

# Friedrich von Martens: A Great International Lawyer from Pärnu

By Dieter Fleck\*

**N**ext year, in 2005, a centenary after Friedrich von Martens' official retirement from an excellent diplomatic and academic career in St. Petersburg and 160 years after his birth in Pärnu in 1845, the international community will have good reasons again to commemorate this great international lawyer whose wisdom, creative spirit and loyalty has indebted the mighty and encouraged the weak.

His lasting contribution to the development of international law cannot be overestimated. But many of his important activities have fallen into oblivion.

Hence I was amazed, during one of my recent visits in Tallinn, to learn about Lauri Almann's excellent idea to make Jaan Kross' novel "Professor Martens' Departure"<sup>1</sup> mandatory reading for his international law course. This great piece of literature, although not meant as exact historical source, gives an excellent insight in Martens' life and work and can be strongly recommended to law students not only in Estonia.

Friedrich Fromhold Martens was born on 27 August (15 August old style) 1845 as son of a tailor. Having lost both his



**Friedrich von Martens**

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parents at the age of nine, he was sent to a Lutheran orphanage in St. Petersburg where he completed the full course of studies at a German high school. In 1863 he entered the law faculty of St. Petersburg University, soon caught the attention of his professors and started a brilliant academic career. After four years of service in the Russian foreign ministry, Martens taught public law at St. Petersburg University from 1872 to 1905. The themes of his publications include the right of private property in war (1869), the goals of contemporary international law (1871), the law of consular jurisdiction in the Orient (1874), the Russian policy towards the Ottoman Empire (1877), the expansion of Russia and Great Britain in Central Asia (1879), and the Berlin conference of 1884-85 in which European spheres of interest in Africa, the Middle East, China and the Pacific had been rearranged. Martens's standard textbook of the contemporary international law of civilised nations was first published in 1882 and translated into many languages. From 1874-1909 he edited the ambitious

“Recueil des traités et conventions conclus par la Russie”, a work in 15 volumes – four volumes on Russian treaties with Austria (1648-1877), four with Germany (1659-1888), four with Great Britain (1710-1895), and the remaining three with France (1717-1906), each printed in Russian and French in parallel columns, which not only contain the texts of treaties between Russia and other states but also offer inside explanations on the historical background and diplomatic conditions of their conclusion.

Martens was instrumental in practical negotiations at many diplomatic conferences. Impressive was his role as a renowned arbitrator in disputes such as between Great Britain and France over Newfoundland (1891), Great Britain and Holland on the imprisonment of a British subject by Dutch authorities (1892), and Great Britain and Venezuela on the Orinoco river basin (1899). For the latter case he developed a code of arbitration which was later used as a model for the code elaborated at the First Hague Peace Conference. In the newly created

Permanent Court of Arbitration, Martens was involved in the settlement of the Mexican-US dispute (1902). He was also instrumental in the negotiations of the Russo-Japanese peace treaty of Portsmouth, N.H. (1905).

Martens acted as a Russian delegate at nearly all International Red Cross Conferences since 1884. At the First Hague Peace Conference in 1899 he was elected President of the Second Commission which dealt with the 1874 Declaration of Brussels (concerning the laws and customs of war on land) and with the Red Cross in time of naval war. In the Second Peace Conference in 1907 he served as President of the Fourth Commission, that on maritime law, which was a task particularly sensitive due to the Anglo-German rivalry in this field.

There are some surprising similarities with the life and work of another self-made man who had lived one century before. They are worth being mentioned here, although no family relationship exists: Georg Friedrich von Martens (1756-1821) from Hamburg, became professor

of law in Göttingen in 1783. He was ennobled in 1789, served as a counsellor of state by the Prince Elector of Hanover since 1808, was appointed as President of the financial section of the council of state of the Kingdom of Westphalia in 1810, and a privy cabinet councillor (Geheimer Kabinettsrat) by the King of Hanover since 1814. This Martens was the editor of another famous collection of treaties (Recueils des Traités), which was later continued by his nephew Karl von Martens and numerous later scholars, covering international treaties from 1761 onwards, until 1944.

While I always looked at efforts in paying tribute to Friedrich von Martens as a noble competition in which Estonians, Russians, Germans and the Red Cross have a privileged role to play, we know from Jaan Kross' famous novel that German cultural roots were not dominating Martens' life and work. He was brought up in St. Petersburg, ennobled by the Tsar<sup>2</sup>, and was never registered in the matricles of the knightage of Livonia (Livländische Ritterschaft) or one of the other three

knightages (that is of Estonia, Courland and the Isle of Ösel/Saaremaa), which were all German at the time. One can imagine that his contributions at the Hague Peace Conferences might not have always been vigorously supported by the German delegation, although he was on excellent terms with General von Voigt-Reetz and other German delegates since the Brussels conference in 1874.

Martens was a true internationalist of his time. His academic and diplomatic standing was widely recognised. In his capacity as a renowned international lawyer he had soon become an active Member of the Institut de Droit International, where he authored projects on consular jurisdiction in the Orient (Munich 1883) and a convention on the publication of international treaties (Geneva 1892). He received honorary degrees from universities such as Oxford, Cambridge and Yale and was granted membership of the prestigious Institut de France. For his services as arbitrator there had been conferred upon him the most honourable title, 'Lord Chief Justice of Christendom'. In

1902 he came very close to receiving a Nobel Peace Prize. He died in St. Petersburg on 20 June (7 June old style) 1909.

Until today, his influence on the application and further development of the law of armed conflict is connected with the "Martens' Clause" which, indeed, forms "part of the absolute core of knowledge which all legal experts interested in international humanitarian law must possess"<sup>3</sup>. This clause was developed in a conciliation process in the Second Commission at the 1899 Hague Conference, when a group of smaller powers led by Belgium did not agree with the majority on the rights and duties of armies of occupation, but demanded an unlimited right of resistance for the population of occupied territories. Martens proposed to include in the Preamble of the Hague Convention Respecting the Laws and Customs of War on Land the following:

"Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and

belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the dictates of the public conscience”.

This proposal was greeted by applause, and the Convention to which the Hague Regulations Respecting the Laws and Customs of War on Land were annexed, was adopted unanimously<sup>4</sup>. In fact, in the dispute which was solved by Professor Martens with such elegance, no concessions were made as to the full application of legal rules: the rights and duties of armies of occupation were fully incorporated in Section III of the Hague Regulations (Military Authority Over the Territory of the Hostile State),<sup>5</sup> and no combatant rights were accepted for resistance fighters once military occupation was established.

In his own written accounts of the First Hague Peace Conference, Martens did not mention this important personal contribution to the outcome and final success of the multilateral negotiations. In the first publication for American readership<sup>6</sup>, he

rather emphasised the conference achievements for international arbitration, not without referring to the landmark development of the *ius in bello* which had been achieved at The Hague. He expressly stated that the Second Commission of the conference (which he had chaired) had accomplished its task in full. But the main parts of his report were focussing on the possibilities for peaceful settlement of disputes by arbitration which he considered as a realistic option, worth being pursued with the greatest efforts. Martens underlined the importance of the 1899 conference in comparison with similar events in the 19th century. In his opinion, the Congress of Vienna in 1815 had left no leading provision concerning the political interests and the territorial rights of nations which was still in force, except for “a few provisions which concern navigation of international streams and the declaration that the slave-trade is abolished forever”. The Congress of Paris of 1856, by which the Crimean war was ended, had left nothing behind which tends to the pacific and progressive development of

international relations, except for rearranging the status quo in Turkey and the famous declaration on maritime law. The Congress in Berlin 1878 “had in view nothing but the political interests of the [participating] nations, and political interests change and develop under the influence of circumstances, of time and the prejudices of the nations”. The 1899 Conference at The Hague, however, “will ever remain the foundation, the corner-stone, of every useful attempt made towards the establishment of normal and peaceful relations between the nations, and of creating an order of things more in conformity with the permanent and legitimate interest of the nations independent of the transitory aspirations of statesmen”<sup>7</sup>.

One year later, Martens published a book on the history of the First Hague Peace Conference<sup>8</sup> in which such ideas were further pursued, but again no reference to the Martens Clause was made. Another year later, his voluminous book on the 1874 Brussels Conference and the First Hague Peace Conference was published<sup>9</sup>. Here Martens gave a detailed ac-

count of his role as President of the Second Commission and in extenso reproduced statements he had made both at the beginning and the end of that conference in which he had eloquently expressed himself against any temptation to let the interests of power triumph over humanity. He argued in favour of clear and unequivocal interpretations and even raised the question as to who would profit more from doubts and incertitude: the weak or the powerful? Again he did not dwell on the preamble provision of the Hague Convention Respecting the Laws and Customs of War on Land which he himself may have looked at as an episode. But he strongly underlined one of the driving ideas behind all activities of developing the laws of war: 'Si la limitation des armements n'est pas décidée, ne doit-on pas au moins atténuer l'usage et les effets désastreux de certaines armes au cours des guerres entre nations civilisées?'<sup>10</sup>

The Martens Clause, however, was confirmed at the Second Peace Conference in 1907,<sup>11</sup> and, as soon as international cooperation on further developing Hague

law could be resumed after two world wars and many other conflicts in the 20th century, the legal community has again put new emphasis to Martens' approach of securing compromise solutions without excluding further resort to principles of international law, deriving from established custom, principles of humanity and the dictates of public conscience. In Nuremberg the Martens Clause was invoked in response to assertions that the Nuremberg Charter, as applied by the tribunals, constituted retroactive penal legislation and that deportation of inhabitants of occupied territories was prohibited by, and constituted a crime under customary law<sup>12</sup>. In the Krupp Trial (1948), the United States Military Tribunal declared that the Martens Clause was much more than "a pious declaration" but rather an element of "the legal yardstick to be applied if and when the specific provisions of the [Hague] Convention and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare"<sup>13</sup>. Elements of the Martens Clause had been recognised al-

ready in Articles 63/62/142/158 respectively of the four Geneva Conventions of 1949, which provide that any "denunciation shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience".

On the background of this legal development it was important to also reaffirm the Martens Clause in the Additional Protocols of the Geneva Conventions which finally achieved the task to bring Hague law and Geneva law closely together. I still remember my participation as a young delegate at the 1973 Red Cross Conference in Teheran: when I was given the floor by the conference President, Jean S. Pictet, I proposed to revive the famous Martens Clause in the forthcoming text of the Additional Protocols of the Geneva Conventions. My reference, speaking as a Western German, to the outstanding 'Russian' delegate at the Hague Peace Confer-

ences in 1899 and 1907 was met with some surprise in the Soviet delegation in 1973, but the proposal was generously supported and later incorporated in Art. 1 (2) of AP I<sup>14</sup> and the Preamble (para. 4) of AP II<sup>15</sup>.

It has been observed that the language of AP I “may have deprived the Martens Clause of its intrinsic coherence and legal logic: by replacing ‘usages’ with ‘established custom’ the Protocol conflates the emerging product (principles of international law) with one of its component factors (established custom) and raises questions about the function, role, and necessity of the uncodified principles of humanity and dictates of public conscience. The original wording had a coherence that the Protocol lacks. It is not at all clear that this result was intended or realized by its drafters.”<sup>16</sup> Indeed, no such limitation was intended in these negotiations, and a strict linguistic approach should not obscure the policy effects that were pursued and finally reached at the Diplomatic Conference.

The developments during the last three decades show that Martens’ famous clause

has vigorously supported the adoption of further international instruments, such as the 1980 Convention on Certain Conventional Weapons<sup>17</sup> (which incorporated the clause in the Preamble para. 5), the 1995 prohibition of anti-personnel laser weapons<sup>18</sup>, the 1997 prohibition of anti-personnel land mines<sup>19</sup> and the 1998 Rome Statute of the International Criminal Court<sup>20</sup>. Without the Martens Clause many issues would have led to long controversies which might have stalled the negotiations. The Clause points to the fact that conventional law is imperfect and further improvements have to be achieved in the light of general principles and custom. By this it has proved the French wisdom that ‘il n’y a plus permanent que le provisoire’<sup>21</sup>. But the contents of the clause, highly important as it is, must not be over-interpreted.

For the interpretation of the Martens Clause, three different aspects have been mentioned in legal literature<sup>22</sup>: the Clause first serves as a reminder that customary international law continues to apply after adoption of a treaty norm<sup>23</sup>. In a broader

sense, the Clause provides that something that is not explicitly prohibited by a treaty is not *ipso facto* permitted<sup>24</sup>. The Clause is also phrased dynamically so as to support the opinion that conduct in armed conflicts is not only judged according to treaties but as well to the principles of “natural law” as expressed by international law derived from established custom, from the principles of humanity or from the dictates of public conscience, thus resulting from any of these sources or from their combined significance<sup>25</sup>. To consider these different interpretations as being exclusive of each other, would be less than convincing. All three aspects may well be supplementing each other. But as Christopher Greenwood had explained<sup>26</sup>, the public conscience is too vague a concept to be used as the exclusive basis for a prohibition of specific means or methods of combat.

This latter aspect was extensively discussed by the International Court of Justice in its Advisory Opinion on the legality of the threat or use of nuclear weapons<sup>27</sup>, after intensive debate in literature in which many arguments used by the

Court had in fact been anticipated<sup>28</sup>. In its Opinion the Court referred to the Martens Clause as “an effective means of addressing the rapid evolution of military technology” without, however, drawing specific conclusions from such assessment<sup>29</sup>. In view of controversial state submissions, in particular by Australia, Japan, Nauru, the Russian Federation, and the United Kingdom, the argument was not driven any further. However, Judges Koroma, Shahabuddeen, and Weeramantry in their dissenting opinions offered interesting insight in the meaning of the Clause and its significance.

The forthcoming ICRC study on customary international humanitarian law is influenced by Martens' underlying ideas as much as my own project in the International Institute of Humanitarian Law, San Remo<sup>30</sup>, which is designed to develop a Manual on the Protection of Victims of Non-international Armed Conflicts<sup>31</sup>.

The impressive personality of Friedrich von Martens, his strong involvement in many international activities which went far beyond Russian foreign policy of his time, and his lasting contribution to in-

ternational rules concerning the peaceful settlement of disputes and humanitarian protection of the weak are worth being remembered as a great service to mankind.

<sup>1</sup> Jaan Kross, Professor Martensi äräsõit, Tallinn 1984 [Le départ du professeur Martens, Paris 1990; Professor Martens' Departure, Tallinn 1994; Уход Профессора Мартенса, Moscow 1996; Professor Martens' Abreise, Hamburg 2002].

<sup>2</sup> The date and circumstances of this ennoblement are difficult to trace. While it is undisputed that he called himself and was referred to as ‘von’ or ‘de’ Martens in publications since the early 1870s, this title might have been bestowed upon him either with one of the more distinguished Russian Orders, or simply with his appointment as a full professor. His social advancement was the more remarkable, as it was exclusively based on his professional merits.

<sup>3</sup> International Review of the Red Cross N° 317, 1997, Note from the Editor, Dr. Hans-Peter Gasser, p. 124.

<sup>4</sup> Vladimir Pustogarov, Fyodor Fyodorovich Martens (1845-1909) a humanist of modern times, in: International Review of the Red Cross, No 312, 1996, pp. 300-14 [310-11]. Professor Vladimir V. Poustogarov was awarded the Martens Prize of the Russian Academy of Science in 1996. He also published a biography on F. Martens (Пустогаров, В.В., “С пальмовой ветвью мира: Ф. Ф. Мартенс – юрист, дипломат,

публицист”, Moscow, 1993) in which reference is made to the Estonian biography by E. Rahumaa and P. Järvelaid, #; Фридрих Фромголд (Фёдор Фёдорович) Мартенс и юристы Татурского университета, Tartu ülikooli teaduslikud sidemed, XVI, Tartu 1985.

<sup>5</sup> This Section of the Hague Regulations has been replaced by the IVth Geneva Convention of 1949.

<sup>6</sup> F. de Martens, International Arbitration and the Peace Conference at The Hague, in: The North American Review, Vol. CLXIX, N° 516 (1899), 605-24 [http://cdl.library.cornell.edu/ Cornell University Making of America].

<sup>7</sup> Ibid. pp. 622-3.

<sup>8</sup> F. de Martens, La Conférence de la Paix à La Haye. Etude d'histoire contemporaine, traduit du russe par M. le Comte de Sancé (Paris 1900).

<sup>9</sup> F. de Martens, La Paix et la Guerre. La Conférence de Bruxelles 1874, Droit et devoirs des belligérants (leur application pendant la guerre d'Orient 1874-1878), La Conférence de La Haye 1899. Traduit du russe par M. L. Comte N. De Sancé (Paris 1901).

<sup>10</sup> Ibid., p. vi.

<sup>11</sup> The slightly revised version of 1907 reads: “Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public con-

science.” Again, no particular reference by Martens as to the reaffirmation and significance of this clause in 1907 can be found. However, at the last meeting of the Fourth Commission on 26 September 1907 he was reported to summarise its achievements in the following terms: “If from the days of antiquity to our own time people have been repeating the Roman adage ‘Inter arma silent leges’, we have loudly proclaimed ‘Inter arma vivunt leges’. This is the greatest triumph of law and justice over brute force and the necessities of war.” (J.B.Scott, *The Conference of 1907, The Proceedings of the Hague Peace Conferences, 1921, Vol. III*, p. 914.

<sup>12</sup> Altstötter, 6 Law Reports of Trials of War Criminals, 40 [58-59].

<sup>13</sup> Krupp 10 Law Reports of Trials of War Criminals, 69 [133]. Erroneously, in this judgment the Martens Clause was referred to the „Belgian delegate, Martens“, but there was no Belgian delegate of this name at the Hague Peace Conference.

<sup>14</sup> Art. 1 (2) 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts [[www.cicr.org/ihl](http://www.cicr.org/ihl)] (AP I): “In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.”

<sup>15</sup> Preamble (para. 4) 1977 Geneva Protocol II Additional to the Geneva Conventions of 12

August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts [[www.cicr.org/ihl](http://www.cicr.org/ihl)] (AP II): „Recalling that in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience“.

<sup>16</sup> Theodor Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, in 94 *AJIL* (2000), 78-89.

<sup>17</sup> 1980 UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects [[www.cicr.org/ihl](http://www.cicr.org/ihl)].

<sup>18</sup> 1995 Protocol IV on Blinding Laser Weapons to the UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects [[www.cicr.org/ihl](http://www.cicr.org/ihl)].

<sup>19</sup> 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction [[www.cicr.org/ihl](http://www.cicr.org/ihl)].

<sup>20</sup> 1998 Rome Statute of the International Criminal Court [[www.un.org/law/icc/statute](http://www.un.org/law/icc/statute), [www.iccnw.org](http://www.iccnw.org)].

<sup>21</sup> George H. Aldrich and Christine M. Chinkin, *A Century of Achievement and Unfinished Work*, in: 94 *AJIL* (2000), 90-98 [97].

<sup>22</sup> Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, in: *International Review of the Red Cross*, No 317, 1997, pp. 125-134.

<sup>23</sup> Christopher Greenwood, „Historical Development and Legal Basis“, in: Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, reprint Oxford 1999, p. 128-9.

<sup>24</sup> Bruno Zimmermann in: Yves Sandoz, Christophe Swinarski, Bruno Zimmermann (eds.), *Commentary to the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva 1987, p. 39.

<sup>25</sup> Helmut Strebel, *Martens’ Clause*, in: Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 3 (1997), pp. 326-327; Theodor Meron, loc. cit. (supra, note 16).

<sup>26</sup> Supra (note 23).

<sup>27</sup> ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, 226; 35 *ILM* 809 (1996), [[www.icj-cij.org/icjwww/idecisions.htm](http://www.icj-cij.org/icjwww/idecisions.htm)].

<sup>28</sup> Fr. Münch, *Die Martens’sche Klausel und die Grundlagen des Völkerrechts*, in: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 36 (1976), pp. 347-73; Shigeki Miyazaki, *The Martens Clause and international humanitarian law*, in: Christophe Swinarski, *Studies and essays on international humanitarian law and Red Cross principles in honour of Jean Pictet*, Geneva-The Hague 1984, pp. 433-44; Nagendra Singh and E. McWhinney, *Nuclear Weapons and Contemporary International Law*, 2nd ed. Dordrecht 1989, pp. 46-47.

<sup>29</sup> Supra (note 27), para. 78.

<sup>30</sup> See [www.ihl.org](http://www.ihl.org).

<sup>31</sup> Tentative Text available through the author, DieterFleck@t-online.de.