Feodor Martens, Architect of the Hague Tradition of International Law

Dr. Arthur Eyffinger
the Huygens Institute (The Netherlands),
former Librarian of the International Court of Justice

I. Introduction to Life and Works [1]

1. Status quaestionis

Magnus vir cecidit: "a truly great man has passed away". The epic *incipit* of Prof. Holland's obituary written on the spur of Feodor Martens' untimely death in June 1909 duly reflects the heroic status of the celebrated Russian internationalist among his contemporaries. At the time, references like "Lord Chancellor of Europe", "Chief Justice of Christianity" or "Soul of the Hague Peace Conference" were among the household epithets of Martens who, from 1901 onwards figured invariably on the shortlist of the Oslo Nobel Committee.

These are no meagre titles indeed. Nor were they entirely idle in the days they were bestowed. A full century ago, in the world that summoned the Hague Peace Conferences, Feodor Martens' reputation in Europe was impressive by all standards. Slated as perhaps the most expert arbitrator of his time, he was also the staunch advocate of humanitarian principles and *auctor intellectualis* of both the ill-fated 1874 Brussels Declaration and the 1899 Hague Convention on the laws and customs of war. Martens had received honorary doctorates from Oxford, Cambridge, Edinburgh, and Yale. He was the bearer of knight's orders from France and Austria, member of the *Institut de France* and the British Academy, and boasted a world-wide network spanning the domains of high politics and diplomacy as readily as the circles of international lawyers or the world of

[1] On Martens' life: Barclay, in: 1 JSCL (1902) 109; Jacobson, in: 1 La Vie Internationale (1903) 335-339; Fried, in: 11 Friedenswarte (1909) 121-122; Holland, in: 10 JSCL (1909) 10-12; Kamarowsky, in: 23 AIDI (1910) 538-543; Wehberg, in: 20 ZIR (1910) 343-357; De Melville, *Frederic von Martens,* 1912; Nussbaum, in: 22 ASJG (1952) 51-66; Pustogarov, *Our Martens: F.F. Martens, international lawyer and architect of peace,* 2000 (transl. Butler; orig. in Russian, 1993; French ed. 1999); *id.* in 36 IRRC (1996) 300-314; Grabar, *The history of international law in Russia 1647-1917,* 1990; Kross, *Professor Martens' Departure,* 1994 (orig. Estonian 1984, French ed. 1990).

[2] Holland (1909)at lO.

peace apostles. In short, Martens was a prominent public figure in the Europe of the *fin-de-siecle.* Whoever dared so much as question his word was sure to experience the length of his arm.[3]

By the same token, Martens' acclaim was never general, nor did his outspoken views go uncontested. His numerous polemics with Westlake, Barbosa, or poor Danewsky constitute a chapter of their own in the history of internationalism.[4] In a way, Martens' career epitomizes this world of pioneers from the first decades of the *Institut* and the Days the Law was Won. Martens eminently represented his day and age in being the Man For All Seasons: a weather-beaten politician and diplomat, a seasoned privy council, a committed peace apostle, a gifted scholar and a dedicated teacher. Still, with him, the transition of seasons often went on a sliding scale and, invariably, the politician crept in, in what seemed almost a subconscious process.[5] With Martens, national feeling and international thought somehow marched hand in hand. He was, for all intents and purposes, among those early champions of the *Institut* who stormed the haughty bulwarks of reactionary diplomacy to carve themselves a niche and establish the Rule of Law in a world that still knew of no codes.[6] Yet, in the glowing debate within this learned body, his views were invariably on the conservative side. More than this, at times, his sincere longing for peace in the eyes of colleagues blurred his views on the law. Nussbaum's all too stern verdict was that, at the end of the day, Martens "was not a man of the law", but had definitely deserved to become a Nobel laureate.[7]

To be sure, Martens' preoccupations were, first and foremost, with the acute needs of his day and age, both in the national and international domains, and irrespective of borderlines of disciplines or niceties and subtleties of theory. This was his *forte* which, at the conference table, often made a difference. Still, as a natural consequence, the impact of his endeavours was eminently time-

[3] Cf. the polemics with Danewski on Russian-Chinese relations. Pustogarov 2000, 135ff., Nussbaum 1952, at 56 and 61-62.

[4] Nussbaum 1952 at 56-57 and 61-62.

[5] Cf. Wehberg in 20 ZIR (1910)at 351: "Man wird freilich in v. Martens keinen reinen Idealisten erblicken diirfen. Er wahr wohl gleichzeitig ein russischer Politiker."

[6] In 1874 Martens was elected to the *Institut de droit international,* which he would serve as vice-president in 1885 and 1894. An assiduous attender of its Annual Meetings, where he cherished many friends, Martens was on the small committee which, in summer 1880, met at Bluntschli's house in Heidelberg to finalise Moynier's draft *Manuel des lois de la guerre sur terre*, which resulted in the famous 1888 *Oxford Manual.* Over the years, he reported on such varying issues as the Suez Canal, consular procedure, the slave trade, international waterways, and the concept of an international bureau. See Pustogarov 2000, at 146.

[7] Nussbaum 1952, at 62. Between 1901 and 1908, Martens was indeed a prominent candidate for the highest peace award on the shortlist of the Oslo Committee. From 1902 he was expected to become a laureate any time. His name was successively submitted to the Committee by Goos, Matzen, Harburger, Rouard de Card, Bj0rns0n, Lammasch, Nys a.o.; Information Nobel Institute, courtesy Mrs. Anne Kjelling.

bound, indeed to the extent that his renown evaporated along with the society he stood for, in the onslaught of the Guns of August. Unlike the repute of Asser, or Holland, or Renault, whose detached theoretical speculation withstood the test of time, Martens' name was virtually effaced by later generations. After the cataclysm of the Great War and the Revolution Martens was summarily dismissed at home as a reactionary and abroad as a Czarist opportunist.[9]

The bottom-line, however, was reached a full forty years after Martens' demise, in 1949, with the publication in the *American Journal* of incriminating recollections from a former staff member of parties in the 1899 *Orinoco*-case regarding Martens' alleged mishandling of procedure and abusing his chairmanship to intimidate parties.[10] These accusations, influenced Nussbaum's devastating verdict from 1952, which we may briefly recall here.[11] If, to be sure, Martens could count as the founder, codifier and first historian of the Russian discipline of international law, the severe British critic maintained, what struck the modern observer most in Martens' *chef d'oeuvre,* the *International Law of the Civilised Nations (1882),* apart from its obscure and idiosyncretic systematization of the discipline, was the author's flagrant lack of objectivity and conscientiousness. Especially in his laborious articles in the *Revue,* still according to Nussbaum, Martens had made himself known, first and foremost, as the champion of Czarist opportunism and the apologist of cynical expansionism, whose "very natural, but perhaps a bit exclusive patriotism" had actually more than once embarrassed the journal's general editor Rolin-Jacquemins.[12] In short, in his scholarly work Martens had confessed himself the consistent advocate of the principle of expediency.[13] In the same tenor, the British critic asserted, Martens' views on arbitration as an essentially political institution, had been dictated by his Petersburg superiors. The justified suspicion and indignation these tenets had met had been their inevitable and well-deserved outcome.

[8] Wehberg (1910) at 343: "Nach dem Tode v. Martens hat man seiner Verdienste kaum erinnert."

[9] See Pustogarov 2000 at 4ff. Extradited as a "Tsarist Old Hand" or simply forgotten, no reference to Martens is found in the 1925-26 Russian *Encyclopedia of State and Law,* the 1938 *Great Soviet Encyclopedia,* and the 3-volume *History of Dplomacy* from the 1960s. Even Grabar is distinctly chary in his praise (Grabar 1990, at 464). As regards the rception before the Revolution cf. Pustogarov 2000 at 33ff., with references to Levin, Nolde, Taube, Grabar, Danewski and Kamarovski. Russian censure of Martens' life and work started with Kamarovski's obituary in 23 AIDI (1910) 538-43.

[10] Schoenrich, in 43 AJIL (1949) at 523-30.

[11] Nussbaum 1952 at 58-60.

[12] As for the titles, see below, nt. [54], The primary reference is to Martens' fervent contribution in 9 RDILC (1877) 49ff., on which Rolin observed in an editor's footnote that these expressed "the very natural, but perhaps a bit exclusive patriotism" of his "eminent collaborator of St. Petersburg". Cf. Nussbaum 1952 at 56.

[13] Cf. Pustogarov 2000 at 147ff. Cf. in this context also the articles written by Charles Marvin, which were first published as Annexes to *Our Martens (2000),* W.E. Butler's English version of Pustogarov's biography from 1993.

And there was more to it, Nussbaum insisted. Allegations of tendentious distorting or suggestive omission of facts had clung to Martens' works from early on. On various occasions, he argued, close colleagues like Lammasch, Geffken and Holland had pressed stringent censure of this nature.[14] Others had voiced their surprise at Martens' apparent unawareness of this aspect of his work and his disarming *naivete* in these matters. If admittedly entitled to a prominent rank as researcher of international law and relations, thus read Nussbaum's final verdict, to Martens international law was not "something different from, and in a sense above, diplomacy." Legal argument served him merely as a refined art of rhetoric. Keeping this in mind, his occasional grandiloquent phrases and public addresses rang insincere.[15]

We will have the occasion to evaluate this stern verdict later on. Suffice to say here that later generations somewhat recanted these acerbics. Still, it is only fairly recently, by virtue of political circumstance, the opening up of archives, and the personal efforts of Vasili Pustogarov and W.E. Butler[16], that critics are making volte-face again. Recent harvest on Martens has been impressive on all accounts: the publication of his diaries; a new biography by Pustogarov; a novel by Jaan Kross, a bust in the Peace Palace instigated by Mr. Jeltsin himself; and commemorative conferences in St. Petersburg and Estonia[17]. Last but not least, the topicality of humanitarian law and recent case-law of both ICJ and ICTY prompted an avalanche of comments on that bewilderingly elusive gem of diplomacy, the "Martens Clause".[18] The intriguing figure of Martens, in short, is back on the map of internationalism and, by all appearances, there to stay. The present article will focus essentially on what must be deemed Martens' Finest Hour. It will address his perhaps most lasting contribution to internationalism, his truly pivotal role in establishing the *Oeuvre de la Haye,* both in terms of legal substance and with regards to its

[14] On Holland's censure of Martens' views as often primarily representing the diplomatist see 10 JSCL (1909) 10-12. On Lammasch's censure of the 1882 treatise as deliberately ommitting well-known facts see 11 ZPORG (1884) at 405ff, notably at 419. All this is very true; still, by the same token, Holland's obituary is a fairly balanced review of Martens' merits, while Lammasch worked diligently and in the best of harmony with Martens on arbitration panels and was his steadfast supporter at the Oslo Nobel Committee. Also, his appraisal of Martens' work at The Hague in 1899 is very favourable; see 11 ZIR 26ff. As for Geffken's censure of Martens' discussion of treaty law in his 1882 treatise, see 11 RDILC (1884) at 104.

[15] Nussbaum 1952 at 60.

[16] Not just as translator, but cf. his Introduction to Pustogarov 2000.

[17] Pustogarov's biography was first published in 1993; Kross' novel in 1994. Martens' bust was unveiled in the Hague Peace Palace in 1999. Conferences were held in 1999 and 2003 in St. Petersburg (RAIL) and in Tallinn/Parnu in Estonia.

[18] On the Martens Clause see Horn, in 3 HR (1990), 168-7; Ticehurst, in 37 IRRC (1996), 125-134; Pustogarov, in 1 JHIL (1999), 125-135; Schircks, in 12 HV (1999), 167-69; Cassese, in 11 EJIL (2000), 187-216; Meron, in 94 AJIL (2000), 78-89. Meron, in *Human Rights and Humanitarian Norms as Customary Law* (1989) 46; id. *Recht zwischen Umbruch und Bewahrung.* Festschr. Bernhardt (1995), at 173-77; Benvenuti "La Clausola Martens", in *Festschrifft Barile* (19950 at 173-224; Schircks, *Die Martens'sche Klausel; Rezeption und Rechtsqualitat,* 2001.

material implementation: the Permanent Court of Arbitration and the Peace Palace itself. Still, a brief sketch of Martens' life and works up to that juncture may not come amiss.

2. The Making of a Career

So much at least the above has shown that in order to properly evaluate the figure and views of Feodor Martens we must delve deep into that complex and multi-faceted world of late nineteenth-century Europe. A society which, utterly divided in a stalemate of political blocks, was in desperate search of instruments to stop that unsettling demon of the armaments race. Again, a society which saw its greatest boast, that is, the unprecedented material growth, merely help deepen the social rift by the day. Vaguely realizing that it was heading for the abyss, it was at a loss how to preclude the cataclysm. In this, the incorrigible self-complacency of the establishment was paralysed by the uncompromising fanaticism of socialists and the nihilism of anarchists. In order to break this deadlock, this world could muster but few enough tools: the abstruse idealism of pacifists - and that newly emerging legal discipline of internationalists. Still, like all newcomers in the political arena, these legal luminaries were looked upon askance by the establishment. One should not forget that in The Hague, in 1899, all too numerous were the diplomats who resented the intrusion by law professors, mere technocrats in their eyes, into their privileged circles.

Feodor Martens criss-crossed this caleidoscopic world for some thirty-five years. Onto this meandering he set out with a number of severe handicaps of both private and public nature. With hindsight one might say that his career prospered against all odds.[19] Having been born in a far-flung province, from no pedigree if not German, Martens was raised in an orphanage. This pedigree was not exactly conducive to recommending him to the elitist circles of the St. Petersburg aristocracy.[20] Nor was a legal training of much help, outside the strictly academic world that is. At least in Martens' own perception, it earmarked him as a toiling work horse, whose technical expertise could be profited from or ignored at will. Along the borders of the Neve, as all over

[19] From Pustogarov's pages the vicissitudes of Martens' life are well-known. Fedor Fedorovich Martens was born on 15/08/1845 (Old Style) at Pernov in the Russian province of Livonia on the Baltic from relatively humble Estonian descent. Raised in German Lutheran surroundings, by the age of nine he had lost both parents. The orphan found shelter at the Lutheran Church gymnasium in St. Petersburg where, in 1863, in the days of social upheaval and reform following Alexander II's manifesto, he was enrolled in the law faculty. Upon his graduation, in 1867, he embarked on a *peregrinatio* to Leipzig, Vienna, and Heidelberg, where the teachings of Bluntschli and Lorenz von Stein left a lasting mark, prompting his switch from criminal and constitutional to international law.

[20] At a certain stage Martens changed his name from the German Friedrich Frommhold to the Russian Fedor Fedorovich. In 1879 Martens was married to Ekaterina Tur, a Lutheran and daughter of a senator and privy councillor; the marriage was harmonious; see Pustogarov 2000 at 329fF.

reactionary Europe, Themis was still seen as a mere hand-maiden to diplomacy. Still, Martens, not unlike Cicero himself, if being a *homo novus,* keenly aspired at entering this world. Some of the most severe pitfalls of his career were the predictable outcome of this deliberate choice.

Clearly, at home, Martens never really belonged, and due to his overt ambitions, he was an all too ready toy in the hands of his successive superiors at the Ministry. Thus, in 1898, he was allured into drawing up the programme of the Hague Peace Conference with vain promises to be invested with the chairmanship of the Delegation and an ambassadorship in The Hague to follow. In the end, he was not even lodged in the same hotel as De Staal and the other plenipotentiaries.[91] His complaints of maltreatment and of instances when decisions on paramount issues were taken against his better advice as privy council are legio - still, it was Martens who let it happen. In this, yet another streak of character served his superiors at will, to wit, Martens' indefatigable zeal and industry. "Labor omnia vincit" read his life-long motto, which of course, if not strikingly original, was praiseworthy.[22] But one recalls the maxim of that epitomy of diplomacy: "Pas de zele, surtout pas de zele". With time, Martens would learn the truth of that word.

Over the years, Martens served as privy council to no less than six Foreign Ministers and, for a span of some three decades, helped steer, indeed to the outside world personified Russian foreign policy. A prominent delegate at all major congresses from Brussels through San Stefano and Berlin to The Hague, and including all Geneva Red Cross and Tobias Asser's private law conferences, he proved himself to be a competent negotiator. Still, it would seem that he was not the born diplomat by intuition. Witness to this is his appraisal of the negotiations in Portsmouth when, in calling the peace treaty a disgrace, he most likely misjudged the pragmatism of a superior diplomat, Count Witte.[24] Having made up his mind as to the desirable, Martens, notably in his later years, easily lost sight of the attainable.

[21] With the years, Martens' ambitions grew ever more disproportionate with his subaltern position. Numerous indeed were the humiliations his peacock had to swallow. His persistent complaints that, on more than one occasion (Port Arthur, Boxer Revolt, Suez crisis, Portsmouth), official policy decided against his better views, should be read from this perspective. See Pustogarov 2000 at 244ff.

[22] On this, friend and foe easily agreed. Cf. Wehberg 1910 at 346: "Tatendrang", "Uebereifer".

[23] Martens entered the Foreign Office in 1869. This step, to a large extent, was to determine the course of his life. A permanent member of its Council since 1881, he served Gorchakov, Giers, Lobanov-Rostovski, Muraviev, Lambsdorf and Witte and, through invaluable advise, helped shape Russian foreign policy from Brussels 1874 to The Hague 1907. Cf. Pustogarov 2000 at 217ff.

[24] Portsmouth 1905: Postugarov 2000 at 284ff.

3. Personality

Stealthily we have already come to review some characteristics of Martens' personality. In this respect, one is bound to acknowledge, the appraisals of contemporaries are not in all respects flattering. To go by the reports, Martens struck one as rather stiff, formal, and reserved. Impeccably correct, he was not easily approachable to intimate friendship. Somewhat shy and introvert by nature, he would not exactly put one at ease in private conversation. One wonders whether perhaps Martens lacked some of that social grace and refined elegance that often comeswith a gentle upbringing. There was rarely a smile to grace his countenance. Martens was not the type of man to bear his uncontested, impressive learning lightly; he is described as lacking all humour.[25] He was, by all reports, a man who rather felt at home in the study than in the salon. Reports indeed that recall Hugo Grotius' meddlings with the Paris salons of his days. It is observed at The Hague that, as an orator, Martens lacked the glowing eloquence of Leon Bourgeois or the burning idealism of d'Estournelles de Constant. With Martens no tact as with White, Nigra or Choate to pamper colleagues in a preparatory *tete-a-tete,* nothing of Asser's subtle acuteness and refined sagacity, or the temperament of Barbosa and Drago. If by all means prominent and respected among his colleagues, he was essentially a loner whose authority was undisputed but who would not be called a personal friend by too many.

Contemporaries never stopped wondering at these social "flaws". All too frequent are the critics, also from unbiased sources, notably in Martens' later days, pointing to his plunging headlong into ill-prepared propositions without previous consultation of his superiors or having ascertained himself as to the attainability of his ideas - then to find himself left out in the cold. Reports from 1907 are most severe: uncompromising, rigid, unyielding, obstinate. On this occasion, his tact was likewise questioned. Memoirs from delegates often enough refer to casual caustic remarks of his which caused unnecessary rancour at the conference table. We will later qualify some of these statements. And let us bear in mind that, as a representative of a whimsical autocrat Martens' position, often enough, must have been less than enviable. **Suffice** for now to conclude that figures of lesser stature would most likely have seen their careers wrecked from these social shortcomings. Surprisingly enough, Martens' career never did. For this there were many reasons.

[25] Close reading of the proceedings of the Hague Conferences would suggest a qualification of this verdict.

4. Powers of Will and Persuasion

The reasons for Martens' prominence and his being indispensable at home seem obvious. For one, within the Russian diplomatic service, no one could by any length touch his massive expertise, vast learning, or command of facts and figures. Also, his perfect command of Western languages, be this French, German, or English, was unparalleled in these circles. Still, at the end of the day, other aspects counted most. At both Hague Conferences diplomats, military men and lawyers alike were stunned by the virtual absence within the body of the Russian delegation of any expertise in handling diplomatic gremia of the kind. President De Staal was, by general appraisal, the sweetest of men, but otherwise a non-entity. Well-beloved by all, if not for Martens he was at a loss the moment he was faced with a hundred delegates expectantly awaiting his lead. As for Russia's technical representatives, all delegates easily agreed that they consistently miscarried their own propositions and with just a little help from German or, as the case might be, English or American delegates were able to wreck whatever they proposed of their own accord. From day one, when put to the test, they became trapped in technicalities and endless minutiae.

Martens was the one and only exception. If, in 1899, he was heralded as the Soul of the Conference, it was also because, from his vast experience, he knew the tools of the trade. His chairmanship of the Second Commission was an unqualified success. Martens was very much in control. Numerous indeed were the occasions where he himself broke a deadlock or came up with conciliating terms. In this, a consistent and predominant element of his career came to the fore, the implications of which we will inquire in some detail later on. Martens worked essentially for peace and the final settlement of dispute - arguably, as has often been asserted, at the cost of the law. The spirit of the law meant more to him than strict legalistic interpretation. Besides, if fervently representing his nation and notwithstanding all his alleged patriotic zeal[26], he never lost sight of the wider context.[27] In perusing the addresses he made in 1899 and 1907, one is struck by the broad scope of his outlook.[28] However, what in the end made the difference

[26] Martens felt pride in the humanitarian tradition of the Romanovs. Throughout his life, he never failed to extoll the initiatives taken by Catherina the Great, Alexander I, Alexander II and Alexander III in these respects, indeed much to the amusement of delegates at conferences. Cf. e.g. Scott *Proceedings* II 1907 at 741, meeting of 24 June 1907: "Catherine II ... was the first to lay down the basis of the rights and obligations of neutrals." Or the reference to Alexander I after the battle of Leipzig in *La paix et la guerre* 1901 at 73ff. Alexander II was Martens's great hero; see e.g. his *Conference de la Paix* 1900 at 23 and 37 ("le Tsar Liberateur").

[27] Cf Wehberg 1910 at 348:"Gerade dort, wo es sich nicht um ganz bestimmte, jetzt erfiillbare Forderungen handelte, sondern um die grossen prinzipiellen Gesichtspunkte, tritt uns v. Martens Geist in seiner ganzen Kraft und seinem Idealismus am schonsten entgegen. Hier wachst sein Sehnen mitunter uber das seiner Mitarbeiter weit hinaus und gleichsam prophetenhaft sieht er mit leuchtenden Augen die Zukunft. Wertvolle, tiefe Worte hat er in solchen Stimmungen gesprochen."

[28] Cf. his address on June 6, 1899 on "the vital interests of peaceful, unarmed populations"; Scott, *Proceedings* at 503/4. Also the Martens Declaration of June 20; Scott, *Proceedings* at 547-48.

at the conference table, was his sheer persuasiveness. Faced with whatever audience, Martens never failed to impress people, at least momentarily - and cashed in immediately. Martens' reputation, I venture to say, was made not in writ, but in oral presentation, by the dominating impact of his sheer presence.

Still, as Nussbaum would ripost, one has to draw the line. Martens, he argued, in fulfilling his role at the *Orinoco* arbitration panel, had actually resorted to personal intimidation, if not downright blackmail, to have affairs turned his way. We will deal with that later but, no denying, Martens' willpower must have been overwhelming at times. Andrew Carnegie's wilful pacifism has sometimes been scoffed at as "peace at all cost". Martens had different means at his disposal, but if the latter strung a chord with the former, this may have been more than just coincidence. And Martens' adrenaline must have run high that summer of 1899. Commuting between Paris and The Hague by night train several times a week, he managed either to reschedule or postpone meetings at either end, or single-handedly reopen debates that were considered long settled. A typical incident is his own record of how, having stumbled into a wedding ceremony in Paris one afternoon in July, he reproduced the words of advise he had overheard the priest give to the young couple the next day at the Conference table: "dans les grandes choses - *l'unite*\ dans les petites choses - *la liberte;* dans toutes les choses - *la charite! "*[29]

It is not easy, and probably premature, to rule the verdict of a man who has been portrayed as a cynicist by lawyers, but was acclaimed as an idealist by Peace apostles, a steadfast positivist by some, one with naturalist leanings by others. *Pace* Barclay's verdict that "his observations are characterised by a juridical discrimination which, while Germanic in the subtlety of its distinctions, is French in clearness of enunciation", Martens was not primarily the philosopher-theoretician.[30] His was not the eminently speculative mind of Asser or Renault. In this author's appraisal, Martens' approach to society, and consequently to the law, was an eminently pragmatic one. Still, before evaluating Martens' role in The Hague, it may serve our purpose to try and pinpoint Martens' theoretical positioning in the field.

[29] ' See La Conference de la Paix 1900 at 38.
[30] - Barclay 1902 at 109.

5. The Manual on International Law[31]

Starting off as a teacher of constitutional law, by 1871 Martens gradually succeeded the physically fragile Ivanovski at the chair of international law in St. Petersburg. He would occupy the chair as an *ordinarius* for no less than 30 years (1876-1905). From day one, Martens' approach was a provocative disclaim of tradition. In his opinion the legal structuring of the international arena was dictated by diplomatic practice. From these convictions sprang his 15-volume comprehensive survey of treaties concluded by Russia from the days of Westphalia. The work of a lifetime, it was justly hailed as the veritable encyclopedia of Russian foreign relations.[32] If Pustogarov' monograph on Martens bears the title "*Our* Martens", this was not just to distinguish Feodor from his celebrated German namesake of a previous century[33], but also to stress their parallel roles in assessing their respective national legal traditions.

If 1899 would become Martens' finest hour, this was also by virtue of a traumatic experience a full 25 years earlier which refocused his interest for the remainder of his life. Undoubtedly, 1874 was the all-decive year in Martens' career. The Brussels conference marked his entrance into the world of diplomacy. Second to Baron Jomini, Martens both inspired and actually drafted the Declaration which was meant to put a halt to endless reprisals and mitigate the most severe consequences of war for civilians. The frustrating experience of the negotiating process and the failure of ratification at the end of the day turned Martens into a man with a mission and made him confiscate humanitarian law as his acknowledged territory. It accounted for his personally taking up the presidency of the Second Commission in The Hague in 1899. Martens confiscated a similar role of prominence for himself at the Crimean War peace conferences of San Stefano and Berlin, advocating legal idealism as against Malthusian military realism. Appreciating war as primarily a clash of national interests and personal aspirations, his firm objective was the

[31] Martens' major publications were the following. The Law of private property in times of war, 1869 (in Russian); Consuls and Consular Jurisdisction in the Orient,, 1873 (diss, in Russian; German transl. 1874); Recueil des traites et conventions conclus par la Russie avec les puissances etrangeres, 1648-1906 (15 vols., 1874-1909). The Eastern War and the Brussels Conference, 1878 (in Russian; French transl. 1901); La Russie et l'Angleterre dans l'Asie centrale, 1879 (transl. in Russian, German, and English); Le conflit entre la Russie et la Chine, ses origines, son developpement et sa portee universelle, 18880 (transl. in Russian and German); La question egyptienne et le droit international, 1882; The contemporary international law of the civilised nations; 1882-83 (orig. Russian, 2 vols., German ed. 1883-86, French 1883-87, Spanish 1894; also in Serbian, Japanese, Persian and Chinese transl.); Memoire sur le telegraphe en Chine, 1883; La conference du Congo a Berlin, et la politique coloniale des etats modernes, 1886; Memoire sur l'affaire Zappa, 1893; La conference de la paix a la Haye, 1901; La paix et la guerre, 1901 (orig, in Russian); Par la justice vers la paix, 1907.

[32] The reference is to Feodor Martens' 15-volume comprehensive survey of treaties concluded by Russia with foreign nations from the days of Westphalia, which was published between 1874-1909. Cf. Pustogarov 2000 at 31-38. On Georg Friedrich Martens see *Les fondateurs du droit international* 1904 (ed./introd. A. Pillet) at 602-676 (H. Bailby).

[33] Georg Friedrich Martens (1756-1821) and, to a lesser degree, Charles Martens (1790-1863).

framing of a proper legal conscience. From 1884 he was permanent representative at the Red Cross conferences.

The year 1874 also saw Martens elected to the *Institut de droit international*, which he would serve as vice-president in 1885 and 1894. An assiduous attender of the Annual Meetings, where he cherished many friends, Martens was on the small committee which, in summer 1880, met at Bluntschli's house in Heidelberg to finalise Moynier's draft *Manuel des lois de la guerre sur terre*, which resulted in the famous 1888 *Oxford Manual}*' Over the years, he reported on such varying issues as the Suez Canal, consular procedure, the slave trade, international waterways, and the concept of an international bureau.[35]

In 1880 Martens was co-founder of the Russian Association of International Law. Shortly afterwards his *chef d'oeuvre* was published, the two-volume *Manual of international law of the Civilised Nations*. It was a pivotal event. The work constituted nothing less than the first ever exposure of the Russian international law tradition, and was reviewed eagle-eyed by European critics. It saw French and German editions (surprisingly enough no English, and was rendered into Serbian, Persian, and Japanese.[37] Its reception was generally favourable, although not without qualifications.[38] Perhaps the part best appreciated was Martens' lengthy historical introduction to the Russian tradition of international law. If deemed coloured at times, it was a *Fundgrube* of factual dates highly appreciated by contemporary scholars.[39]

Structure

Censure was most severe with respect to the structuring of the work. The treatise was published in the days when, following Von Ompteda's attempt at systematisation, the classical Grotian dichotomy of the discipline into laws of war and laws of peace was gradually being replaced by the modern concepts of formal and material law. Martens' somewhat eccentric dichotomy of the discipline into general principles on the one hand and administrative law on the other, a concept borrowed from the public law sphere, did not comply with the prevailing mainstream of contem-

[34]' Holland 1909 at 10.

[35]' See above, nt. [5],

[36]' Two volumes, 1882-83, repr. Moscow 1996. The word "civilised", which at the time, and with the widening circle of internationalism, gradually came to replace "Christian" had a very distinct meaning to Martens; see below at p. [=]. On Martens' international law theories in general see Pustogarov 2000 at 49-86.

[37]' Interestingly enough, no English edition was ever published. Nussbaum has a point in asserting that the various translations into languages of wwcivilised nations, that could not boast an intellectual elite served mainly to voice the Russian foreign policy.

[38]' Critical notes by Geffken in 16 *RDI(*1884) 104, and by Bulmerincg in 15 i?D7(1883) 630.

[39]' On Martens' stature as a historian and his numerous tracts in this discipline see Pustogarov 2000 at 38-40.

porary thought. It was liable to the censure of not being based on a distinctly international legal concept. As many of his colleagues, Martens was probably still too much steeped in Roman and public law traditions to arrive at fully satisfying results in his endeavours to create an *ordo certus* for the discipline. While therefore his presentation of the discipline was not generally deemed convincing, what was perhaps more to the point: it was not typically Russian, nor was it all his own. Martens' doctrine was, at its core, the reflection of his prolonged stay in Heidelberg during his formative years and the concept of *Verwaltungsrecht* advocated by his two foremost teachers of that period, Bluntschli and Lorenz von Stein.[40]

Meanwhile, the merits of the work are many. It allows us to see Martens elaborating his views in the triangle of politics, morals and law at a fairly early stage. In the building process towards an international order, Martens distinguished three historical phases: the pre-Westphalian era of natural law; the pre-Vienna age of naive positivism; finally, the growth of synthesis attained in the 19th century. With international communications intensifying by the day - it was maintained - compliance, self-constraint and consensus had become the only natural prerequisites for the proper functioning of modern international society. These norms had to be consolidated in the international rule of law. In advocating this, Martens was far from being a Kantian utopist. Perpetual peace he deemed beyond reach. Inevitable dispute and conflict, and ensuing political excesses should be anticipated through international organization or else regulated through progressive codification, arbitration procedure and the development of humanitarian concepts. Intriguing in our context is his summary dismissal at that stage of contemporary projects for an international tribunal as chasing moonbeams.[41] While deeming the growth of international administration unstoppable, Martens did not advocate World Federalism or a United States of Europe, if only for its short-term unbalancing repercussions on society. This, incidentally, may be noted as a consistent element in Martens' tenets, the anxiety for social upheaval. To that extent at least, he was the product of the days following Alexander II's reforms. His goal was a free alliance of autonomous States, and he insisted on the role of international conferences in the developing process of a network of international agencies on a volitional basis.

The domestic and the International Domains

The work also elaborated on the role of the State. Ideally, in Martens' appraisal, the State-entity

[40] Upon his graduation in 1867 Martens embarked on a *peregrinatio* to Leipzig, Vienna, and Heidelberg. The teachings of J.C. Bluntschli (1808-81)at Heidelberg and Lorenz Von Stein (1815-90) at Vienna left a lasting mark on him. Stein first published a *Verwaltungslehre* in 1866; Martens' treatise of 1882 is dedicated to him. Bluntschli published a seven-volume *Verwaltungslehre* (1865-68). Both were prominent thinkers on the theory of State and Law.

[41] Cf. Pustogarov 2000 at 73-74.

was based not on nationality but on cultural identity, its constitution the reflection of the people's shared social norms, values and ideals. The primary role of the State was to upkeep human rights, secure self-determination, and protect the individual from Hobbesian and Darwinian powerplay. Indeed, in Martens' perception, a nation's civilization was determined in the last resort by the legal position it attributed to the individual, and its concepts of "Sittlichkeit, Recht und Staat".[42]

Martens' treatise also discussed the interplay between the domestic and international spheres. Here, the author confessed himself an outspoken dualist. He categorically dismissed any parallelism between the domestic and international legal orders as being the products of fully independent and historically incomparable social processes. In this, one must appreciate that, to the expert historian Martens, the organic processes of history had an almost normative value. Meanwhile, in his appraisal, it was precisely a nation's involvement in the international arena which testified to its cultural advancement. Already in his thesis on the Consular Laws he had called a nation's participation in international commerce "ein Gradmesser seiner Culturstufe".[43] When discussing the international sphere Martens again explicitly refers to the human rights element as the ultimate criterion to assess the status of development of international law. Within the context of the time, this may actually be deemed quite remarkable

Natural Law and Positivism

Martens' manual relied on the acute observation of day to-day relations among the nations. Sobered by the prevailing contradictions, inconsistencies and perpetual changes in the international arena, its author relied rather on the conference table than on speculative theory. International law, in Martens' view, rested on diplomacy and therefore essentially on positive law. From this perspective, Martens' positivism has not often been questioned. Still, pinpointing him on the scale between natural law and positivism is no mean task. Actually, his treatise was innovative in focusing not on State-entities exclusively but rather emphasizing the social, legal, and cultural bonds of the international community.[44] Martens somehow looked upon the State as an organic part of the Commonwealth of Man which recalls the best tradition of Stoic *oikeioosis.* By the same token, however, to him autonomy and territoriality were sacrosanct. He strictly limited interference with domestic affairs, albeit that he legitimized military intervention by civilized nations into barbaric realms, thus to check the persecution of Christians. This was criticised by

[42] *Consularwesen* 1873 at 8; *Volkerrecht* 18821 at 203ff.

[43] *Consularwesen* 1873 at 17.

[44] Pustogarov 2000 at 65-71.

many contemporary observers as treading a somewhat slippery track. His treatment of treaty law was considered by many to labour from much similar deficits.[45]

The Concept of Civilised Nations

And then of course there was this concept of the "Civilised Nation(s)" as reflected in the title of the work.[46] To be sure, the concept was not Martens' own, but had become an increasingly current one in literature since the days of the Holy Alliance. It encompassed the conglomerate of legal norms and customs that had been developed within the cultural and religious unity of the European tradition. With time they had become a normative canon also applied in the (former) colonies of the New World. To that extent the concept had gradually come to replace the previous references to the Christian Commonwealth. With the, at least formal, entrance of the Ottoman Empire into the privileged circle of the European Concert in Paris in 1856, the new concept was in a way upgraded, if only because from then the concepts of "European" or "Christian" were no longer applicable. By the same token the new concept suitably expressed both the generally felt superiority of the European tradition and its independence from religious connotations.

It will come as no surprise that Martens' professor at Heidelberg, Bluntschli, had been pivotal in coining the idea. In his *Das moderne Volkerrecht der civilisirten Staten als Rechtsbuch dargestellt* (1868) he voiced both the idea of the Commonwealth of Man and the missionary role, if not sacred duty, of the European nations "vor den andern Volker die Trager und Schirmer des Volkerrecht zu sein".[47] In a both epochal and controversial article in the *Revue* of 1884 James Lorimer was to divide the world in a *humanite civilisee, humanite (a demi*) barbare, and *humanite sauvage.*[48] Around the turn of the century, Otto Nippold was perhaps the first to firmly abjure this idea of 'civilisation" and instead apply a proper legal norm as criterion for entrance into the *Volkerrechtsgemeinschaft* as a subject of international law, this criterion being the verification of an actor as a sovereign state[49] In 1905, Oppenheim would define "civilised" as enabling a State and its subjects "to understand and act in conformity with the principles of the Law of Nations".[50]

[45] See *e.g.* Geffken's censure in 16 RDILC (1884) at 104.

[46] Pustogarov 2000 at 50-56. Interestingly enough, the French translation does not bear this reference to *nations civilisees.*

[47] Bluntschli 1868 at 55. References taken from Rhea Schircks, *Die Martens 'sche Klausel* 2001, notably at 81 -96.

[48] In 16 RDILC 1884 at 335ff.

[49] Nippold, "Geltungsgebiet", in: ZVB 1908 II441-472, at 453.

[50] Oppenheim, *Int. Law* 1905 at 31.

In the ongoing debate of the 1870s Martens' must have struggled with the idea. The title-page of the French translation of his work does not feature the "civilised nations"-colon. By the same token, its preface refers to "nations civilisees ou chretiennes".[51] However, Martens' proposition rings true in that it, once more, defines the macro-cosmos of the Society of States according to the same criteria which are applied by him to the micro-cosmos of the domestic sphere: [die] "Gemeinsamkeit der socialen, culturellen und rechtlichen Interessen der durch sie verbundenen civilisirten Nationen".[52] Meanwhile, in his treatise La paix et la guerre of 1901, Martens refers to "l'opinion publique du monde civilise" and "nations civilisees" on almost every page.[53]

If, according to Martens, the Law of Nations in the proper sense remained reserved to the civilised nations, their relations with the uncivilised nations, peoples, or tribes were determined, if only for lack of the above-mentioned "common interests", by the dictates of natural law and the "gewisse Grundsatze, welche aus der sittlichen Natur und Vernunft des Menschen entspringen".[54] A review of Martens' references, and notably of his chapter on the *Geltungsgebiet des Volkerrechts*[55], reveals, as was rightly pointed out by Schircks[56], that Martens' concept of 'civilised nations', as with Bluntschli, was still an essentially cultural, not an exclusively or primarily legal concept: "Das moderne Volkerrecht ist ein Product des Culturlebens und Rechtsbewusstseins der Nationen europaischer Civilisation."[57] In this appreciation of Martens', religion played a pivotal role, as is revealed not just by his emphasising the role of the Christian religion, but notably by his factual exclusion of the Ottoman Empire on behalf of the "entwicklungshemmende" doctrine of Islam.[58] Even more interesting perhaps, in view of the above, is Martens'firm disagreement with Bluntschli's idealism and his teacher's extension of the sphere of positive international law to all nations, as being a negation of the legal principle of reciprocity. Martens' verdict here is unequivocal:

… solch' edler und erhabener Kosmopolitismus entzieht dem Volkerrecht alien realen Boden und jede praktische Bedeutung, er verwandelt das Volkerrecht in ein Gespinnst idealer, aber, wenigstens unter den gegenwartigen Verhaltnissen, unrealisirbarer Rechtsnormen."[59]

51. Martens *Traite* I at 2ff. *Cf* Schircks 2001 at 90, n. 439.
52. *Volkerrecht* I at ix.
53. The *Preface* is most illustrative in this respect.
54. *Volkerrecht,* I at 182.
55. *Volkerrecht* I at 181-184.
56. Schircks 2002 at 88-92.
57. *Volkerrecht* I at 181.
58. Martens terms are categorical:"absolut keine Moglichkeit"; *Volkerrecht* I at 181.
59. *Volkerrecht* I at 184.

It is with these concepts in mind that Martens entered debate at the Hague Peace Conferences. They were perhaps not entirely consistent and altogether convincing. As stipulated above, Martens at the end of the day was not the theoretician.[60] He did not elaborate these views in any appreciably comprehensive form later on. What he did produce was a number of contributions to the *Revue* on mostly topical and delicate issues of contemporary international relations. These articles gave rise to the embarrassing polemics with Westlake, Holland, Lammasch, Danewski and others.[61] If signed by the law professor they were generally deemed the work of the councillor of the Foreign Ministry and a downright apology of Russian policy only tarnished by the academic varnish. The topics in themselves would indeed suggest some truth in this criticism.[62]

II. Martens' involvement with the Hague Tradition

1. The First Hague Peace Conference of 1899[63]

Matters of Preparation and Organization

Martens simply loved Holland. On more than one occasion during the Peace Conferences, so as to persuade wavering diplomats in taking bold steps, he referred to the brave mentality of the Dutch. They had not complacently idled behind their dunes, but had ventured onto the high seas. By throwing up dams to check the waters, they had survived against all odds. He loved inserting allusions to their rich cultural tradition, or to draw attention to that genius who stood at the cradle of international law. He felt warmth and sympathy to this native soil of Erasmus, the nation that had advised Peter the Great in building his Baltic fleet, and had embraced Anna Pavlovna as its

60- Cf. Kamarovsky in 23 AIDI (1910) 538-43 at 542-43: Martens was primarily "historien et diplomate" [...] "les questions abstraites ou de pure theorie ne l'attirent que faiblement. II professait pour les reformes de droit et de la vie internationale un certain scepticisme qui caracterise les hommes de la pratique."

61. Nussbaum 1952 at 56ff. V.P. Danewski, *La Russie et I'Angleterre dans I'Asie centrale. Observations critiques sur ... F. Martens* 1881, which attacked Martens' theory of treaty violation by England. On the same issue Martens crossed swords with Westlake in lengthy articles in 12 RDILC (1880).

62' The articles concerned issues such as "Consuls and Consular Jurisdisction in the Orient", 1873 (diss, in Russian; German transl. 1874); "The Eastern War and the Brussels Conference", 1878 (in Russian; French transl. 1901); "La Russie et I'Angleterre dans I'Asie centrale", 1879 (transl. in Russian, German, and English); "Le conflit entre la Russie et la Chine, ses origines, son developpement et sa portee universelle", 1880 (transl. in Russian and German); "La question egyptienne et le droit international", 1882; "Memoire sur le telegraphe en Chine", 1883; "La conference du Congo a Berlin, et la politique coloniale des etats modernes", 1886; "Memoire sur l'affaire Zappa", 1893.

63' On Martens' stay in The Hague in 1899 see Martens'treatises *La conference de lapaix a la Haye* 1901; *Lapaix et la guerre* 1901 (orig, in Russian); *Par la justice vers la paix* 1907. Also Pustogarov 2000 at 157-93, and Eyffinger, *The 1899 Hague Peace Conference* 1999 passim.

Queen.[64] In appreciating this, one must call to mind that Martens was a native from Estonia, like Holland a humble nation along the seashore and wedged between great powers all around. He was born in Parnu, a small but time-honoured Hansa town. Inevitably, Martens must have felt akin to the Dutch. Well before 1899, Martens had repeatedly applied to his Ministry to be made envoy to The Hague.

Martens' first actual visit to Holland had been occasioned by Tobias Asser's Hague Conferences on Private International Law of 1893 and 1894. By that time, Martens and Asser had already become tried and trusted friends through their meetings at the *Institut.* With Renault they were to constitute a kind of Triumvirate to enhance the Hague tradition.[65] In 1893, Martens had been favourably struck by the quiet overall climate and Asser's competent organisation of the Conference. In the opening weeks of 1899 the issue of the venue for the Peace Conference still remained to be settled. By then, all major capitals of Europe had eliminated each other. With Scandinavia disinterested, Switzerland in the grip of anarchism, and the keen aspirations of the Belgian king effectively blocked by Parliament, it was Martens who, to his superiors' eminent relief, suggested The Hague as venue and, at the top of his head, added a dozen good arguments to strengthen its candidature. The Hague tradition of internationalism was launched that very day.[66]

Undoubtedly, the 1899 Peace Conference was Martens' finest hour. In the strength of his years, he availed himself optimally of all the experience gathered over previous decades in the domestic and international arenas: as a weather-beaten diplomat, a consummate lawyer, and a seasoned arbitrator. To be sure, his position was never easy. The summer of 1899 was to prove the ultimate test, both physically and mentally, to his seemingly inexhaustible sources of energy and willpower. The preparatory months were an ordeal, but in the end Martens drew endless joy from the intellectual and social rewards they rendered.

[64] Eyffinger 1999 at 408: "Concord": "Consider for a moment the example offered us by this small and charming country whose guests we are. Why has Holland played so great a part in history? Why have her commerce and her ships spread over all the oceans? It is because the Dutch have not remained behind their dunes; they have climbed to the top of those dunes and breathed in the air of the sea. [...] let us follow that country's example: let us climb to the top of our dunes and direct our gaze upon a broader horizon. [...] The barriers of prejudice must fall, and then we shall see a spirit of understanding and of mutual confidence in dealing with all questions. Concord, gentlemen, should be the watchword and the aim of our labours." Scott *Proceedings* at 641-42. See also Martens, *La Conference de la paix a la Haye* 1900 at lOff.

[65] Asser may be called the architect of the Hague tradition in the sphere of private international law. He was the founder of the Hague Conference of 1893. Along with his dear friend Renault he was the founding father of the Hague Academy, which was inaugurated in 1923.

[66] The decision to select The Hague as venue for the Conference was the outcome of a long process of elimination. The considerations put forward traditionally such as the references to Grotius, the rich parliamentarity tradition of the Dutch, its time-honoured neutrality, the links between the Romanovs and the House of Orange through Anna Pavlovna, and its ready accessibility were mere afterthoughts mostly. Vexing issues of the invitation policy, such as the attendance of the Holy See, played their role. By all accounts, it was Martens who first suggested The Hague. See Lysen 1934 at 76 with reference to correspondence between Asser and Martens; also Eyffinger 1999 at 70ff., and Martens, *La Conference de la paix a la Haye* 1900 at lOff.

As with so many, the Czar's *Rescript* had fallen on him 'as snow on his head' at his estate in Livonia.[67] However, soon enough he was summoned to the capital. Knowing foreign minister Muraviev all too well, Martens duly anticipated that the convocation had not been based on any serious preparation. The drafting of the Programme was predictably left to him. Faced with vaccillation and flippancy all around, in the midst of disinterest and disrespect, he set out on a labour of love. Anticipating imminent failure in the sphere of disarmament, he first bent emphasis towards the gradual reduction of the steady increase of armaments, then entwined his own hobby-horse into the Programme, to wit, humanitarian issues in the Brussels tradition, and finally elaborated the insertion of the concept of peaceful settlement of disputes. In short, the 1899 programme was his, and no one else's. If he is to blame for its shortcomings, he is at least partly excused by circumstance, and he deserves all the credit for its merits.

Once in The Hague, Martens, from day one assiduously supported the helpless De Staal, both in matters of substance and protocol. In day to day practice he acted as his nation's first delegate, much to the resentment of colleagues such as De Basily, who was to play some nice little tricks on him. Given his authority as the champion of the 1874 Brussels declaration, Martens was the only natural chairman of the Second Commission on the laws and customs of war. Still, no less prominent was his voice in the debate of the celebrated *Comite d'examen* of the Third Commission, whose efforts resulted in the establishment of the Permanent Court of Arbitration.

Martens' self-assuredness and authority in The Hague can be distilled from his various formal addresses, speeches and interventions which, amid his other works, stand out as gems of rhetoric, persuasion, and will-power.[68] Clearly, he felt at ease. In a short tract on the history of this "Parliament of Man" he permits us wonderful insights into the daily affairs of the Conference, including an impression of the lavish 17th century decorations of the Orange Room, venue of the "Hundred Chosen", at the Huis ten Bosch palace.[69] Martens impressed his colleagues on many accounts: by his excellent command of languages, his visionary thoughts as compared to the narrow-mindedness of so many colleagues, and above all by his unwavering quest for compromise. So much so indeed that fellow-lawyers at times resented his insistence on concord at the cost of what they thought legal scrutiny. Clearly, with Martens, at the end of the day, it was the diplomat who prevailed at The Hague. To him, at the conference table, international law was instrumental to the pragmatism of international relations. A legal gem of a convention, if not

[67] Pustogarov 2000 at 158.

[68] See Eyffinger 1999 at 298: 'The vital interests..."; *ibid,* at 379: "Martens Declaration"; and notably at 403: "To the rescue of arbitration".

[69] Martens, *La Conference* 1900 at 13-15.

backed by the nations, was to remain a dead letter. In this, the Trauma of Brussels must have played a dominant role. Repetition of the rude awakening he had experienced 25 years earlier, when round after round of non-committal discourse and theoretical speculation had finally left him virtually empty-handed, should be prevented at all costs.

Martens' role in the concluding of the 1899 Conventions cannot possibly be over-estimated. It was his versatility, dexterity, persuasion and willpower which in the end carried the day.[70] They saved this first ever intergovernmental debate on most of the outstanding socio-political issues of the day from remaining "trashing out Russian straw"[71] or turn out a mere "footnote in the history of mankind" as Mommsen and so many others had predicted.[72] For all the censure on the Conference, Martens, for one, on perusing its results was extremely pleased and actually surprised. From day one he had argued that putting *heikel* issues on the agenda was meant simply to sound out the positions of the Governments in a first exploring round of debate, not necessarily to solve all riddles. He had cherished no illusions whatsoever as to disarmament, but had appreciated its inclusion in the programme and its free discussion, if only as a token of goodwill to the demands of the outside world. For him, from the beginning, the 1899 conference was merely the first in a series, "the beginning, not the end".[73] In fact, as he argued at The Hague, the concept of the Conference should be quickly institutionalised. He therefore readily deferred inconclusive issues to its anticipated sequel.

Humanitarian issues: the Martens Clause

Meanwhile, Martens' personal triumphs at The Hague were numerous. First of all, and much to his relief and satisfaction, his upgraded version of his 1874 Brussels declaration passed virtually unscathed. The intrinsic value of the 1899 (and 1907) humanitarian conventions has only deepened with time. Over the past decade, we have come to reappraise their merits as a major stepping-stone on that long and winding road which brought the nations to Leipzig, Nuremberg and Tokyo, then along the Yugoslav and Rwanda crises to Rome, finally to settle down at ICC Headquarters in The Hague. It was Martens who first put these issues on the agenda. In 1899, Martens' pioneering and conciliatory role in this domain was appreciated with a thunderous applause by the Plenary.[74]

[70] Cf. Wehberg 1910 at 350: "..tiber die Inkonsequenz seiner Ideen meist durch die Kraft und Ueberzeugung..." under reference to Merignhac's estimate: "une dialectique vive et puissante".

[71] *Cf.* Zorn in: *Deutsche Rundschau* January 1900, and Scott *Proceedings* at 136.

[72] See Eyffinger 1999 at 204.

[73] Taken from the opening address of the Russian First Delegate De Staal. See Eyffinger in *UN Decade Int. Law; Centennial First Int. Peace Conf. At bthe Peace Palace,* The Hague 1999.

[74] Scott *Proceedings* at 549.

And then of course, there was this moment on June 20, which saw the formulating of the so-called *Martens Clause,* aptly described by Cassese as "one of the contemporary myths of the international community".[75] Was it a historic moment? Recently, the Clause has been subjected to in-depth scrutiny from various angles, and this on solid grounds. It would seem as if, over the decades, the formula has gradually gained the status of mantra to be invoked by courts and councils indiscriminately as a convenient safety-valve with no specific import. The recent appeal to this magic formula in various cases before ICJ and ICTY and its diverging interpretation on these occasions, urgently required a thorough scrutiny as to its origin and author's intention. Cassese, in an eminently lucid analysis of a century of case-law, state practice, and legal literature has, through terse reasoning, evaluated the manifold threads to be distinguished: its downgrading as a formula of strictly moral and political value, self-evident and therefore pointless from the viewpoint of law; its appreciation as a major source of inspiration to the development of international humanitarian law as such; its upgrading into a general interpretative guideline in that domain; its interpretation as at least excluding the *e contrario* argument; finally, the trend to assign to the Clause a veritable norm-creating character, a historic juncture in the history of the discipline, when two new sources of international law saw the light. Quite recently, Schircks has thoroughly reviewed the Clause from its linguistic, historical and teleological aspects and by in-depth research has evaluated its various constituting elements of "usages etablis", "nations civilisees", "lois de Phumanite" and "conscience publique".

The outcome of this multi-faceted research, needless to say, has not been unequivocal. This in itself is not dramatic. Arguably, the mere fact that, apparently, the author's intention of the Clause is no longer historically identifiable should not *ipso facto* hamper its role in the organic development of the law, that is, as long as its application is meaningful, consistent and relevant. To that extent, one may refer to the distinction applied by modern linguistics between *meaning* and *significance*,[77] Major tenets propounded by Grotius have, in the course of time, remained of distinct value for successive generations precisely by virtue of their re-interpretation and extrapolation. On the other hand, a durable lack of consistency in terms of reference in State practice, learned commentaries and rulings by some of the highest judicial organs in the world will turn the Clause into an ever less reliable, indeed less innocent instrument.

[75] Cassese, in; 11 EJIL (2000) at 187.

[76] *Ibid,* at 202ff. with references to the *Klinge* case (1956), the *Krupp* case (1948), the ICJ *Corfu Channel* case (1949), the Brussels *K. W.* case (1950), the ICJ *Military and Paramilitary Actions* case (1986), a Colombian Constit. Crt case (1995), the ICTY *Martic* decision (1996), and the ICJ *Legality... Nuclear Weapons* case (1996). Cf. also Schircks 2001 notably at 31ff. (ICJ) and 55ff.(ICTY).

[77] See e.g. Hirsch, *Meaning and Significance Reinterpreted*, in: 11 *Critical Inquiry,* Dec. 1984.

Clearly, this is not the place to reopen this complex ongoing debate. Still, a few casual remarks on the side may perhaps be permitted. All too readily perhaps the Clause is being dismissed in literature as, to use Cassese's phraseology, a mere "diplomatic gimmick" and a typical formula of compromise, and emphasis laid on its being intrinsically, if not deliberately "vague", "evasive", "ambiguous", or at least "very loosely worded". From this perspective, it may be worthwhile to once more call to mind the historical context.

Martens, it has been stipulated before, entered debate in The Hague still heavily burdened with the frustrating experience of 1874. The never ratified Brussels Declaration had been his brainchild all along. During the previous quarter of a century, he himself had been the most persistent advocate of its substance matter. Actually, it was Martens who had inserted the issues in the Conference Programme in the first place. In June 1899 he was the obvious candidate to chair the Second Commission and notably that Commission's second sub-commission, which dealt with these issues. Within this latter expert body, in the course of the first two weeks of debate, harmony had prevailed throughout and all went smoothly. This in itself was no surprise, as in the arrangement of articles the Commission had deliberately postponed the most vexing issues to the last.[78]

Then, on June 6, at the opening of its sixth meeting, and with "three-fourths finished"[79], the subcommission had reached the last remaining issues[80], which dealt with the status of belligerents and the relations between combatants and non-combatants.[81] "Sur le champ" the Belgian delegate Beernaert took the floor to raise substantial objections, both of a general and wider nature[82] and more in particular against what in Martens' view[83] was the core of the proposed Convention, the articles 9 and 10. These defined the status of belligerents and the reciprocal rights and duties of the invading forces *vis-a-vis* defending levies and the population.

The drift of Beernaert's tenets was the following. Imbued with the best of humanitarian considerations no doubt, delegates in 1874 had intended to reduce the evils of war for the harmless population of invaded countries. However, in order to accomplish this goal and minimize civil

[78] *Cf.* the phrasing in the *Rapport* by Rolin: "Get ordre des discussions, destine a reserver pour la fin les questions les plus delicates."

[79] The words of Beernaert; Scott *Proceedings* at 502.

[80] The Chapters 1, 2 and 9 of the 1874 project.

[81] Point 10 on the Agenda, articles 9-11 which, due to a later rearrangement of the project proposed by the *Comite de Redaction* became the articles 1 and 2 of the *Reglement.*

[82] Beernaert actually suggested to drop six articles: 3-5, 40-42, to carefully rephrase 2, 6, 9-11, and to insert two new articles conditioning the levying of taxes by conquerors and requisition in kind. We will focus on the discussion regarding art. 9-10 exclusively.

[83] As expressed explicitly and repeatedly in the meetings of June 6 and 20.

unrest the invaded country was advised to acknowledge *in limine* all rights and claims to its territory advanced by the invader; in similar vein, its population was ordered to abstain from participating in the war. It was then to be left to the invader either to apply or emendate the up to then prevailing laws, or introduce legislation of its own. Beernaert did not deny that it had been the acknowledged practice from times immemorial for invaders to impose their laws on invaded countries by sheer force. However, it was something different to have this procedure legitimated by Convention. This would "turn fact and force into right" and "in advance legitimate the use of force, and recognize as law" what should be left to a subsequent peace conference to decide. But, above all, this was militating against all moral notions and the very idea of patriotism. The first duty of a citizen was to defend his country, to which "we all owe the most beautiful pages of our national history".

Also, in Beernaert's view, the proposed articles ran to the exclusive benefit of the great powers, which never incurred similar risks at the hands of the small. As for Belgium - the wiser from the lessons of history and appreciating its delicate geographical situation - this country was an acknowledged neutral nation; the great Powers had pledged themselves by treaty never to invade her.[85] For all these reasons he felt it was much better to leave the substance matter of the articles 9-10 to "the domain of the law of nations, however vague it may be." "Moderation" on the part of the conqueror was all that was needed. Or, as he put it later with respect to acts of heroism by individuals: "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".* [italics added]

Beernaert's stand in itself must not have come as a complete surprise to Martens. These were the very articles that had caused the undoing of the Brussels Declaration in 1874, as was readily admitted by Beernaert himself.[86] Still, Martens could not but look upon the intervention as a booby-trap undermining the whole undertaking: the Brussels nightmare revived by the Belgians of all people! Actually, Beernaert was well aware of this. The gist of his tenets was precisely, as he coined it, to prevent incurring "the same difficulties as before".

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 indeed the ones to profit from lea-

[84]' Scott *Proceedings* at 503; Eyffinger 1999 at 296.

[85]. Beernaert's address is most intriguing in the perspective of events fifteen years later.

[92]' Scott *Proceedings* at 533.

ving these issues *"in a vague state and in the exclusive domain of the law of nations*"? [italics added] "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. The outbreak of wars could not be prevented, therefore armies should not just be provided with the best weapons, "but also be imbued with the notions of right, justice, and humanity, binding even in an invaded territory and even in regard to the enemy." The Brussels Declaration should in fact be an *Act of Education.* If delegates failed a second time now after Brussels[87], this added up to giving free rein to licence, and numerous would be the ones to avail themselves of this state of affairs.

One aspect of Martens' speech should be stressed here at the outset: "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 position that of reaching a vain compromise.

On June 10, in the eighth meeting, a new bomb was planted, this time 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 would - at least in his private opinion (!) - certainly not bind itself to a Convention.[88] 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.[89]

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 well-known comparison with *mutual insurance association".* With the abuses of military force it was as with devastating fire or hail, no one would welcome their occurrence, but still their occurrence was undeniable. One was free

[87]' He could have added: "after all these meetings of the *Institut,* the work of Moynier, and the *Oxford Manual...."*

[88]. Scott *Proceedings* at 517.

[89]' See *La paix et la guerre* 1901 at 109.

to accept the Association's Statutes or not, but its terms were binding. This Convention was meant to warrant the interests of the population against the worst disasters. It did not legitimate these disasters, but simply took the existing danger for a fact. Martens was no fool: "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."[90]

On June 12, the commission returned to Beernaert's objections. The core of the matter was, as Baron Rolin would later put it concisely in his Rapport:

De savoir si la crainte de paraitre consacrer comme un droit, dans un reglement international, le pouvoir de fait qui s'exerce par la force des armes, doit faire abandonner le precieux avantage d'une limitation de ce pouvoir.[91]

Being forced by law to automatic compliance with the law imposed by the invading army for the sake of civil order and in order to prevent unnecessary suffering, was identical to acknowledging as right what was a mere fact of force. Beernaert only wished to adopt dispositions which accepted the *fact* of conquest but not the *right* of the conqueror, all this conditional to its entailing specific obligations to invading armies so as to warrant moderation of their force. Otherwise he much preferred to leave the unlimited rights of the defendant untouched.

To this Martens riposted that it was absolutely necessary not to surrender the vital interests of peaceful and unarmed populations to the hazards of war and international law. No member of the sub-commission wished to see legal authorities of the invaded country sanction factual power in advance. By the same token, the adoption of the strictest regulations to put limits to the exercise of power was generally felt to be in the interest of all nations. In fact two irreconcilable viewpoints were advanced. Martens despaired - momentarily. It 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."[92]

But then, on June 20, in the eleventh meeting, he had gathered enough strength to embark upon a formal declaration. He once more summarised the debate, while stressing the extreme importance of the articles 9 and 10. They had the "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

[90]' Scott *Proceedings* at 518. In this meeting the Dutch delegate Van Karnebeek spoke of "a patriotic duty of the highest importance to remain to the end the most determined and resolute opponents and enemies of the invader."; Scott *Proceedings* at 521. The German Colonel Gross von Schwarzhoff s interventions are likewise worth noticing.

[91]' Cf. Scott *Proceedings* at 418.

[92]' Scott *Proceedings* at 533.

population was sacred, so was the duty of governments not to sacrifice unnecessary victims in the interest of the 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. Spontaneous acts as by individuals could never be anticipated. Heroes were not created by codes, their only code was their self-abnegation, their will and their patriotism. They were in fact above the code.

Martens then proposed to have inserted into the *proces-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 perfectly complete 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's reaction was immediate. While the articles 9-10 did not quite corrrespond to what he had hoped for, he now felt satisfied to subscribe to them "en raison de la declaration que vient de faire M. le President".[93] He emphasised the importance of the Declaration and insisted on its inclusion into the official documents of the Conference.[94] He also drew the conclusions from it that "armies, militia, organized bodies, and also the population which, even though unorganized, spontaneously takes up arms in unoccupied territory, must be regarded as belligerents." All eventualities not provided for in the Convention ""sont regies *par le droit des gens dans les termes de la declaration que vient de lire le President,* [italics added].[95] His subsequent observation was also remarkable: "Mais ce sont la des regies et nul ne les a mieux tracees qu'un autre de Martens, qui a ete, lui aussi, l'honneur de son pays." None had outlined these rules better than another Martens, who had also been an honour to his country. "To-morrow as today the rights of the victor, far from being unlimited, will be *restricted by the laws of the universal conscience*[96] and no nation, no general would dare violate them for he would thereby place himself under the ban *of civilized nations."*[97] [italics added]

[93] *Ibid,* at 548.

[94] Whether the *proces-verbal* of the meeting, the final protocol or the General Act of the Conference.

[95] Scott *Proceedings* at 548-49.

[96] In his *La paix et la guerre* (at xi) Martens insists on the importance of closely watching the abiding of the Convention, which in his opinion "contribuera assuremant beaucoup au developpement de la conscience juridique des nations et des gouvernements".

[97] Scott *Proceedings* at 549.

Then another incident occurred. The Swiss colonel Kiinzli launched an emotional appeal on the commission not to "punish love of country".[98] He wished the whole chapter of the draft Convention as well as the British proposition of non-commitment put to the vote as a whole. To this Martens replied that an article by article deliberation seemed necessary, *"metis son expose et sa declaration se rattachent a I'ensemble des articles 9 et 10 qui sont etroitement unis."* [italics added] What followed was a prolonged discussion on the British proposition. Finally this was withdrawn but only, and precisely because it was felt by the majority to have become redundant by Martens' declaration and conditionally, as the French delegate Bourgeois insisted, on the explicit inclusion of this Clause into the official documents of the Conference.[99] On this footing agreement was reached.

On July 5, the draft text was without much debate accepted by the plenary of the Second Commission: Martens' phrasing "un code *tout a fait* complet" was replaced with *"plus* complet"[100] [italics added]. On July 27 Martens' Declaration was accepted by the Plenary of the Conference as a *peroratio* to the *Preamble* of the Convention, which stipulated *that it applied notably* [italics added] to the articles 1 and 2 of the Reglement, which were identical to the articles 9 and 10 as discussed within the body of the second sub-commission. On June 20 Martens wrote in his diary:

"I myself did not expect such a brilliant success. The Brussels Declaration - my beloved child - has been adopted."[101] 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."[102] He had but one regret, as he confessed in February 1903 in his *Preface* to Merignhac's commentary on the Convention: "...nous avons commis une grande faute en n'insistant pas sur la necessite de fixer un terme precis pour la mise a execution de l'engagement pris." Three years after The Hague, few were the Governments that had complied with "cet engagement d'honneur" to implement the *Reglement* in the instructions for their armies and have these published.[103]

What are the conclusions one may draw from the above?

1. The Clause was developed within the context of a debate on very specific issues of humanitarian law, these being the later articles 1 and 2 of the 1899 Regulations.

[98] Scott *Proceedings* at 550-51.

[99] *Ibid,* at 553-54.

[100] At the request of delegates Bildt and Nigra. Scott *Proceedings* at 415-18.

[101] Cited from Pustogarov 2000 at 178.

[102] Cf. Holls *Peace Conference* 1908 at 161-62.

[103] Merignhac, *Les lois et coutumes de la guerre sur terre,* 1903, *Preface* viii.

2. Although in itself applicable to all articles of the Regulations annexed to the Convention, the Clause was aimed specifically for these articles. This can be concluded from its consistent interpretation by Martens himself, Beernaert, Rolin, and the text of the Preamble.

3. The Clause was decisive in having the above-mentioned articles adopted unanimously; Beernaert's reaction and the debate regarding the British proposition make this unequivocal. Adoption of these articles constituted the major leap ahead as compared to (Paris 1856, Geneva 1864, St. Petersburg 1868, and) Brussels 1874. In historical perspective this was perhaps the paramount role of the Clause.

4. Meanwhile, its substance addressed specifically those issues that could *not* be comprehended in the advanced Regulations. In the debate of 1899 the legal issues at stake were never solved completely within the terms of Convention and Regulations. It was the "non liquet" which inspired and was covered by the Clause.

5. In doing so, it filled a vacuum between international humanitarian law as codified in the Convention and Regulations, and the arbitrariness of the "victor's law" (the *e contrario* element)

6. It did so with reference to the principles of the law of nations.

7. Although therefore applicable to international humanitarian law, its references did not constitute part of that law, but of general international law.

8. Being clearly inspired by considerations of charity and humanity, the Martens Clause is an instrument bearing a distinct legal basis and character.

9. The Martens Clause was nothing new, but simply recalled well-established principles of international law. The following considerations may suggest this interpretation:

   • Martens never claimed the "Clause" as his own, neither in later publications or private correspondence.

   • Beernaert immediately accepted the Clause as relying on the solid basis of well-established principles. His reference to Georg Martens, if he is indeed the Martens referred to here, leaves no doubt on that point whatsoever.[104]

[104] This author has not been able to verify any clear-cut reference to this specific formula in the work of Georg Martens. Martens of course distinguishes between the "obligations parfaites" of positive law and the "obligations imparfaites" created by the *loi naturelle* (see *Les Fondateurs du droit international* 1904 at 605ff.). His *Precis de droit des Gens,* in its *Introduction,* contains numerous references to *morale naturelle, raison naturelle* on the one

- Rolin's Report does not voice any surprise, nor does it refer to any debate. It is extremely unlikely that a body of lawyers including prominent *Membres* of the *Institut* (Lammasch, Nigra, Rolin, Renault, Descamps, Stancioff etc.) who through the efforts of the *Institut,* notably the *Oxford Manual,* were well versed in the substance-matter, whould have accepted the introduction of any "new sources of law" without any comment.

To conclude: the Clause is not vague or elusive. It was designed as a very efficient instrument to bridge the gap between the stipulations of Convention and Regulations and prevailing arbitrariness with regard to certain issues that could not possibly be covered by the former but required protection from the latter. The Clause was not a "diplomatic gimmick" and only to a very limited extent a "compromise". It did not import the issues at stake into the Convention and Regulations, it did not affect the Convention and Regulations, but offered the maximum of legal warrant subsidiary to these.

An interesting parallel to the considerations which prompted the Clause is perhaps found in Grotius' system of laws of war. Being faced with the harshness and imperfection of the positive code of his day and age, and while accepting this inevitable state of affairs, Grotius insisted on the relevance of two aspects: first his doctrine of the so-called *temperamenta,* which called for a humanitarian approach whose terms he drew much stricter than the bottom-line of what went unpunished; and secondly on the sovereign notion of the *interna iustitia,* the precepts of moral justice.

Even so, the question remains, what did Martens' references amount to in day-to-day practice of harsh political reality. Did he sell them "pie in the skye"? There is this old maxim taken from Cicero: "Clausulae inconsuetae semper inducunt suspicionem."[105] In this case at least, they did not - but should they have? Professor Cassese's article carries a lot of wisdom to that extent.

Arbitration

If Martens' reputation in the world was confirmed by the 1899 proceedings, it was established well before that day, and actually on another title. His treaty series, his manual from the 1880s and his humanitarian efforts had earned him acclaim within the world of specialists. To the

hand and the "consentement unanime des nations civilisees" on the other. As is put in the *Introduction* (ed. 1858 I at 33: "Aux yeux de quelques publicistes, la difference entre la morale et le droit est une simple question de temps ou de culture humaine. Pour eux, le droit represente cette portion toujours croissante de la morale que la conscience publique juge actuellement applicable dans la societe et exigible au besoin par la contrainte. II y a erreur de leur part, la distinction n'est pas accidentelle mais permanente: elle repose sur des caracteres que le temps ne peut effacer."

105. "Unusual clauses always excite suspicion." Cic. 3 *Rep.* 81.

world at large however his name had become known in the 1890s as a synonym to that of the great arbitrator. William Stead, the eloquent spokesman of his day, only epitomized Martens' fame in his famous epitheton "Chief Justice of the Christian World".[106] In the last twenty years of his life 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 in literature, Martens was invited on many occasions as arbitrator or umpire in proceedings which either did not materialize or from which he was prevented to assist by distinct orders of his superiors.[107] Among these, incidentally, are ones from well beyond the Christian world. Meanwhile, the prominent ones are well-known: the 1891 *Newfoundland* dispute, the 1893 *Bering Sea* case, the 1895 *Costa Rica Packet* dispute, and most of all the 1897-99 *Orinoco* case.[108] To this last tribunal, already referred to above, Martens served as president. Hearings took place in Paris between June and September 1899, in the very midst of the Hague Peace Conference and his work on the *Comite d'Examen,* to which we will now turn.

Obviously, Martens' decade of experience with arbitration panels made him a generally acknowledged authority in the scholarly debate on the constitution of the Court of Arbitration. This is not to say that he represented the *communis opinio* among lawyers, far from it. In fact, if ever Martens disagreed with close colleagues from the *Institut,* it was perhaps in this area. Also, it is on these issues that he was least understood and incurred the most heated debate during both Peace Conferences. Again, this did not in the least affect his reputation at large. Martens constituted a school of his own, a minority opinion to be sure, but one that had to be reckoned with. The least one can say is that throughout these successive rounds of highly technical debate, and in the face of severe opposition, Martens expressed his views with almost untypical clearness and lucidity[109], and demonstrated a consistency and pertinence one can only admire.

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. Actually, in acknowledging defeat in the Italian political arena, Pope Leo XIII had, in past years, successfully

106. ^ stead, in his *The U.S. of Europe on the Eve of the Parliament of Peace.* 1899 at p. 125 refers to Martens as "The Deputy Lord Chief Justice of Europe".

107. ' As in the Franco-Siamese dispute of 1898, when Rolin-Jacquemyns, advisor to the King of Siam, approached Muraviev to have Martens appointed umpire, which request was turned down; cf. also the British dispute with Siam and Persia. See Pustogarov 2000 at 199.

108. ' Pustogarov 2000 at 196ff.

109. In these respects, Martens was often compared unfavourably with his trusted friend Tobias Asser. See Wehberg 1910 at 350: "Ueberhaupt fehlte es v. Martens mitunter an der notigen Klarheit, und vor allem auf den internationalen Privatrechtskonferenzen soli er neben der iiberlegenden Einsicht eines Asser, Kriege und Renault nicht haben bestehen konnen."

mustered all his allies to recapture moral prestige through this mechanism.[110] It was precisely this claim which made it such a dilemma for the inviting powers, Russia and the Netherlands, to bar the Holy See from the Conference, even in the face of fierce Italian - and consequently German and Austrian - opposition to the High Pontiffs attendance.[111]

Martens' was categorically opposed to any such relapse and the fervour of this conviction made him eloquent: heads of State as arbitrators were *ipso facto* "under no control and above all contestation".[112] His otherwise amusing encounter with Czar Nicholas, referred to elsewhere in this volume[113], is tale-telling for the views cherished in the complacent world at the European courts at the time. Martens primary goal therefore was to check this development and bend prodecure from the political towards the legal sphere. However, as he knew well enough that, wi th governments, for all the legal niceties, it was *quid pro quo.* At a fairly early stage he had concluded that in order to allure the nations into accepting the mechanism, he had to offer a package deal constituting a reasonable alternative. The concept of arbitration was to succeed only if it was tailor-made to the reality of international relations. Accordingly, Martens' absolute priority was to guarantee to the governments the perfect reliability and inviolability of the mechanism. It was meant to settle disputes for once and for all, and governments had to be sure to rely on this. Hence his focusing on the finality of awards and his militating against revision.

The same held good for the reservations he entertained against the mandatory publication of the substantiation and train of reasoning leading up to the award, including the objections raised by dissenting arbitrators. In Martens' opinion, such a demand would easily narrow down the latitude of arbitrators and to that extent hamper compromise. Arbitrators, it should be understood, for all their legal learning, also represented their Governments and should not felt embarrassed on their return home. In this, Martens' views may well have been inspired by his own precarious position and experience. It would seem that his outspoken preference for having the Peace Conference proceed "a huis clos", that is, without media attendance, came from the awareness that exposure to the public would only unnecessarily restrain the latitude of delegates and affect the results of talks. Experience had made Martens a very pragmatic diplomat and many were the lawyers who found that hard to swallow.

[110] Reference is made to the German-Spanish conflict on the Carolines (1885)and the Brasil-Argentina dispute of 1898. In 1896, and against the backdrop of the bilateral talks between Pauncefote and Olney, Leo himself had suggested the institution of international legal institutes.

[111] On Leo XIII, his role as arbitrator and his views on the 1899 Conference see Eyffinger 1999 at 77-88.

[112] Scott *Proceedings* II326-27.

[113] Cf. contribution Judge Higgins. Cf. Pustogarov 2000 at 197-98.

Meanwhile, Martens' policy at The Hague with regard to arbitration was all his own. To him, the two major issues at stake, the constitution of a Court of Arbitration and rendering the mechanism obligatory were two parts of the same issue. Compulsory submittal and a binding verdict were the flip-sides of the same medal. Martens, typically enough, "wanted it all, and wanted it now". Once more, his angle of approach reveals not the legal technician, but the weather-beaten diplomat. On many accounts Martens did not reach his goal, such as in advocating the compulsory status of the mechanism. The institution of the PCA itself he considered a major triumph, especially after the prolonged crisis and trial.

Last but not least we must briefly mention that other brainchild of Martens', the concept of Commissions of Inquiry. This mechanism he catapulted into the Committee, in his inimitable way, as a safety-valve in emergency situations, to cool-off emotions by factual examination. The reactions to this proposition varied to the extreme. The Romanian delegate Beldiman for one, "the eternal obstructionist" as he was typified by contemporary commentators, identified it as yet another tool at the hand of the major powers to influence, if not intervene into the domestic affairs of smaller nations. In this arena, however, Martens was to obtain an unqualified victory which, much to the surprise of sceptical commentators, soon afterwards turned out justified by events following the *Doggers Bank* incident (1904).

In his final evaluation, Martens' deemed his mission at The Hague an almost unqualified success. The more so as he trusted 1899 to be the first stage of a series of encounters. In 1907, Martens expected to reap a second harvest. It was on that occasion that he was to be desillusioned. Still, he was right, that his achievements of 1899 were to be only the opening move of his enduring commitment to / *'Oeuvre de la Haye.*

2. The Permanent Court of Arbitration[114]

Given Martens' prominence in 1899, it was small wonder indeed that, in 1900, he was among the first "Members" to be put on the list of the newly established Court of Arbitration. Little surprise either that he was elected on the bench of the first two cases submitted to that Court, the *Pious Fund* case of 1902 and the *Preferential Claims* case of 1904. Among his contemporaries, Martens' fame as an arbitrator was never questioned. As stipulated above, all this changed in 1949 with the publication in the *American Journal* of incriminating recollections from a former

[114] ' Pustogarov 2000 at 195-216.

staff member of parties in the *Orinoco* case and subsequent allegations by Nussbaum.[115] The incident is most regrettable. Not only were the charges of political intimidation and insincerity never corroborated by documents, they proved not verifiable in the archives. Child and Pustogarov who independently checked their national archives never unearthed any relevant source or document either damning or discharging its victim.[116] Was it a non-issue? Clearly, the *onus prohandi* in this matter lies not with the defence.

The *Orinoco* issue concerned the drawing of a boundary line, which was to be interpreted on the basis of, at least in legal terms controversial and hardly verifiable sixteenth century maps. Faced with four arbitrators who, not surprisingly, and pursuant to elaborate scholarly research, each of them submitted distinctly different propositions, Martens availed himself of his prerogative to draw up a line which, in his eyes at least, did justice to both parties. In this he succeeded incontestably as can be verified from many sources; both parties at the time were extremely pleased with the outcome.[117] Whether Martens based this opinion on legal grounds exclusively or that extra-legal considerations, be this based on common sense or diplomatic pressure also had their say is another matter. So much for certain, Martens, here as at all times, will have aimed - successfully in this case - at attaining a definite settlement of the dispute and at securing consensus. In doing so, he can be trusted to have remained well within the legal boundaries, but not necessarily to the exclusion of other considerations.

The lack of substantiation of the *Orinoco-award* may seem remarkable to us as contrary to prevailing practice. As Martens himself pointed out during a session in The Hague in 1907 it was well *belegt.* Be this as it may, Martens' views can easily be accounted for by reference to Martens' insistence on the outward appearance of harmony within the panel. For all we know, he did indeed consider this instrumental to the authority and general acceptance of the award. So much for certain, 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.

To conclude, to his day and age at least, Martens' prominence in this domain was perhaps best illustrated by the great mural *Les grands artisans de I'arbitrage,* which was produced in 1897 by

[115] Schoenrich, in: 43 AJIL (1949) at 523-30 and Nussbaum 1952 at 58-60.

[116] Child, in: 44 AJIL (1950) 682-693; Pustogarov 2000 at 202ff.

[117] Pustogarov 2000 at 206 refers a.o. to the honorary doctorate at Yale and Queen Victoria's explicit message of gratitude.

a French painter, Henri-Camille Danger, and which was on show at the 1898 Paris Salon.[118] A glorious survey of the advocates of arbitration world-wide and through the centuries, it is reminiscent of Raphael's *School of Athens* in the Vatican (1509). In it feature 106 personages, from Confucius, Isaiah, Aristides and the Amphyctionic judges, to St. Paul, Marcus Aurelius and Louis IX. They are escorted by peace leaders such as Erasmus, Henri IV and De Sully, Leibniz, Abbe de St.-Pierre, Kant and Bentham, and contemporary figures such as Dudley Field, Cleveland, Mancini, Passy and Von Suttner. In the centre are the dedicatee, Czar Alexander III, flanked by Count Orloff and - Feodor Martens. The huge panel was presented to the Czar.[119]

3. The Peace Palace[120]

In 1899 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 with an estimated capital of some US $ 480 million.[121] In an interview in September with the English journalist and pacifist William Stead - a prominent member of that colourful coterie of peace apostles at the Hague Conference that was headed by the Baronesss Von Suttner[122] - Carnegie mused on his "Gospel of Wealth" and how to embark upon that infinitely more complex task of distributing his amassed fortune to the benefit of the world. He welcomed any ideas that might help solve his "conundrum". In subsequent weeks, Stead interviewed a number of prominent public figures, Martens among them, as to their recommendations to the Scottish American. As early as November 1899 Martens suggested Carnegie's sponsoring of a proper Court House annex library of international law to serve the newly founded Permanent Court of Arbitration.[123] Initially, nothing came of it. In months following, PCA headquarters were established in the Hague city centre. They were lodged in fairly modest quarters. Clearly, the Dutch Government had not incurred the risk of investing too deeply in the uncertain undertaking of a first ever international institution.[124]

[118] - Eyffinger 1999 at 334-335.

[119] The mural has not yet been verified. It is known from a lithograph only, but reference to its location in the Imperial Historical Museum in Moscow is found in the papers of Henry Dunant in Geneva, the Nobel Institute in Oslo, and the Carnegie-Foundation in The Hague.

[120] See Lysen *History of the Carnegie Foundation* 1934 *(Bibl. Visser.* XXVIII) and Eyffinger *The Peace Palace* 1985.

[121] See Eyffinger 1988 at 37-47.

[122] See Eyffinger 1999 at 56-57 and 62-63 respectively. Bloch and Moscheles were other prominent members.

[123] The reconstruction can be made from a letter by Martens to Fried dated 13-01-1905. See Fried 1909 at 122; Lysen 1934 at 3ff.

[124] Lysen 1934 at 41ff.

In June 1900, by then a duly appointed member of the PC A, Martens paid a visit to an acquaintance of his, the then American ambassador to Berlin and former ambassador to St. Petersburg Andrew Dickson White, who had been his nation's first delegate at The Hague in 1899.[125] Knowing White to be an "old shoe" of Carnegie - the two had made a tour of the world together in the 1870s[126] - Martens intimated his wish to see a Court House built in The Hague which could serve as definite headquarters for the PCA and as a centre of studies. This venue should become the very symbol of internationalism and should likewise host any future Peace Conferences. White consented to approach Carnegie and in years following both White and Martens paid complimentary visits to Skibo Castle, Carnegie's castle in the Scottish Highlands to advocate the idea.[197]

In 1902, Martens was on the PCA panel of the *Pious Funds* case. On that occasion, he expressed his discontent with the all too modest housing of the Court, which he deemed utterly inadequate and poorly situated, in no uncertain terms.[128] By then, the joined endeavours of White, his colleague Frederick W. Holls, Andersen and Martens had finally awoken Carnegie's keen interest. In October 1902, when both Martens and White were bestowed a honorary doctorate at Oxford, the latter - whose health had become extremely fragile - implored Martens to once more advocate the idea with the millionaire.[129] In May 1903, in the very weeks Martens gravitated to The Hague to take up his task in the Venezuelan *Preferential Claims* case, his efforts finally bore fruit when Carnegie awarded US $ 1,5 million for the establishment of a "Temple of Peace".[130] The next month, a government-steered Dutch Carnegie Foundation embarked on its veritable tale of misery to implement the gift. A full eighteen months later, in December 1904, no progress had been made whatsoever. Some fifteen locations in The Hague had been amply considered and dismissed. Protests were raised from all quarters and it was widely recommended, also by Carnegie himself, to have the Palace transferred to Brussels.

At a loss what to do, the Board of the Carnegie Foundation finally settled for contracting a rather questionable spot, introduced a bill to Parliament to that end, and almost had the Royal Decree passed, when Martens once more visited The Hague to attend a meeting concerning an addition to the 1899 Hague Convention on the adaptation to maritime warfare of the principles of the

[125] Lysen 1934 at 3-5.

[126] Eyffinger 1988 at 42.

[127] That is, according to Prof, de Taube. See Lysen 1934 at 14-15.

[128] Lysen 1934 at 42ff.

[129] Lysen 1934 at 50.

[130] Eyffinger 1988 at 51-53.

Geneva Convention on Hospital Ships. Of his own accord Martens went visiting the allocated spot, was unable to locate it, went back with a native guide, 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 make the Board retrace its steps.[131] Astonishingly enough, this is what actually happened.[132] A few months later a new bill was passed allocating the Palace to its present spot. These were the very weeks of the Hull incident.[133] Within months Martens was to see another idea of his, that of the International Commissions of Inquiry gloriously pass a first test under the auspices of the PC A.

4. The Second Hague Peace Conference[134]

The skies were not to remain that blue for long. Within a year, Mukden, Tsushima Straits, the disbanding of the Douma and Bloody Sunday made Martens turn morose as to the future of his beloved country. Second to Count Witte he helped negotiate the Portsmouth Treaty, which he personally deemed a disgrace to Russia. Already we had occasion to mention that his appraisal was probably wrong here.[135] In 1906 Martens attended the Geneva Red Cross Conference, from there on to focus exclusively on the preparation of the Second Hague Peace Conference. As in 1899, it was not to be smooth sailing. For all his authority abroad, at home his peacock once more had to swallow endless humiliations.

Martens' preparation was hampered by various sources: lukewarm Petersburg officials, a wavering Czar, a change of Foreign Minister, and opposition to his person. Still, by January 1907, all dark clouds seemed dispelled when he set out on his prestigious tour of Europe to sound the Governments as to their views on the Conference Programme. His personal authority and the nature of his mission warranted official receptions wherever he came. Indeed, Wilhelm II, Edward VII, the French Prime-Minister, Queen Wilhelmina and Franz-Joseph all received him in personal audience. Martens comments in his diaries on these meetings with dignitaries make for great reading.[136] Criss-crossing Europe from Berlin to London and Paris, by early February and on his way to Vienna and Rome, he passed The Hague, were he was "fed from morning to night". Foreign Minister De Beaufort noted that Martens was in good health and

[131] Lysen 1934 at 81-84.

[132] ' Martens' was not an isolated protest, but may well have tipped the balance.

[133] ' Eyffinger 1999 at 445-47; Pustogarov 2000 at 28Iff.

[134] ' Pustogarov 2000 at 297-328.

[135] ' Pustogarov 2000 at 284ff.

[136] ' Pustogarov 2000 at 306-14.

spirit, but had definitely gained weight. Martens, on this meeting, showed himself fairly optimistic both as regards the domestic theatre - the prospects for the new Douma, which he expected to be more moderate than its predecessor - and regarding the Peace Conference.[137]

Martens was to be disillusioned on both accounts. In the end, and due not to any fault of his own, Martens' trip was not to be the success he had anticipated. He was duped by the *Wilhelmstrasse* and grinded between "Nicky and Willy".[1] Personal resentment at home at his international prominence invited obstructionism and caused ever new delays and irritation. Also, as compared to 1899, the skies over Europe had only darkened. All too high expectations for the Conference were definitely forestalled by the keen rivalry between Germany and Britain in matters of naval programmes. In London, Martens discussed the British wish for disarmament (while upholding its policy of "double supremacy") at some length with Lord Grey. Predictably, at The Hague, the mere discussion of British proposals for arms reduction was wrecked on a resolute German *Nein.*

Still, in June, at the opening of the Conference, Martens returned to The Hague outwardly 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 by as head of his nation's delegation in favour of Russia's ambassador in Paris, De Nelidov, otherwise a gentle and intelligent diplomat. Still, Martens took up his duties as before 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.[140] To start with, the Commission worked under a cloud: German-British rivalry and mutual suspicion as regards 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. His impatience started to affect his personal contacts. Also, as was plain to see, the Russian delegation

[137] *-Dagboeken De Beaufort* I (1874-1910), The Hague 1993 [RGP Small Series no. 73] at 373-74. According to Pustogarov (at 310) Martens stayed in The Hague from February 4-8. That will be according to the Russian calendar. De Beaufort's entries would rather suggest 17-21 February.

[138] Pustogarov 2000 at 311.

[139] Pustogarov 2000 at 309.

[140] Pustogarov 2000 at 314-28. For the *General Report* of the proceedings within the Commission see Scott *Proceedings* I at 233-69.

was utterly divided in much the same way as the American had been in 1899. Charykov undermined Martens' authority. As a consequence, and unlike in 1899, when his relationship with President de Staal had been exemplary, Martens had some skirmishes with De Nelidow and henceforward proceeded on his own authority. In doing so, he most unfortunately ignored susceptibilities of colleagues, introduced ill-prepared propositions, embarrassed intimates with his rigidity, entered fierce polemics with the inflammable Ruy 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 De Beaufort's diaries refer to his handling the American proposition regarding contrabande as to the "highly biased presentation" by "the most partial chairman I have ever seen".[141]

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[142]; to turn the PCA into a Standing Court with teeth and claws[143]; to enforce the finality of arbitration awards[144]; and to upgrade the role of Commissions of Inquiry and entwine these into the regular settlement procedure. He fought as a lion, one must grant him that.

As in 1899, Martens repeatedly, and in the most eloquent terms, declared himself a convinced opponent of the concept of revision as contrary to the very idea of arbitration. Curious enough, at one stage of the debate, he referred to a public letter directed to that effect to the Dutch Foreign Minister by the 1902 *Pious Funds* Arbitration panel.[145] In response, Beernaert and Choate militated strongly in favour of having the revision formula at hand in case new facts emerged or an apparent error on the part of the tribunal had come 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."[146] The debate reveals Martens' approach. More than anything, to him the instrument was an avenue to

[141] *Dagboeken De Beaufort* I at 388.

[142] Scott *Proceedings* II99,102,175,378,406-11 *etc.*

[143] *Ibid.* II619-701.

[144] *Ibid.* II 369ff.

[145] *Ibid.* II 369ff.; II 949ff.

[146] *Ibid.* II 369-371. Cf. also Wehberg 1910 at 349: "internationale Schiedsgerichtsbarkeit...is..nicht lediglich, wie v. Martens einmal sagte, "Aus-der-Weltschaffung von Streitigkeiten."

settle dispute and secure peace. Revision, in his eyes, would open the way for politicians to "perpetuate" dispute and 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.[147]

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, still taken somewhat unaware in 1899, for all their disagreements, easily agreed on setting strict boundaries to these innovative mechanisms which, for all their intransparancies, were sure to intrude on their sovereignty. At this stage, the Standing Court of Arbitration and the Prize Court, for all the rhetoric, were not to be, whatever stratagem, fallacy, or sophism this would take. It was to be left to the Killing Fields of Flanders and a new generation to break this deadlock. Only, Martens could not wait that long.

Clearly, as a tactician Martens was not at his best these months. Did he anticipate that this was to be his last stand? At all accounts, his pressure on delegates, not just to come to terms, but on *his* terms, backfired on his prestige. On 10 October reference is made by De Beaufort to the concluding session of the First Commission on obligatory arbitration and Martens' extreme clumsiness in advocating what he presented as a Russian conciliatory proposition. In fact he had concocted the idea with Bourgeois and the French delegation without ever consulting De Nelidow or for that matter the German delegation. Much to the fury of Kriege, who observed: "Wir sind furchtbar gereizt, eine Katastrophe ist sehr nahe." Already on an earlier occasion the German first delegate Marschall von Bieberstein had argued most categorically, that "Libertas" was the cornerstone of arbitration.[148] In the end, Martens was forced to withdraw his proposition for lack of support.[149]

This kind of surprise attack was an error of judgement which was typical, it would seem, of Martens' obstinacy in his later years to secure results at all costs and enforce structural progress in the face of opposition. His proposition with respect to the law of prize laboured from similar defects. As Wehberg observes, the previous year, when attending the Geneva Red Cross Conference in Geneva, Martens had made a much similar counter-productive move in proposing the

[147] Scott *Proceedings* II 364ff.

[148] *Ibid.* II371.

[149] *Dagboeken De Beaufort* I at 408-11. As the Dutch Minister comments: "The clumsiness of Martens' defence was positively astounding. Repeatedly this most able and learned man attests to his failing policy in handling matters. I presume that, as a Russian, he is wont to address people of limited education and servile attitude and is therefore encouraged to submit propositions whose deeper purpose is crystal-clear to all and sundry at the Conference, in spite of all his sophisms." On the issue see Scott *Proceedings* II 134-40, 165-77, 904-05. De Beaufort's diaries also make reference to Martens' involvement with the Prize Court (at 400-01).

unaware delegates that all disputes on the interpretation of the Convention were to be submitted automatically to the PCA. However, as Pustogarov maintains, on Martens' part, this move was precisely meant to sound the feasibility of the idea in anticipation of the Hague Conference.[150]

Meanwhile, the above proposition recalls the much similar procedure Martens proposed in 1907 with respect to his brain-child, the Commissions of Inquiry, which had so eminently served their purpose on the occasion of the Hull-incident.[151] In case of a stalemate or failure of this mechanism, Martens argued at The Hague, 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. Again, the praiseworthy objective of this "double tie" as Martens called it, was to enhance the effectiveness of the 1899 convention.[152] However, his insisting on the "moral duty" of the Conference to comply with these proposals merely caused irritation, and it is hard to decide whether Martens was actually blind for the objections raised from many quarters or simply wished to have it his way.[153]

In tirelessly advocating his various propositions, Martens voiced his firm conviction that arbitration was meant to put an end to disputes between sovereign nations. All his arguments were aimed at this goal and inter-linked thereto: they were presented by him as a package deal. Making allowances for the obstruction from diplomats and the military class, it must have been a truly sobering experience to him that very few of his convictions were shared unrestrictedly by his legal colleagues from the *Institut.* Arbitration was generally viewed as first and foremost an instrument of law. Martens' views made him liable to the reproach of considering arbitration panels as political rather than legal institutions. Merely settling conflict without a solid legal basis, it was widely argued, was to prompt ever new disputes. Martens ended up in the cross-fire.

Be this as it may, one cannot but admire Martens' repeated efforts for what he saw as the best avenue ahead. In retrospect, one may perhaps evaluate Martens' approach as an effort to firmly implant the new mechanisms and institutions into the social life of his times and thereby break away from 19th century diplomacy, whithout bothering too much with legal niceties which, in his view, could be optimized once the instruments had been generally accepted. As the following decades and the ongoing work of the *Institut* which culminated in the 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 adjudic-

[150] Wehberg 1910 at 346; Pustogarov 2000 at 302.

[151] Scott *Proceedings* II 222ff.

[152] Cf. Wehberg 1910 at 347.

[153] Scott *Proceedings* II18-219,223,380-404.

ation 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.

Martens' behaviour in The Hague was perhaps typical of the concluding days of his career, when he lost grip on affairs and saw his ideals slipping away. Faced with the inexorable, all his charms seemed to evaporate. His heavy-handed attempts at the jocund never made a head-way. His power of persuasion turned into stubborn rigidity and intimate friends saw, much to their regret, the former master of compromise give way to the pedant wiseacre. Although being incessantly implored by relatives at home to return before August, he 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.[154] In the final analysis, most of what he advocated in 1907, if visionary, was premature and had to await a future generation. Some ideas were counter-productive and have been distinctly belied by time.

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.[155] 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. Such as his opening speech in the Fourth Commission on June 24 with reference to Paul's address at the Areopagus in Athens and the altar of the "Unknown God".

"Methinks that in that 'Huis ten Bosch', in that chamber filled with magnificent paintings, there also stood an altar, above which I did not read the inscription stating that it was sacred to the "Unknown God." No, I saw emblazoned the inscription that that altar was sacred to the "God of Right, of Justice, and of Peace. This God [...] was not an "Unknown God" to the members of the First Conference. No, he possessed their souls and was rooted in their hearts. [...] The Fourth Commission will keep this altar in sight and will draw its inspiration.. ,"[156]

[154]' Cf.Wehberg 1910 at 357: "Aber auch auf der zweiten Friedenskonferenz muss man sinen hohen Eifer und seine unermiidliche Tatigkeit fur den Fortschritt hoch einschatzen. Schon lange vor Schluss der Konferenz solte er wegen seines Leidens abreisen, aber er hielt standhaft auf seinem Posten aus."

[155]' Scott *Proceedings* 1333-35; III 741-43; III 913-15. Cf. Wehberg 1910 at 351: "Aber trotzdem glaube ich, dass v. Martens, der in seinem Leben auch dichterisch hervorgetreten ist und sich bei seinen Reden gewiss oft selbst an dem Schwunge seiner eigenen Worte hat berauschen wollen, dennoch in seinem Herzen .. .fest Ueberzeugt war."

[156]. Scott *Proceedings* III 741-43. The theme, incidentally, was a favourite of Hugo Grotius who, still a youngster, rendered the text into a Latin poetical paraphrasis.

Or his reference in the First Commission to the great ideals of mankind:

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. *(Prolonged Applause)*[151]

Or, to turn from the public to the private domain, Martens' personal tribute to Leon Bourgeois and the latter's "understanding of heart":

"Intelligence by itself can command and even reign. But intelligence without heart will never form lasting bonds and friendships which give warmth and beauty to life."[158]

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 Martens, at his best, countered legalism with ethics and his "intelligence de coeur". And whenever arbitration or humanitarian issues were at stake, Martens was invariably at his very best.

5. Epilogue

When Martens left The Hague it was full of anticipation 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 first stone that summer. It was not to be. The end came in 1909. Desillusion no doubt played its part in the decline. Raised in Pobedonosef s doctrine of strictest autocracy and orthodoxy, the Western-oriented Martens was very critical of the wide-spread illiteracy and obscurantism in Russia. While urging for acute social reform, he anticipated mere

[157]' Scott *Proceedings 1*328

[158]' Ibid. 1334.

chaos from socialism.[159] Martens eagerly awaited an enlightened, law-abiding Czar to tread in the footsteps of Alexander II. Initially cherishing high expectations of Nicholas II, he was soon to be disillusioned. Bloody Sunday and the disbanding of the Douma had left him shattered.

F.F. Martens was a man of strong character, enormous will-power, and an independent mind. He was an energetic organiser and an inspiring teacher. He was a scholar of imposing, though somewhat ponderous erudi tion and, although not blessed with the intuitive fifth sense of the true-born diplomat, he was a versatile and able negotiator. Martens felt perfectly at home in the international arena, indeed perhaps better so than in ministerial circles at home. Whatever Martens' shortcomings in terms of character or mistaken convictions, to his day and age he made a difference, more so indeed than many more cautious and circumspect colleagues, more so too than the specialists who clung within the precinct of a single discipline. Martens' essentially interdisciplinary, social approach was the outcome of his many academic, official, and practical commitments. It lent him an outlook on his contemporary world, which was relatively rare to the point of giving rise to misunderstanding.

Whatever the debts of St. Petersburg, The Hague is infinitely indebted to this true architect of the *Oeuvre de la Hccye.* One may summarize his achievements this way. If not for Martens, no Peace Conference would ever have taken place in The Hague. And if so, if not for Martens it would not have been properly organized. And if so, if not for Martens, it would not have included the issue of arbitration. And if so, if not for Martens it would not have ensued in the constituting of the PCA. And if so, if not for Martens, the idea of a Peace Palace would never have risen. And if so, if not for Martens, it would not have been established on its present location. To The Hague at least, Feodor Martens made all the difference.

We have come full circle - and Professor Holland, whom we met at the opening of our quest, is awaiting us. It is time to reveal the secret hidden in his three majestic words "Magnus vir cecidit". Holland, needless to say, knew his classics. The words are taken from Seneca's *Moral Essays* - these gems of wisdom so recommended to all lawyers by Hugo Grotius himself.[160] In

[159] In his 1882 treatise Martens named all revolutionaries indiscriminately "anarchists" and "dynamiters" who threatened legal order within Russia and abroad. See Puistogarov 2000 at 36, with referenc to the 1882 treatise at 162-80, 381-417.

[160] Hugo Grotius in a letter to B. Aubery du Maurier dated 13 May 1615 [copy Paris, Bibl. Nat., Fonds Dupuy 16 f. 93], See *Briefwisseling Hugo Grotius,* Vol. 1, ed. Molhuysen, The Hague 1928, at 384ff. The letter was published separately in 1626 as *De studiis instituendis.* See Reeves, "Grotius on the Training of Ambassadors', in 23 *AJIL* (1929) 619-625.

his *Essay to Helvia on Consolation*[161], Seneca recalls the death of Aristides, that epitome of virtue.[162] The wider context of Professor Holland's quote is reproduced here as a fitting tribute:

At Athens, when Aristides was being led to death, everyone who met him would cast down his eyes and groan, feeling that it was not merely a just man, but Justice herself who was being doomed to die; yet one man was found who spat in his face... [...] I know that there are some who say that nothing is harder to bear than scorn, that death itself seems more desirable to them. To these I will reply that even exile is often free from any mark of scorn. If a great man falls, though prostrate, he is still great - men no more scorn him, I say, than they tread upon the fallen walls of a temple, which the devout still revere as deeply as when they were standing...[163]

Holland himself had locked horns with his colleague on various occasions, stag versus stag one may say. But he for one never failed to see the true stature of Feodor Martens.

161. Seneca, *Moral Essays* [Dialogi], lib. xii: *AdHelviam Matrem, De Consolatione.*

162 Aristides (fl. first part 5th c. B.C.), Athenian statesman of proverbial honesty from the days of Salamis.

163' Sen. *Helv. Cons,* xiii.8. The passus reads: "Si magnus vir cecidit, magnus iacuit, non magis ilium contemni, quam aedium sacrarum ruinae calcantur, quas religiosi aeque ac stantis adorant." Translation J.W. Basore (1932) in *Loeb Classical Library* Vol. 254, Cambridge, Ma. / London 1970 at 464ff.