalf of Russia amounted essentially to a refurbishing of the PCA. The National Groups would assemble annually in The Hague and from their midst select three judges, who would stay ready at hand at the Bureau that year. The US felt differently. It proposed the supplementing (*not* supplanting) of the PCA with an alternative means of recourse: a true bench of fifteen permanent judges, with nine making a quorum, to be appointed by the Highest Courts of the nations.

The protracted debate on principle resulted in a complete deadlock, and we shall soon see why. Still the importance of this single debate ever between the nations of the world before World War I can never be underestimated. For one thing, debate had now reached the crossroads of advancing the institution from the plane of diplomacy onto that of a genuine judicature. From here, there was no way back, as was generally felt. However, the avenue ahead proved to be strewn with obstacles never anticipated. These were of a technical, procedural, and political nature alike. To start with, some nations raised the sound point that a body of permanent judges invalidated the free right of choice inherent to the idea of arbitration. They called the idea of a World Court – or “International High Court of Justice” as the US had labelled it – a dangerous utopia. Still, in the end, the idea was adopted as basis for discussion.

In the end, it proved that the idea itself to create a bench of seventeen salaried judges and deputy-judges, appointed for terms of twelve years and representing the various judicial systems of the world, met with little opposition. Still, when it came to the criteria for selection and representation of judges, all legal genius was trapped into a *cul-de-sac*. The eight great powers, predictably, claimed permanent representation, but then, so did the small ones, protesting their full equality – not just before the law, but as regards factual, political influence – and this, of course, was a different thing altogether.

In short, with the extension of the Conference towards a veritable world *gremium*, including the rising Asian and Latin-American nations, a new point came to the fore, *viz.* the rivalry between the great and the small. The Brazilian representative Barbosa, leading Latin-American opposition, in

a series of brilliant, elaborate addresses and emotional interventions, adamantly insisted on full equality for all, thus precluding all compromise. For all its possible academic merits, such a formula raised all sorts of problems of pragmatics and logistics. It was proposed to have the small states occupy the nine remaining seats by rotation for periods of one to four years and depending on certain criteria; or to implement a regional assignment; or to have each State cast a vote for a prescribed number of judges; finally, to have each State submit its candidate for a judge and deputy-judge to the Hague Bureau, have the nations vote 15 judges and 15 deputy-judges, and settle draws by lot.

The discussion left delegates with the eerie feeling that, whatever the nature of the future International Court would be, due to the prevalence of politics in the international arena this bench would necessarily be of a different kind altogether from national High Courts. Amidst protest and general confusion, the Conference by resolution withdrew to the position of adopting the creation of the Court as agreed upon in principle, conditional to the solution of the riddle on the selection of judges. Delegates felt they had been a hairbreadth removed from creating a first ever global judicial body, only to find the small powers readier to run the risks of waging war with great powers than bow to them in court ... Martens felt devastated.

At this stage, and for all the flourish of rhetoric, the Standing Court and the Prize Court were not to be, whatever stratagem, fallacy, or sophism this would take the nations. In the long run, however, the 1907 debate would prove far from abortive or, as Bourgeois had predicted: "the tree is blossoming, the harvest will come" for "life precedes the law". It was to be left to the Killing Fields of Flanders and a new generation to break the deadlock. With the creation of the League of Nations and its two-tiered formula of Council and Assembly, the way was paved for solving the baffling riddle of election procedures. In 1920, the Committee of Jurists that was invited to draw up the statute of the Permanent Court of International Justice (PCIJ), when it assembled in the Peace Palace, found the reports of the 1907 debate an invaluable shortcut to traversing political and procedural minefields. The Committee emerged brandishing a Statute for the PCIJ whose very phraseology, to many veterans like Bourgeois, felt like balm to their souls. It was Bourgeois himself who first coined the word "Statute" in this sphere.

10. Epilogue

Clearly, as a tactician Martens was not at his best in 1907. Did he anticipate that this was to be his last stand and simply lose patience? His pressure on delegates, not just to come to terms, but on *his* terms, backfired on his

prestige. Thus, on 10 October reference was made by De Beaufort to the concluding session of the First Commission on obligatory arbitration and Martens' "clumsiness" in advocating what he presented as a Russian conciliatory proposition. In fact Martens had concocted the idea along with his intimate Léon Bourgeois and the French delegation without ever consulting De Neligov – or for that matter the German delegation. Much to the fury of Krieger, who observed: "*Wir sind furchtbar gereizt, eine Katastrophe ist sehr nahe.*" On an earlier occasion the German first delegate Marschall von Bieberstein had argued most categorically, that *Libertas* was the cornerstone of arbitration. Martens was forced to withdraw his proposition for lack of support.

This kind of surprise attack was not just a single isolated incident. It concerned a recurrent error of judgement which was typical, it would seem, of Martens' obstinacy in 1907 to secure results at all costs and enforce structural progress in the face of blatant opposition. His proposition with respect to the law of prize laboured from similar defects. The previous year, when attending the Geneva Red Cross Conference in Geneva, Martens had made a much similar counter-productive move in taking delegates unaware with the proposition that all disputes on the interpretation of the Convention were to be submitted automatically to the PCA. The idea was as logical and sensible as it was unacceptable.

It was much the same in 1907 with respect to the Commissions of Inquiry, as one will recall. In case of a stalemate or failure of this mechanism, Martens argued, nations should bind themselves to automatically submit the issue to the PCA. For this reason, the third member of the Commission should be selected from the list of arbitrators kept by the Hague Bureau. Clearly, the praiseworthy objective of this "double tie" as Martens called it, was to enhance the effectiveness of the 1899 Convention. However, his insisting on the "moral duty" of the Conference to comply with his propositions merely caused irritation, and it is hard to decide whether Martens was actually blind for the objections raised or simply wished to have it his way.

In tirelessly advocating his various propositions, Martens voiced his firm conviction that arbitration was meant to put an end to disputes between sovereign nations. This conviction was not shared without qualification by the majority of *membres* of the *Institut*. Within this *coterie*, arbitration was generally viewed as first and foremost an instrument of law. Martens' views made him liable to the reproach that he considered arbitration panels as political rather than legal institutions. Merely settling conflict without a solid legal basis, his opponents argued, was to prompt ever new disputes. Martens ended up in the cross-fire between lawyers and politicians.

In spite of all this, one cannot but admire Martens' zeal for what he saw as the best avenue ahead. Although being incessantly implored by relatives at home to return before August, Martens held on doggedly well into October, limping and suffering from spasms of rheumatism. He badly needed a Spa at Baden, but was intent on rounding off what he, with some justice, considered *his* cause. His obsession was to firmly implant the new mechanisms and institutions into the social life of his day and age, and break away from traditional 19th century diplomacy, without bothering too much with legal niceties which, in his view, could be optimized once the instruments had been generally accepted. In the final analysis, much of what he advocated in 1907, if visionary, was premature and had to await a future generation. As the ongoing work of the *Institut* and the 1920 preparatory commission of the PCIJ would tell, there was no way in which the 1907 Conference, in a single move, could have possibly removed all the stumbling-blocks to the implementation of international adjudication the way Martens had envisaged. The 1907 debate first dawned up to, and then only tentatively started mapping, the immense legal and political minefields barring the crossing of that watershed.

Still, whatever else may be said of it, even in the weeks of his last bow, Martens rendered some addresses which may count among the most eloquent and truly inspired ones ever rendered in the history of the Hague institutions. There were moments, in 1907 as in 1899, when the glow of his rhetoric, his deep feeling and humane approach, and his visionary panoramas of a better world to be, swept all before them:

I have concluded, gentlemen; allow me a few words more from the bottom of my heart. There have always been in history epochs when grand ideals have dominated and enthralled the souls of men; sometimes it was religion, sometimes a system of philosophy, sometimes a political theory. The most shining example of this kind was the crusades. From all countries arose the cry, "To Jerusalem! God wills it!" To-day the great ideal, which dominates our time is that of arbitration. Whenever a dispute arises between the nations, even though it be not amenable to arbitration, we hear the unanimous cry, ever since the year 1899, "To the Hague!" If we are all agreed that this ideal shall take body and soul, we may leave The Hague with uplifted head and peaceful conscience; and history will inscribe within her annals: The Members of the Second Peace Conference have deserved well of humanity.

Man is a complicated being. Martens may have struck colleagues as an unfathomable character, reserved, a man of the mind and without much outward warmth. Yet, at his best, he countered legalism with ethics and his

intelligence de cœur. And whenever arbitration or humanitarian issues were at stake, Martens was invariably at his very best.

Martens left The Hague full of anticipation, it was felt, to return within a matter of years to attend a Third Conference on the premises of the Peace Palace, for which his first delegate, Count Nelidov, had laid the founding stone that summer. It was not to be. The end came in 1909, with a disillusioned Martens despairing that he would ever see an enlightened, law-abiding Czar to tread in the footsteps of his beloved Alexander II and preserve his beloved Russia from revolution.

There is one final point to make. Martens, the versatile lawyer and weather-beaten diplomat, was a typical representative of a generation that addressed the problems of its day and age from the sound perception that the law could never flourish in isolation, that its backing by social strata, notably the worlds of politics and diplomacy, was a prerequisite to its proper functioning. Somehow, after the cataclysm of World War I, that piece of wisdom seemed lost to the next generation, as exemplified by the celebrated Committee of Ten which, in 1920, was invited by the League of Nations to draft a Statute for the World Court to-be. It availed itself of all the legal genius and draft concepts amassed by the 1907 delegates, but somehow forgot to take to mind the political lessons to be drawn from that debate. It came up brandishing a draft-Statute which, unwisely, bound the nations into a strait-jacket.

The Committee was mercilessly punished for its impertinence by the concerted action of the League Members. The “obligatory” paragraph of its draft was simply annulled, and the outcome of the debate at Geneva left the PCIJ saddled with a curious dual role, on the basis of a Statute which presented an unlikely mixture of legal and political ingredients. It was a lesson which, one should say, was not to be misunderstood. Still, the next decade would witness two more fallacies: the still-born “Optional Clause”, and the 1928 Paris Pact to have nations abjure war as an instrument of national policy – yet another Pyrrhic victory of the law over politics which soon would backfire. As it was, politicians cunningly rephrased the idiom and definition of war and the use of force, with the reappraisal of the principle of self-defence as perhaps the most striking and dramatic outcome for the century to follow. There is much to be learned from the way Friedrich Martens tried to reconcile the spheres of law and politics into functional harmony.

A Bibliographical Note

On Martens' Life

- Barclay, Thomas.** 1902. Professor F. de Martens. – *Journal of the Society of Comparative Legislation*, Vol. 1, No. 2, p. 109.
- Fried, Alfred Hermann.** 1909. Staatsrat von Martens. – *Die Friedens-Warte*, Vol. 11, Juli, pp. pp. 121–122
- Grabar, Vladimir.** 1990. F. F. Martens (1845–1909). – *The History of International Law in Russia 1647–1917: A Bio-bibliographical Study*. Oxford, Clarendon, pp. 381–388.
- Holland, T. E.** 1909. Frederic de Martens. – *Journal of the Society of Comparative Legislation*, Vol. 10, No. 1, pp. 10–12.
- Jacobson, J.A.** 1903. Figures Contemporaines: Son Excellence M. Frédéric de Martens – La Justice Internationale, Vol. 1, septembre–oktobre, pp. 335–339.
- Kamarowsky, Leonid.** 1910. Frédéric de Martens. – *Annuaire de l’Institut de Droit International*, Vol. 23, pp. 538–543.
- Kross, Jaan.** 1994. Professor Martens' Departure. Anselm Hollo, transl. New York, NY: The New Press.
- Lysen, Arnoldus.** 1934. History of the Carnegie Foundation and of the Peace Palace at The Hague. Leiden: Brill.
- Melville, Edgar de.** 1912. Frederic von Martens. Haarlem: Tjeenk Willink.
- Nussbaum, Arthur.** 1952. Frédéric de Martens: Representative Tsarist Writer on International Law. – *Nordisk Tidsskrift for International Ret*, Vol. 22, pp. 51–66.
- Pustogarov, Vladimir.** 1996. Fyodor Fyodorovich Martens (1845–1909), A Humanist of Modern Times. – *International Review of the Red Cross*, No. 312, pp. 300–314.
- . 2000. Our Martens: F.F. Martens, International Lawyer and Architect of Peace. W. E Butler, transl. Hague: Kluwer Law International.
- Wehberg, H.** 1910. Dr. Friedrich v. Martens und die Haager Friedens-Konferenzen. – *Zeitschrift für Internationales Recht*, Vol. 20, No. 4, pp. 343–357.

On the Martens Clause

- Benvenuti, Paolo.** 1995. La Clausola Martens e la tradizione storica del diritto naturale nella codificazione del diritto dei conflitti armati. – Giorgio Badiali *et al.* (eds), *Scritti degli allievi in memoria di Giuseppe Barile*. Padova: CEDAM, pp. 173–224.
- Cassese, Antonio.** 2000. The Martens Clause: Half a Leaf or Simply Pie in the Sky? – *European Journal of International Law*, Vol. 11, No. 1, pp. 187–216.
- Horn, Lutz.** 1990. Die Martens'sche Klausel und das Friedensvölkerrecht. – *Humanitäres Völkerrecht*, Vol. 3, No. 3–4, pp. 168–171.
- Meron, Theodor.** 1989. – *Human Rights and Humanitarian Norms as Customary Law*. Oxford: Clarendon, pp. 46ff.
- . 1995. On Custom and the Antecedents of the Martens Clause in Medieval and Renaissance Ordinances of War. – Ulrich Beyerlin *et al.* (eds). *Recht zwischen*

- Umbruch und Bewahrung: Völkerrecht, Europarecht, Staatsrecht: Festschrift für Rudolf Bernhardt. Berlin: Springer, pp. 173–77.
- . 2000. The Martens Clause, Principles of Humanity, and Dictates of Public Conscience. – American Journal of International Law, Vol. 94, No. 1, pp. 78–89.
- Pustogarov, Vladimir.** 1999. The Martens Clause in International Law. – Journal of the History of International Law, Vol. 1, No. 2, pp. 125–135.
- Schircks, Rhea.** 1999. Zum hundertjährigen Geburtstag der Martens'schen Klausel: eine Bestandsaufnahme. – Humanitäres Völkerrecht, Vol. 12, No. 3, pp. 167–169.
- Schircks.** 2002. Die Martens'sche Klausel: Rezeption und Rechtsqualität. Baden-Baden: Nomos.
- Ticehurst, Rupert.** 1996. The Martens Clause and the Laws of Armed Conflict. – International Review of the Red Cross, Vol. 37, No. 317, 125–134.

Further Texts on Martens by the Present Author

- Eyffinger, Arthur.** 1988. The Peace Palace: Residence for Justice, Domicile of Learning. The Hague: Carnegie Foundation.
- . 1999. The Hague Peace Conference: The Parliament of Man, the Federation of the World. The Hague: Kluwer Law International.
- . 2004. The Trusteeship of an Ideal: The Carnegie Foundation, Vignettes of a Century. The Hague: Carnegie Foundation.
- . 2007. The 1907 Hague Peace Conference: The Conscience of the Civilized World. The Hague: JudiCap.
- . 2009. Feodor Martens: Architect of the Hague Tradition of International Law. – East-West Studies, No. 3 (41), pp. 17–59.
- . 2011. Dreaming the Ideal, Living the Attainable: T.M.C. Asser (1838–1913), Founder of the Hague Tradition. The Hague, T.M.C. Asser Press.