

THE MARTENS CLAUSE AND INTERNATIONAL CRIMES IN ESTONIA

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The year 2009 saw several anniversaries related to international humanitarian law and to the life and work of Friedrich Fromhold Martens. Here in Estonia, it also brings to mind two other anniversaries – unpleasant, but nevertheless necessary to remember in the same context:

First, 70 years would pass since the 1939 Molotov–Ribbentrop Pact that started the nearly two year cooperation between Hitler’s and Stalin’s regimes; regimes which launched the Second World War in the same year. Although the large-scale terror against the civilian population in the Soviet Union and Nazi Germany had begun several years earlier, it was the Pact and the following aggressions that revealed the international dimension of the crimes of these regimes.

Second, 60 years would pass from the 1949 deportation of more than 100,000 Estonians, Latvians and Lithuanians, mostly women and children. The deportation of March 1949 was not the only crime against humanity committed by the Soviet regime, but because of the vast number of civilians deported in only a couple of nights, it is perhaps the most infamous. The deportees made up only a smaller part of the total number of the victims of Communism in the Baltic countries in the 1940s and 1950s.¹⁰³ In turn, the victims of Communism in these countries were only a small part of the total number of victims of Communism and Nazism all over Europe in the 20th century. At the same time, it is remarkable that such an act of mass deportation took place four years after the signing of the London Agreement and the adoption of the Charter of the Nuremberg Tribunal by the winners of the Second World War, *inter alia* the Soviet Union.

So, the century without Martens turned out to be a much more violent one than he probably would have expected. At the same time, his contribution to international humanitarian law turned out to be extremely valuable for

¹⁰³ See, e.g., **Estonian International Commission for the Investigation of Crimes Against Humanity**. 2006. Estonia 1940–1945. Tallinn: Estonian International Commission for the Investigation of Crimes Against Humanity.

seeking justice for civilians who suffered from the terror of the 20th century totalitarian regimes.

It is somehow ironic that more than 110 years ago Martens was the representative of the Russian Empire at the 1899 Hague Peace Conference. Of course, the aims and values of Russia's foreign policy in those days were much different from those of the Stalinist Soviet Union. But Russia was a big empire – even bigger than Stalin's Soviet Union – and definitely not built on the principle of self-determination of nations. As we know, at the Hague Conference, a group of smaller nations, led by Belgium, did not agree with the majority on the rights and duties of occupation armies. Contrary to the interests of greater powers, the smaller nations demanded an unlimited right of resistance for the population of occupied territories. As a satisfactory solution for both sides, Martens, an Estonian representing Russia, made the following proposal to be added to the Preamble to the Convention under discussion:

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.¹⁰⁴

Martens' proposal was greeted with applause and the Convention was adopted unanimously.¹⁰⁵ The above-quoted clause found its way also into the Fourth Hague Convention in 1907¹⁰⁶ and became an important part of several subsequent international agreements, including the four Geneva Conventions of 1949,¹⁰⁷ which became the most important acts of modern international humanitarian law. Even today, the provision proposed by Martens is known and quoted as “the Martens Clause”.

¹⁰⁴ Convention (II) with Respect to the Laws and Customs of War on Land, The Hague, 29 July 1899, in force 4 September 1900, 205 CTS 277, at Preamble.

¹⁰⁵ **Dieter Fleck**. 2003. Friedrich von Martens: A Great International Lawyer from Pärnu. – Baltic Defense Review, No. 10, Vol. 2, pp. 19-26.

¹⁰⁶ Hague Convention (IV) Respecting the Laws and Customs of War on Land, The Hague, 18 October 1907, in force 26 January 1910, 205 CTS 277, at Preamble.

¹⁰⁷ See, e.g., Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 31, Article 63(4); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Geneva, 8 June 1977, in force 12 July 1978, 1125 UNTS 3, Article 1(2).

The Hague Conferences were the last major efforts before the World Wars to set standards for conflict resolution between nations. We will never know if Martens contemplated the tragic future of tens of thousands fellow Estonians in the possibly predictable wars and occupations of the 20th century Europe. Nor can we think that Martens could predict the Holocaust that, as elsewhere, destroyed the small Jewish community in his home town, Pärnu.¹⁰⁸

But at the Nuremberg trial, held in the wake of the Second World War, the Martens Clause was a decisive legal argument against the assertions that the tribunal's Charter was retroactive penal law. Referring to the Martens Clause, the tribunal found that the crimes defined in the Charter, including, of course, deportation of inhabitants of occupied territories, was prohibited and constituted a crime under customary law.¹⁰⁹

The same idea can be seen in the European Convention for the Protection of Human Rights and Fundamental Freedoms, which recognises that certain acts are punishable regardless of the will or wording of the current legislator, if these acts were "criminal according to the general principles of law recognised by civilised nations" at the time of commission (Article 7(2)).

In the 1990s, when Estonia, along with Latvia and Lithuania, became able to investigate and prosecute serious international crimes, the principle was seen as a commitment to investigate war crimes, crimes against humanity and genocide, binding through several international conventions.¹¹⁰

Since 1995, the Estonian Security Police and the Public Prosecution Service have investigated crimes against humanity committed as part of Soviet large-scale and systematic actions against the Estonian population. The courts have convicted eleven persons for such offences: eight persons (J. Klaassepp, V. Beskov, M. Neverovski, V. Loginov, J. Karpov, A. Kolk, V. Kask and P. Kislyiy) for participating in the 1949 mass deportation and 3 persons (K.-L. Paulov, V. Penart and R. Tuvi) for killing civilians who were hiding in the forests to avoid repressions by the Soviet authorities.¹¹¹

¹⁰⁸ Having lost both of his parents when he was nine, Martens grew up in a Lutheran orphanage in St. Petersburg. While making an amazing international academic and diplomatic career, he came back to Pärnu to spend his summers.

¹⁰⁹ Fleck 2003.

¹¹⁰ In particular, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, entered into force 12 January 1951; Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 26 November 1968, entered into force 11 November 1970, 754 UNTS 73.

¹¹¹ **Estonian Security Police**. n.d. Criminal Cases. <www.kapo.ee/eng/areas-of-activity/international-crimes-not-subject-to-statutory-limitations/criminal-cases>, (accessed 29 August 2011).

However, the legal dispute about deportation as a crime against humanity continued until 2006, when two Estonian cases – one regarding the 1949 deportation (*Kolk and Kislyiy v. Estonia*) and the other regarding civilians murdered by the Soviet authorities in 1953–1954 (*Penart v. Estonia*) – were brought before the European Court of Human Rights.

In both cases the Court rejected the applications submitted by the Russian lawyer as “manifestly ill founded”.¹¹² For Estonia, these cases were more than just disputes about maintaining human rights during a criminal proceeding. They were actually disputes about the universal validity of international humanitarian law. The result was an important landmark for our law enforcement authorities and courts.

The European Court of Human Rights very clearly pointed out legal arguments that had never before been brought to such a high international judicial body:

1. There was a clear connection between the Molotov–Ribbentrop Pact and the Soviet Occupation, which, interrupted by the German occupation in 1941–1944, lasted from 1940 to 1991.
2. The totalitarian communist regime of the Soviet Union conducted large-scale and systematic actions against the Estonian population, including (but not limited to) the deportation of about 10,000 persons on 14 June 1941 and of more than 20,000 on 25 March 1949.
3. The Nuremberg Principle that deportation and murder of the civilian population constitutes a crime against humanity has universal validity. It means that the responsibility for crimes against humanity cannot be limited only to the nationals of certain countries and solely to acts committed within the specific time frame of the Second World War.

Last but not least, the European Court of Human Rights reminded that deportation was a crime in 1949, because it was criminal according to the general principles of law recognised by civilised nations.

The Court did not refer to the Martens Clause, as the clause itself is still strictly legally relevant only in war crime cases. But crimes against humanity committed after 1946 are clearly criminal under the Nuremberg Principles – the same principles that owe their validity to the Martens Clause.

¹¹² *Kolk and Kislyiy v. Estonia*, Application nos 23052/04 and 24018/04, ECtHR, Decision (17 January 2006); *Penart v. Estonia*, Application no. 14685/04, ECtHR, Decision (24 January 2006).

In 2010, in the case of *Kononov v. Latvia*, the Grand Chamber of the European Court of Human Rights adopted a remarkable judgement.¹¹³

The case originated in an application from former Soviet “red partisan” Vasiliy Kononov against the Republic of Latvia. Mr. Kononov was convicted in Latvia for war crimes, including the murder of nine civilians, six of whom – including three women, one in the final stages of pregnancy – were burned alive, and the burning down of two farms. The applicant alleged that his conviction for war crimes resulting from his participation in a military expedition on 27 May 1944 violated Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In 2008, the Chamber of the Court delivered a judgment in which it found, by four votes to three, that there had been a violation of Article 7 of the Convention and that just satisfaction should be awarded to the applicant.

The Latvian Government requested the referral of the case to the Grand Chamber. The Government of the Russian Federation exercised its right of third-party intervention to support the applicant. Finally, the Grand Chamber found, by fourteen votes to three (!) that the applicant’s conviction for war crimes in Latvia was lawful as it did not constitute a violation of Article 7 of the Convention.

In the legal argumentation of the case the 110 years old Martens Clause was referred to several times and once again turned to be a key to a just judgement. The Court pointed out, *inter alia*, that the Martens Clause constituted a legal norm against which conduct in the context of war was to be measured by courts.¹¹⁴

The Martens Clause has influenced the development of all international humanitarian law. Thus we can thank Martens for making it possible to condemn Communist crimes together with Nazi crimes. It has helped us to re-establish justice and secure a future for smaller nations of the international community just as it did more than a century ago.

Treaties

Convention (II) with Respect to the Laws and Customs of War on Land, The Hague, 29 July 1899, in force 4 September 1900, 205 CTS 277.

Hague Convention (IV) Respecting the Laws and Customs of War on Land, The Hague, 18 October 1907, in force 26 January 1910, 205 CTS 277.

¹¹³ *Kononov v. Latvia*, Application no. 36376/04, ECtHR GC, Judgement (17 May 2010).

¹¹⁴ *Ibid.*, para. 215.

- Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 31.
- Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, 213 UNTS 222.
- Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, entered into force 12 January 1951,
- Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 26 November 1968, entered into force 11 November 1970, 754 UNTS 73.
- Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Geneva, 8 June 1977, in force 12 July 1978, 1125 UNTS 3.

Cases

- Kolk and Kislyiy v. Estonia*, Application nos 23052/04 and 24018/04, ECtHR, Decision (17 January 2006).
- Penart v. Estonia*, Application no. 14685/04, ECtHR, Decision (24 January 2006).
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