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# The Enactment of Irony: Reflections on the Origins of the Martens Clause

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## Abstract

*The Martens clause has made F. F. Martens one of the 'household names of our profession'. Since its first appearance in the preamble to the 1899 Hague Convention (II) on the Laws and Customs of War on Land, the clause has incessantly been puzzled over, historicized, celebrated, and re-enacted. Much of the extant discourse, however, is geared towards normative construction of the clause. This article, by contrast, seeks to depart from normative construction of the clause and draw attention, instead, to the discourse it has generated. To facilitate discursive exploration and demonstrate its pertinence, I offer a critical reading of the clause's origins as the enactment of an irony. Thus, the making of the clause saw words used to express something in the opposite of their literal meaning. In time, the clause itself came to represent that which is entirely the opposite of what it was first used for. These and other ironies underpin how the clause itself, its making, and Martens' role therein are interpreted, historicized, and celebrated today. They also pave the way for critical explorations of the clause's epistemic significance.*

They'll run a proper little essay about me. I'd be willing to bet on it. *A great peacemaker*, or something in that vein ... Ridiculous, isn't it. I feel ironic about them in advance – and they will be ironic about me in retrospect. Inevitably. They'll be ironic about me, about Russia, and about both, because they won't be able to comment on my loyalty without irony.

J. Kross, *Professor Martens' Departure*, at 131

## 1 Professor Martens' Silence

At our point of departure, there is frustration. Which is meant to say that Jaan Kross's *Professor Marten's Departure* leaves those who engage in the practice, study,

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and teaching of international humanitarian law (IHL) somewhat dissatisfied. After all, Martens' claim to recognition and fame comes from his contribution to the laws of war, as it was then called. What makes Martens one of the 'household names of our profession'<sup>1</sup> is the eponymous treaty clause – the ninth paragraph of the preamble to the Hague Convention II of 1899 – and its later reincarnations:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.<sup>2</sup>

Kross provides a series of imagined yet mesmerizing retrospections by the ageing Martens on his life and career; he exposes the tensions of class, ethnicity, and identity underlying Martens' life and his work. Kross' historical fiction, based on 'scrupulous research and fidelity to actual events',<sup>3</sup> explores the ambitions driving Martens and the disappointments besetting him, in private as well as in his public life. These frequently belie the hagiographic qualities of much that is written about Martens and his contribution to the causes of international law.<sup>4</sup> Through personal footnotes to the history of Russia and the world in the last days of the Romanovs – the Russo-Japanese War, the 1905 Revolution, the Venezuela Arbitration,<sup>5</sup> and the great law conferences of the end of the long 19th Century – Kross makes Martens reflect on the promise and pitfalls of the emergent international legal profession, its use, and its abuse. Yet through all this, not a word on the clause by which we now know Martens' name.

Is this silence instructive? Perhaps. Though Martens received credit for authoring the preamble to Convention II even before the Hague Peace Conference was concluded,<sup>6</sup> he never claimed credit, as Dieter Fleck demonstrated, for authoring the clause in the various texts he subsequently published on the proceedings of the Hague

<sup>1</sup> Bilder and Butler, 'Professor Martens' Departure by Jaan Kross, Book Review', 88 *AJIL* (1994) 863, at 864.

<sup>2</sup> Preamble, Convention No. II with Respect to the Laws and Customs of War on Land, with annex of Regulations, 29 July 1899, 32 *Stat.* 1803, 1 *Bevans.* 247; Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?', 11 *EJIL* (2000) 187, at 188 thus notes that Martens' name 'is inextricably bound up with the clause, whilst all his other diplomatic achievements or scholarly works have fallen into obscurity'.

<sup>3</sup> Bilder and Butler, *supra* note 1, at 864.

<sup>4</sup> Celebratory references are common in the Martens literature. Consider the titles used by his biographer: V.V. Pustogarov, *Our Martens: E E Martens – International Lawyer and Architect of Peace* (trans. W.E. Butler, 2000); Pustogarov, 'Fyodor Fyodorovich Martens (1845–1909): A Humanist of Modern Time', 312 *IRRC* (1996) 300, at 304 (man of 'sublime humanism'). See also Pustogarov, 'The Martens Clause in International Law', 1 *J Hist Int'l L* (1999) 125. On hagiographic qualities of IHL historiography see Giladi, 'Rites of Affirmation: Progress and Immanence in International Humanitarian Law Historiography' (unpublished manuscript).

<sup>5</sup> Cf. *infra* note 110.

<sup>6</sup> Renault, in *The Proceedings of The Hague Peace Conferences Translation of the Official Texts* (ed. J.B. Scott, 1920) [hereinafter *Proceedings*], at 207 (Plenary, 27 July 1899); Rolin, *ibid.*, at 415, 418 (Second Commission, Report, Annex to the Minutes of the Meeting of 5 July).

Conferences and the laws of war.<sup>7</sup> The silence of the two Martens – one real, the other a construct of literary licence – compels examination.

This silence compels inquiries that are rarely conducted in the growing literature on Martens and the clause. Extant literature tends to focus on the normative aspects of this ‘very loosely worded’, ‘particularly ambiguous’, and ‘evasive’ clause of ‘undefinable purport’.<sup>8</sup> The debate revolves, in other words, around identifying the proper construction, the ‘true meaning and purport’ of the clause.<sup>9</sup> Even when existing accounts of the Martens clause examine the circumstances surrounding its nascence – e.g., in emphasizing its provenance as a ‘diplomatic gimmick’ used to circumvent a deadlock over the question of resistance to occupation – such inquiries are harnessed to the ends of normative construction.<sup>10</sup> My concern, by contrast, is not whether we ought to read in the clause anything more than an injunction against a *contrario* interpretations or anything less than an assertion about the existence and import of the patently non-positivistic sources of IHL.<sup>11</sup>

I have little to add to the normative debate. The discourse surrounding the Martens clause – and Martens himself – seems far more interesting. It raises a plethora of questions about text and context, agents and ideas, law and power that seldom are noted, let alone systematically problematized, in IHL scholarship.<sup>12</sup> The topology, cult, even fetish-like qualities of that discourse – the incessant puzzling over, historicization, celebration, and re-enactment<sup>13</sup> of the Martens clause in the last century or so – themselves deserve attention.<sup>14</sup> Why is it that drafters, writers, and practitioners of IHL have been so engrossed by these few phrases over such a long period of time? What do these phrases represent for this professional community?<sup>15</sup>

To facilitate such discursive explorations and demonstrate the pertinence of such inquiries, this article seeks to offer a critical reading of the origins of the clause.

<sup>7</sup> Fleck, ‘Friedrich von Martens: A Great International Lawyer from Pärnu’, 10(2) *Baltic Defence Rev* (2003) 19, at 22–23 and the Martens bibliography listed there, and in Cassese, *supra* note 2, at 199–200, demonstrating that Martens ‘never took pride in the clause’.

<sup>8</sup> All these phrases are used by Cassese, *supra* note 2, at 187–189, 212. See also Meron, ‘The Martens Clause, Principles of Humanity, and Dictates of Public Conscience’, 94 *AJIL* (2000) 78, at 79 (‘somewhat vague and indeterminate legal content’).

<sup>9</sup> Cassese, *supra* note 2, at 192.

<sup>10</sup> *Ibid.*, at 193 ff, 212; Meron, *supra* note 8.

<sup>11</sup> The extant debate was mapped thoroughly by Cassese, *supra* note 2, *passim*. See also M. Bothe, K.J. Partsch, and W.A. Solf, *New Rules for Victims of Armed Conflict: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (1982), at 44; Strebler, ‘Martens Clause’, in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (1997), iii, 327; von Bernstorff, ‘Martens Clause’, in *ibid.*, online edition.

<sup>12</sup> Note, however, the growing focus on Martens in the historiography of international law in the late Russian empire, *infra* note 85; IHL literature rarely draws on the insights of such work.

<sup>13</sup> The appearances of the clause in international instruments are listed by Meron, *supra* note 8, *passim*; Cassese, *supra* note 2, *passim*. Both also survey and analyse judicial reliance on the clause.

<sup>14</sup> The Martens cult encompasses essays of hagiographic qualities and titles (*supra* note 4); generous superlatives; and commemoration activities. Some of these were noted by Eyffinger, ‘Feodor Martens, Architect of the Hague Tradition of International Law’, in *Contemporary Problems of Freedom, Human Rights and Identity, East-West Studies: 40 J Social Sciences of U Nord. Tallinn* (2009) 17, at 20; commemoration also includes the Tallinn-based Martens Society; see [www.martens.ee/en/](http://www.martens.ee/en/).

<sup>15</sup> I sought to provide preliminary answers to such questions in Giladi, *supra* note 4.

Specifically, I seek to expose the irony surrounding how the clause itself, its making, and Martens' role in this respect are interpreted, historicized, and celebrated. By heeding Kross's epigraphic advice to approach Martens with a sense of irony, I hope to delineate some of the contours of critical historical reflections on the clause and IHL more broadly.

## 2 The Making of the Martens Clause

How the Martens clause came into being is a story combining diplomatic skill and creative legal genius. Or so it is told.<sup>16</sup> It can also be told as the enactment of irony: how words were used to express something in the opposite of their literal meaning; and how they came to represent that which is entirely the opposite of what they were first used for.

### *A Better Leave Matters to the 'Domain of the Law of Nations, However Vague' and to the 'Incessant Progress of Ideas'*

At the First Hague Conference of 1899, Martens presided over the Second Commission charged with revising the unratified Brussels Declaration of 1874.<sup>17</sup> In the course of the proceedings of its Second Sub-commission, also presided over by Martens, a rift opened up concerning the wisdom and consequence of exhaustive, detailed legal regulation. Broadly speaking, this was a debate between small and great powers. The former, led by Belgium, had some support from Great Britain; the latter consisted of Russia and Germany. The debate soon became an impasse; and that impasse set the stage for the irony that surrounded the nascence of the Martens clause.

The items giving rise to the debate were Chapters I, II, and IX of the Brussels project on, respectively, 'military authority over hostile territory'; '[w]ho should be recognized as belligerents: combatants and non-combatants'; and 'taxes and requisitions'. All three headings really addressed the position of the occupant – and that of the occupied. What these provisions had 'in common' was that they required 'that the vanquished shall recognize the invader in advance as having certain rights on his territory, and that populations be in some sort forbidden to mingle with the war'.<sup>18</sup> This was the core of the Belgian objection, elaborated on in the meeting of 6 June.

Auguste Beernaert, the Belgian delegate, had voiced these objections from the outset. On form, he warned that the attempt to regulate 'everything' would ensure the repetition of the failure of the Brussels Declaration. 'Certain points', he submitted,

<sup>16</sup> Cassese, *supra* note 2, at 189: 'Martens deserves credit for crafting such an ingenious blend of natural law and positivism. It was probably the combination of his diplomatic skill, his humanitarian leanings and his lack of legal rigour which brought about such a felicitous result'; J. Pictet, *The Development and Principles of International Humanitarian Law* (1985), at 60 (the clause was 'the fruit of the genius of ... Martens'); R. Ticehurst, 'The Martens Clause and the Laws of Armed Conflict', 317 *IRRC* (1997) 125.

<sup>17</sup> 'Project of an International Declaration concerning the Laws and Customs of War, Brussels, 27 August 1874', repr. in D. Schindler and J. Toman (eds), *The Laws of Armed Conflicts* (4th edn, 2004), at 27.

<sup>18</sup> Beernaert (Belgium), *Proceedings, supra* note 6, at 502 (Second Commission, Second Sub-commission, 6 June 1899).

'cannot be the subject of a convention and ... it would be better to leave [these], as at present, under the governance of that tacit and common law which arises from the principles of the law of nations'.<sup>19</sup>

Form and substance were closely linked. Beernaert recognized the fact of political authority stemming from military achievement: '[t]hings have always happened thus, and they will doubtless continue to be the same, so long as humanity does not give up war'. What he found objectionable was that occupant should 'derive the power to act' not from victory but from a treaty 'giving him the right'. Thus, he considered that the position of the occupant under the Brussels Declaration 'does not really seem admissible'. For Belgium, the Declaration had the effect that the 'conquered or invaded country recognizes the invader in advance as having rights on its territory' – rights to change or enforce the existing laws, to collect taxes and impose fines, etc. It was inconceivable that a state, big or small, 'would grant rights to its conqueror in its own territory, in advance and in case of war, and that it would organize a regime of defeat'.<sup>20</sup>

Beernaert readily admitted that such recognition of legal authority in the occupant may have 'some advantages ... that civil order would be better preserved, and that the invaded populations would suffer less'. Against civil order and the suffering of the population, however, he posited 'hardly surmountable' 'objections of a moral and patriotic nature'.<sup>21</sup>

At stake were weakness and power. Beernaert shrewdly called into question the integrity of the Great Powers: he recalled the neutrality of Belgium, 'guaranteed by the great Powers and notably by our powerful neighbors'. Then, he asked, since Belgium 'cannot therefore be invaded', how can his government 'submit to the approval of our legislature a convention providing for the failure of great States in their pledges toward us, sanctioning in advance acts which could but constitute an incontestable abuse of force?'<sup>22</sup> That small countries were liable to be trampled by the great was fact, 'so long as humanity does not give up war'. Until such happy times, what Belgium sought to avoid was giving force the face of law – and its blessing. The problem with enacting restraints on war, *per* Beernaert, was that regulation legitimized war itself. Vagueness was the solace of the weak; complete regulation and exhaustive precision the instrument of the strong:

I therefore think that from every standpoint there are situations here which it is better to leave to the domain of the law of nations, however vague it may be. We cannot here transform fact into law, and this would be the inevitable result, for we must regard the case at once from the standpoint of both invader and invaded. The country occupied is placed under the law of the conqueror; this is a fact; it is force and uncontrollable force at that; but we cannot in advance legitimate the use of this force and recognize it as law. It is certainly not possible for the conqueror to legislate, administer, punish, and levy taxes with the previous and written consent of the conquered.

This can only become regular upon the conclusion of peace, for only then, if a treaty confirms the conquest, will new bonds of law be established.<sup>23</sup>

<sup>19</sup> *Ibid.* ('I am afraid that if we wish to regulate everything and to decide everything conventionally, we shall meet the same difficulties as before').

<sup>20</sup> *Ibid.*, at 503.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*, at 503 and at 504 ('speaking in behalf of a small country, often trampled and cruelly so by invasion, I prefer the continuance of the present situation rather than the peril of uncertainties').

In practice, however, what Beernaert proceeded to propose was a series of express limitations on the liberty of occupants. These were ‘provisions which, admitting the fact without recognizing the right of the conqueror, would involve a pledge on the part of the latter to exercise his right moderately’. They included the occupant ‘pledging ... in advance to respect private property and buildings devoted to arts and charitable uses, and to levy taxes or make requisitions under certain given conditions’; the omission of ‘Articles 3, 4, and 5 of Chapter I ... as well as Chapter IX, preserving the essential provisions of Chapter I, supplemented by some restrictive provisions in the matter of taxes and requisitions’.<sup>24</sup> Less regulation became regulation limiting the rights of the occupant to a minimum.

Beernaert trod a similar path with regard to the question of Articles 9, 10, and 11 of the Brussels draft. These applied the ‘laws, rights, and duties of war’ to armies ‘but also to militia and volunteer corps’ fulfilling the four conditions of combatant status (Article 9); recognized as ‘belligerents’ members of the population engaged in *levée en masse* (Article 10); and vested, in case of capture, ‘the rights of prisoners of war’ in both ‘combatant and non-combatant’ members of the ‘armed forces of the belligerent parties’ (Article 11). Beernaert commended the ‘solicitude’ of the Brussels draft as ‘very laudable in itself, namely, to reduce the evils of war and the sufferings which it involves’; he praised the Tzar, ‘one of the most powerful monarchs in the world’, for pursuing ‘such a purpose’. Yet Belgium, with its strategic vulnerability, beleaguered history, and violable neutrality could not agree to forego such ‘factors of resistance’ or the ‘powerful mainspring of patriotism’ available to it against the armies of powerful neighbours. ‘Small countries especially need to fill out their factors of defense by availing themselves of all their resources ...’. The ‘first duty of a citizen’, he recalled, was ‘to defend his country’; if invaded, Belgium could not ‘liberate to any extent our citizens from their duty to their country, by at least seeming to advise them against contributing toward resistance’.<sup>25</sup> Again, the ensuing imperative was less, not more, regulation, coupled with a thinly veiled hint that the real business of the Conference was to have been coming closer to peace, not regularizing war:

And here again, would it not be better, in the interest of all, not to attempt the regulation by convention of interests which lend themselves only with difficulty to regulation by convention, but rather to leave the matter to the law of nations and to that incessant progress of ideas which the present Conference and the high initiative from which it emanates will so powerfully encourage! (Applause).<sup>26</sup>

<sup>24</sup> *Ibid.*, at 504. Art. 3 of the Brussels Declaration obligated the occupant to ‘maintain the laws which were in force in the country in time of peace’ and to refrain from modifying, suspending, or replacing them ‘unless necessary’. Art. 4 protected state ‘functionaries ... who consent, on [the occupant’s] invitation, to continue their functions’. Art. 5 permitted the collection of ‘taxes, dues, duties, and tolls imposed for the benefit of the State’ by the occupying army. Chapter IX (Arts 40–42) regulated the occupant’s power to demand from communes or inhabitants ‘such payments and services as are connected with the generally recognized necessities of war’, levy contributions, and to make requisitions.

<sup>25</sup> *Proceedings, supra* note 6, at 504–505.

<sup>26</sup> *Ibid.*, at 505. Beernaert’s detailed proposals, *ibid.*, did not explicitly include the omission of Arts 9–11 of the Brussels text.

## B The Merits of Complete Regulation

Against such sentiments, Martens rose to the occasion. His response to the objections raised by Belgium was anything but conciliatory. It was calculated, naturally, to advance legal rules on occupation that suited the interests of the expanding Russian empire he represented.<sup>27</sup> Continental Great Powers perceived themselves as likely authors, not victims, of occupation. They preferred law that granted broad licence and sanctified order legitimized by force over the challenges of patriotism, resistance, and revolution. Russia's autocratic character made it particularly sensitive to suggestions about popular resort to force.<sup>28</sup> Martens' response remains a classic example of power politics veiled by humanitarian rhetoric; it also cunningly harped on the political and professional sensitivities besetting his audience.

Taking the floor, Martens first reminded the delegates of 'the history of these provisions' of the Brussels Declaration. Recalling the initiative of Emperor Alexander II 'in convoking the Brussels Conference of 1874', he claimed that the current initiative of his 'august sovereign was not all due to a new idea'. It was animated by the same 'idea of the importance of forming rules relating to the laws and customs of war in time of peace, when the minds and passions of people are not inflamed'. In wartime, he reasoned, 'mutual recriminations and mutual hatred aggravate the inevitable atrocities of warfare'. 'Moreover, the uncertainty of the belligerents regarding the laws and customs of war provokes ... useless cruelties committed on the field of battle.' Reason combined with traditional legitimacy, and continuity was peppered with evolution: thus, the Brussels Declaration 'brought about by Alexander II was the logical and natural development' of the 'example ... set' by the Lieber Code which 'called forth the idea of regulating the laws of war'.<sup>29</sup>

Next he praised the novelty of the Brussels Declaration and its humane, shielding purport. Its import was that:

for the first time an agreement was to be established between Powers regarding the laws of war really binding on the armies of the belligerent States, in order to shield the innocent, peaceful, and unarmed populations against useless cruelties of war and the evils of invasion where not required by the imperious necessities of the war.<sup>30</sup>

Martens moved to attack directly the proposition that the questions at hand best be left unspecified, in 'a vague state and in the exclusive domain of the law of nations'. The strong, he observed, does not become weaker if its duties are 'specifically defined and consequently limited'; the weak does not become stronger if its rights are not

<sup>27</sup> The Russian position is discussed *infra*.

<sup>28</sup> B.W. Tuchman, *The Proud Tower: a Portrait of the World Before the War, 1890–1914* (1966), at 238 observed that a large part of Russia's motivation in calling the Conference was apprehension of social upheaval, formulated by I. Bloch's *The Future of War* (1898) ('Fear of social revolution being an effective argument in Russia. Bloch gained an audience with the Tzar and his argument found an echo in the manifesto which was written by Muraviev'). See A. Eyffinger, *The 1899 Hague Peace Conference: 'The Parliament of Man, the Federation of the World'* (1999), at 20 ff. Russia's motives are discussed *infra* at note 89.

<sup>29</sup> Martens, *Proceedings*, *supra* note 6, at 505–506.

<sup>30</sup> *Ibid.*, at 506.

recognized. His next passages sought to drive a wedge between military representatives and legal experts while steering both in the direction of Russian interests. He gave credit to ‘the great captains’ of war, not ‘philanthropists and publicists’, for causing the ‘idea of humanity to progress in the practice of war’.<sup>31</sup> Then he appealed to the latter’s professional sensibilities by delineating their proper role: to prove that ‘there are laws of war’. If they are to do so, it was ‘necessary to come to an agreement in determining them’ by bringing ‘our intelligence into play in examining these laws and customs of war’. Speaking as the President of the Commission, he could state that ‘we have thus far worked in concert along this line, and we have been able to solve most of the questions submitted to us’. Now, facing ‘the most important articles of the Brussels Declaration, it would be a pity to leave in a vague condition the questions which relate to the first articles on occupation and combatants’.<sup>32</sup>

Regulation was required precisely because the ‘noble sentiments’ of the human heart cannot be relied upon ‘in the midst of combats’. Matters could not be left ‘to the practice of war, to the generally recognized principles of the law of nations, and, finally, to the hearts of the captains, commanders in chief, and military authorities’. Regulation was required also in order ‘to remind peoples of their duties’ by producing an ‘act of education which is to enter in future into the program of military instruction’.<sup>33</sup> The *coup de grace* conjured the ghosts of past failure, the lawyers’ fear of irrelevance; lack of success in reaching agreement, he warned,

would be fatal and disastrous in the highest degree to the whole of our work, for then belligerent Governments and military leaders would say to themselves: ‘Twice, in 1874 and 1899, two great international Conferences have gathered together the most competent and eminent men of the civilized world on the subject. They have not succeeded in determining the laws and customs of war. They have separated, leaving utter vagueness for all these questions. These eminent men, in discussing these questions of the occupation and the rights and duties of invaded territories, have found no other solution than to leave everything in a state of vagueness and in the domain of the law of nations! How can we, the commanders in chief of the armies, who are in the heat of action, find time to settle these controversies, when they have been powerless to do so in time of peace, amid world-wide absolute calm and when the Governments had met for the purpose of laying down solid bases for a common life of peace and concord?’

Under these circumstances it would be impossible to deny to belligerents an unlimited right to interpret the laws of war to suit their fancy and convenience.<sup>34</sup>

The finale of Martens’ speech, while veiling a threat, took the highest moral ground. It was here that he brazenly championed the cause of small states – to counter their very expressed preferences. Here he advocated the cause of humanity over force in order to advance an agenda of force. Thus, doubt and ‘uncertainty hovering over these questions’ will be of advantage, not ‘to the weak’, but to the strong. They

<sup>31</sup> *Ibid.*: ‘obliged to place a curb on the inflamed passions of their soldiers, they inaugurated a discipline in their armies’; restraining the conduct of armies ‘in case of invasion of a hostile territory’ made military discipline ‘all the more necessary’.

<sup>32</sup> *Ibid.*, at 506.

<sup>33</sup> *Ibid.*, at 507, emphasis added.

<sup>34</sup> *Ibid.*



would allow 'the interests of force to triumph over those of humanity'.<sup>35</sup> Likewise, he appealed to his audience not to sacrifice 'the vital interests of peaceful, unarmed populations to the risk of reasons of war and the law of nations'. Alluding to the expectations created by the Peace Conference and the domestic pressures on governments to showcase achievement,<sup>36</sup> he warned them of the 'consequences ... fatal and disastrous in the highest degree', if they allowed 'the public opinion of the civilized world' to see 'once more the incapacity of the Governments to define the laws of war, for the sake of limiting its atrocities and cruelties'.<sup>37</sup>

Martens' speech did not conclude with any concrete proposals. The outpouring of rhetoric was not aimed at the production of a high-resolution text; rather, it was designed to retain text akin to that of the Brussels Declaration, which was heavily tilted in favour of occupants.<sup>38</sup> Having heard the two 'theses' raised by Beernaert and Martens, the Second Sub-commission decided to postpone discussion 'in order that [it] may pass on them with a full knowledge of the subject'.<sup>39</sup>

### C *Volte-face: 'Heroes Are Above Codes and Rules'*

Detailed, exhaustive regulation was no more than a rhetorical device. Martens had no compunction, as the Sub-commission went on to address the law of occupation,<sup>40</sup> in openly advocating the merits of vagueness and incompleteness when Russian interests so required. When the thorny question of the legitimacy and consequence of resistance to the occupant came up for discussion, on 20 June, in the form of Articles 9 and 10 of the Brussels Declaration, Martens availed himself of the presidential privilege to make 'some observations' even '[b]efore opening the discussion'.<sup>41</sup>

Again ascending to higher moral ground, he alluded to the governments' 'sacred duty to do all in their power in an endeavor to diminish the evils and calamities of war'. This 'sublime purpose' required that defensive forces be 'organized and disciplined' (rather than, presumably, act by spontaneity). But this requirement was not intended, he argued, to deny the 'sacred' duty and 'right of populations to defend themselves'. Just as Martens appointed himself defender of small states on 6 June, now he championed the cause of their populations against their own rulers: humanity, he argued, imposes on governments another, 'no less sacred ... duty ... not to sacrifice useless victims in the interest of the war'. It is here that Martens came to negate

<sup>35</sup> *Ibid.*, at 507–508.

<sup>36</sup> I discuss these dynamics *infra*.

<sup>37</sup> Martens, *Proceedings*, *supra* note 6, at 507.

<sup>38</sup> As regards the Brussels Declaration, the Russian proposals – authored by Martens – on occupation 'so obviously favoured occupying forces that this text became known in European ministries as the "The Code of Conquest": K. Nabulsi, *Traditions of War: Occupation, Resistance and the Law* (2000), at 6. For historical background see D.A. Graber, *The Development of the Law of Belligerent Occupation 1863–1914* (1949); Benvenisti, 'The Origins of the Concept of Belligerent Occupation', 26 *L & Hist Rev* (2008) 621; Giladi, 'A Different Sense of Humanity: Occupation in Francis Lieber's Code', 94 *IRRC* (2012) 81.

<sup>39</sup> *Proceedings*, *supra* note 6, at 508.

<sup>40</sup> It is noteworthy that in these discussions Russia had voted in favour of some of Beernaert's proposals to delete certain of the Brussels Declaration's provisions from the text.

<sup>41</sup> Martens, *Proceedings*, *supra* note 6, at 547 (Second Commission, Second Sub-commission, 20 June 1899).

the need for comprehensive codes, completely reversing the position he had advocated only a fortnight earlier:

It was in order to fulfill this duty [not to sacrifice useless victims etc. – RG] that the Russian Government in 1874 proposed to all the States that they adopt conditions easy of fulfillment in order to enable the populations to take part in the operations of war.

The Brussels Conference, therefore, by no means intended to abolish the right of defense, or to create a code which would abolish this right. It was, on the contrary, imbued with the idea that *heroes are not created by codes*, but that the only code that heroes have is their self-abnegation, their will, and their patriotism.

*The Conference understood that its duty was not to try to formulate a code for cases which cannot be foreseen and codified*, such as acts of heroism on the part of populations rising against the enemy. It simply wished to afford the populations more guaranties than had existed up to that time.

Formerly, the conditions imposed upon populations at the will of the belligerents were much more difficult to fulfill than those laid down in Articles 9 and 10.

This must not be lost sight of, and it must be remembered that *it is not the purpose of these provisions to codify all cases that might arise*. They have left the doors open to the heroic sacrifices which nations might be ready to make in their defense; *a heroic nation is, like heroes, above codes, rules, and facts*.

It is not our province, adds Mr. Martens, to set limits to patriotism; our mission is simply to establish by common agreement among the States the rights of the populations and the conditions to be fulfilled by those who desire legally to fight for their country.<sup>42</sup>

These observations were meant to do more than lay out the Russian position at the outset of the anticipated polemic concerning the explosive issue of legitimate resistance. They were designed mainly to counter, or rather intercept, two proposals ‘laid on the table at the end of the last meeting’: one British, the other Swiss.<sup>43</sup> Martens’ ‘clarifications’ on the true ‘purport’ of the Brussels Declaration were meant to pave the way for pre-emptive action before any other opinion on Articles 9–10 could be expressed. The record reports:

And it is also along this order of ideas that Mr. Martens desires to make the following declaration, which he wishes to have inserted in the minutes and which, he hopes, will succeed in removing all misunderstanding which may still exist in regard to the purport of Articles 9 and 10.

Next, the ‘President reads his declaration’ – again, before yielding the floor to discussion. Its last passage contained what came to be known as ‘the Martens clause’. The declaration read:

The Conference is unanimous in thinking that it is extremely desirable that the usages of war should be defined and regulated. In this spirit it has adopted a great number of provisions

<sup>42</sup> *Ibid.*; emphases added.

<sup>43</sup> *Ibid.*, at 546. These are recorded only in the proceedings of the 20 June 1899 11th meeting of the Sub-commission, not in the previous meeting of 17 June; *ibid.*, at 534–544. The text of these proposals appears at 550: ‘[n]othing in this chapter shall be considered as tending to lessen or abolish the right belonging to the population of an invaded country to fulfill its duty of offering by all lawful means, the most energetic patriotic resistance against the invaders’ (Ardagh, Great Britain); ‘[n]o acts of retaliation shall be exercised against the population of the occupied territory for having openly taken up arms against the invader’ (Switzerland).

which have for their object the determination of the rights and of the duties of belligerents and populations and for their end a softening of the evils of war so far as military necessities permit. It has not, however, been possible to agree forthwith on provisions embracing all the cases which occur in practice.

On the other hand, it could not be intended by the Conference that the cases not provided for should, for want of a written provision, be left to the arbitrary judgment of the military commanders. Until a perfectly complete code of the laws of war is issued, the Conference thinks it right to declare that in cases not included in the present arrangement, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.

It is in this sense especially that Articles 9 and 10 adopted by the Conference must be understood.<sup>44</sup>

Inevitably, a discussion did ensue. The first to speak was Beernaert, who expressed his dissatisfaction with the Articles as they stood, but bowed to the 'unanimous sentiment of the assembly' in view of the 'great importance of having the Conference accomplish a common work'. Requesting that the President's declaration 'be inserted both in the minutes of the meeting and in the final protocol, or else in the general act which is to crown the work of the Conference', he announced that he would vote for Articles 9–10, even if they 'do not come up to what he would have wished'.<sup>45</sup> He proceeded, however, to offer his own interpretation as to the 'real meaning' of the Brussels Conference in drawing up these provisions, where 'no one thought of disregarding the fact that the right of a country to defend itself is absolute, and that it is not only a right but a duty, and an imperious one at that'. It was only due to the 'great difficulties' of stating this right in 'formal language' that left it out of the text, 'it being stated that the Conference left unsettled the questions relating to uprisings in occupied territory and to individual acts of war'.<sup>46</sup>

Others spoke. Again the 'benefit of the populations' obtained by 'imposing on them the conditions contained in Articles 9 and 10' was invoked.<sup>47</sup> But the two Articles were eventually unanimously adopted.<sup>48</sup> Only then did Martens, as President, recall 'the fact that there remain to be discussed the additional articles' proposed by Great Britain and Switzerland.<sup>49</sup> He tried to persuade the authors to withdraw these amendments and be satisfied with 'the insertion in the minutes of his own declaration and that of his Excellency Mr. Beernaert'.<sup>50</sup> Ardagh, the British 'technical delegate', would

<sup>44</sup> *Ibid.*, at 547–548.

<sup>45</sup> *Ibid.*, at 548.

<sup>46</sup> Thus, the outcome of the Brussels Conference was, in his opinion, that 'the only point settled is 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 other cases and situations are regulated by the law of nations according to the terms of the declaration just read by the President': *ibid.*, at 548–549.

<sup>47</sup> General den Beer Poortugaal, *ibid.*, at 549.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.* The text of these proposals is reproduced *supra* in note 43.

<sup>50</sup> *Ibid.*, at 550.

have none of that: he asked for a vote. Künzli, the Swiss, recommended the adoption of the British proposal after an impassioned address in favour of patriotism.<sup>51</sup> Again Martens countered that the task of the Conference could not ‘accomplish an impossible task ... to codify the heroic acts of individuals or population’, but only protect ‘the weak, the unarmed, the inoffensive’.<sup>52</sup>

Germany (after 1870, the real source of Belgium’s apprehensions) joined the debate, adding to the pressure and raising the stakes: Colonel Gross von Schwarzhoff noted that the task of revising the Brussels Declaration was nearly complete. He, too, commended the ‘spirit of humanity’ underlying the Sub-commission’s work ‘for the purpose of mitigating the evils of invasion for the inhabitants’.<sup>53</sup> But, unlike Martens, he evidently had little use for subtlety: the crux of the matter, bluntly stated, was that ‘conciliation of [security interests of large armies] and those of the invaded people is impossible’. The preferred solution did not lie in explicit regulation: he asked ‘nothing more than ... that those questions in regard to which an understanding is impossible be passed over in silence’.<sup>54</sup> The Russian Colonel Gilinsky endorsed this opinion.<sup>55</sup> Martens stated that the Swiss amendment was withdrawn; Ardagh, however, insisted on a vote on his amendment.

It was Leon Bourgeois who proposed to solve the deadlock by having the ‘commission declare that it proposes to insert the declaration of the President in the final protocol’.<sup>56</sup> Some consultations followed, with Martens insisting that his declaration was ‘the same in meaning as the proposition of Sir John Ardagh, but with the difference that it implies the impossibility of providing for all cases’.<sup>57</sup> The course proposed by Bourgeois was more or less followed: the record stated that ‘[t]he declaration of the President is adopted as an official act of the subcommission, and it will figure as such in the records of the Conference’.<sup>58</sup> Even this did not settle whether the British proposal still required a vote; in the end, Ardagh gave in, withdrawing his amendment ‘out of a spirit of conciliation, inasmuch as the principle involved has met unanimous approval’.<sup>59</sup> It had not; this was a mix of sarcasm and face-saving.

The proceedings of the Conference offer only a dearth of detail on the evolution of the text until its final inclusion, with some changes, in the preamble to Convention II. By the time the Second Commission examined the draft prepared by the Second Sub-commission (5 July), a preamble had been proposed, largely ‘borrowed from the declaration made by Mr. Martens’.<sup>60</sup> The Second Commission – presided over by Martens – adopted the draft preamble provisionally, referring it ‘to the Drafting Committee of the Final Act’.<sup>61</sup> The Conference Plenary then met, on the same day, to examine and

<sup>51</sup> *Ibid.*, at 550–551.

<sup>52</sup> *Ibid.*, at 551, emphases in the original.

<sup>53</sup> *Ibid.*, at 552.

<sup>54</sup> *Ibid.*, at 553.

<sup>55</sup> So did the Dutch delegate: *ibid.*

<sup>56</sup> *Ibid.*, at 553, 554.

<sup>57</sup> *Ibid.*, at 554.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*, at 554–555.

<sup>60</sup> *Ibid.*, at 413 (Second Commission, 5 July 1899).

<sup>61</sup> *Ibid.*

approve the text produced by the Second Commission. The meeting started with Staal, the President of the Conference and the head of the Russian delegation, praising ‘the eminent jurist who has presided with his customary talents over the twelve meetings of the subcommission’, adding that ‘a great part of the success is due to’ Martens.<sup>62</sup> The drafting committee of the final act incorporated in the preamble to Convention II ‘the declaration made by Mr. Martens’.<sup>63</sup>

### 3 Irony Enacted

The origins of the Martens clause are fraught with irony. Consider, first, the way its making and Martens’ role therein are historicized. It is ironic that, contrary to prevalent assumptions, Martens did not propose the clause ‘with a humanitarian goal in mind’.<sup>64</sup> Or, indeed, that he should receive, already at the Conference and ever since, accolades for finding ‘an expedient way out of a diplomatic deadlock between the small powers ... and the major powers’.<sup>65</sup> Though the record does not shed light on what happened behind the scenes, in particular with regard to the British and Swiss amendments, it portrays Martens as the obdurate author of contention rather than the architect of its resolution indefatigably engaged in the ‘search for mutually acceptable decisions’.<sup>66</sup> The record, at least, suggests that the ‘impasse’ did not follow from a sudden, last-minute intervention of the Belgian delegate. Marten’s contribution had not consisted in taking a ‘bold step’<sup>67</sup> that ‘found ... a brilliant way out’.<sup>68</sup> Martens’ objection (in the Second Sub-commission) was not, as far as the record shows, ‘greeted by the delegates’ applause’; nor was the Declaration he read on 20 June received ‘so enthusiastically’.<sup>69</sup>

That Declaration, stripped of its flowery phrases, expressed neither more nor less than the Russian position on the question at hand. It did not present a middle way

<sup>62</sup> *Ibid.*, at 45 (Plenary, Fifth Meeting, 5 July 1899).

<sup>63</sup> *Ibid.*, at 207 (Plenary, Eighth Meeting, 27 July 1899); the Plenary approved the Preamble: *ibid.*, at 209.

<sup>64</sup> Cassese, *supra* note 2, at 193; nor was this his ancillary purpose: *ibid.*, at 198 ff.

<sup>65</sup> Cassese, *supra* note 2, at 193; for accolades see *supra* note 6; this irony is compounded by evidence produced *infra*.

<sup>66</sup> Pustogarov, *Our Martens*, *supra* note 4, at 177. Likewise, Eyffinger, *supra* note 14, at 35 lauds Martens’ ‘pioneering and conciliatory role’. Ardagh, however, wrote to Sir James Gowan on 29 July 1899: ‘the formulation of the laws and customs of war in a code ... was a very contentious subject, as the interests of the great military Powers were antagonistic to those of the weak and neutral States. Great Britain has adopted a benevolent attitude towards the latter, while recognizing the power to enforce obedience possessed by the commanders of overwhelming forces. I encountered much difficulty in endeavouring to reconcile the rival claims, and believe I contributed to a fairly satisfactory solution by the course which I took’; cited in S.H. Malmesbury (Lady Ardagh), *The Life of Major-General Sir John Ardagh* (1909), at 324–325. British benevolence and Ardagh’s claim of credit for reconciliation may be as unjustified as Martens’; British superiority remained maritime, and Ardagh was as much an antagonist in the debate as was Martens.

<sup>67</sup> Pustogarov, *Our Martens*, *supra* note 4, at 176.

<sup>68</sup> Pustogarov, *Martens Clause*, *supra* note 4, at 126–127.

<sup>69</sup> *Ibid.*, at 127; Pustogarov, *Our Martens*, *supra* note 4, at 176 (‘applause from those present’), 177 (‘enthusiastically’). The record shows that the applause went to Beernaert’s original objections to recognizing rights in occupied territories: *supra* note 26.

mediating between two conflicting positions. Rather, it wrapped the Russian position in principle and rhetoric. Martens' use of presidential privilege to table his own proposal first, then to preclude any discussion until it was approved; his 'recalling', only after the Declaration was adopted, that the Swiss and British amendments were still on the table; and the pressure he brought,<sup>70</sup> time and again, on the Swiss but especially the British delegate to withdraw the proposed amendments; all these suggest that rather than a compromise or conciliation, the Martens clause enacted discord.

Other evidence supports this reading. It suggests that, as regards the British amendment, the drama at the Sub-Commission was no more than the re-enactment of roles long rehearsed. Both the Russian and the British positions in 1899 were no more than reiterations of positions advanced by the two governments at Brussels, 25 years earlier, precisely on the question of legitimate resistance to occupation and the desirability of its regulation. Thus, in an exchange that followed the Brussels Conference, the British government noted that:

A careful consideration ... has convinced Her Majesty's government that it is their duty ... above all, to refuse to be a party to any agreement the effect of which would be to facilitate aggressive wars and to paralyse the patriotic resistance of an invaded people.<sup>71</sup>

The Russian government, in response, noted the difficulty inherent in formulating 'clear and precise rules' to, for example, 'trace the duties and rights of the occupier and the occupied'. Alluding that '[s]trength will always be able to take advantage of [the necessities of war]', it proceeded to argue that '[b]y leaving things in this indefinite state, the relations between the occupier and the occupied, between the military power and private persons, would be not better for it'.<sup>72</sup> It is of little surprise that the words Martens used in the Second Sub-commission echo this language; he had drafted the base texts discussed both in 1874 and 1899.<sup>73</sup> The declaration he read on 20 June was meant to preclude resort to any language – proposed in the Swiss and British amendments – that might have qualified the 'advantage' occupants drew from Articles 9 and 10 of the Brussels Declaration, now Articles 1 and 2 of the 1899 Hague Regulations. This was the Russian position, and Martens gave it full effect.<sup>74</sup>

<sup>70</sup> Nabulsi, *supra* note 38, at 161, discussed *infra* at note 111. Beernaert's advocating acceptance of the declaration to the Swiss remains a puzzle; the explanation provided by the Dissenting Opinion of Judge Shahabuddeen in the *Legality of the Threat of Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, at 407–409 does not appear convincing.

<sup>71</sup> 'Despatch by Lord Derby, 20 January 1875', repr. in *Foreign Relations of the US* (1875-II) 1042, at 1046. The Ardagh amendment, I suspect, was also tied to Britain's lack of enthusiasm, since Brussels, for obligatory general instruments. It was in this respect that Martens spoke of codification as a 'mutual insurance association against the abuses of force in time of war'. The rhetoric and ironies of both antagonists in this exchange merit a separate discussion: Ardagh, Martens, *Proceedings, supra* note 6, at 518 (Second Sub-commission, Eighth Meeting, 10 June 1899).

<sup>72</sup> 'Observations by Prince Gortschakoff, on the dispatch of Lord Derby' etc. repr. in *Foreign Relations of the US* (1875-II) at 1048.

<sup>73</sup> His role in 1874 is discussed in Pustogarov, *Our Martens, supra* note 4, at 108 ff.

<sup>74</sup> This calls into question the observation that Martens, in preparing and participating in the Conference, had 'not singled out some sort of special interest of Russia'; or that 'Martens never proceeded from any special interests of Russia. In [what] ... he wrote there is not a trace of considerations which would have inclined to the advantage of Russia and, moreover, to the prejudice of any other State': Pustogarov, *Our Martens, supra* note 4, at 191, 171–172, respectively.

This conduct perhaps does not make Martens the ‘champion of Czarist opportunism and the apologist of cynical expansionism’;<sup>75</sup> it does, however, paint with irony the attribution to Martens of a humanitarian motive and his portrayal as the champion of consensus and compromise.

Secondly, there is the irony that underlines Martens’ *volte-face*. Indeed he traversed, within a fortnight, a long distance. He departed from the ‘fatal and disastrous’ consequences of leaving matters in ‘a vague state and in the exclusive domain of the law of nations’.<sup>76</sup> He concluded with the observation that ‘heroes are not created by codes’ and, consequently, that the mission at hand was *not* ‘to codify all cases that might arise’.<sup>77</sup> On the way between departure and terminus, Martens espoused the cause of small states – in order to rebut the case they were making. Similarly, in order to ensure that ‘the interests of force ... triumph over those of humanity’, he championed their populations against their own governments by advocating the protection of ‘the *weak*, the *unarmed*, the *inoffensive*’ – viz. the *unresisting*.<sup>78</sup>

The incongruity between Martens’ early and late positions on the merits of complete regulation in turn highlights the incongruity between the rhetoric he used and the substantive ends for which he used it. It is ironic, then, that praise should go to Martens for a position he first spoke *against* and which, evidently, he advanced out of convenience, not principle. As far as the proceedings at The Hague go, moreover, the seed of the ideas expressed in the Martens clause can be found in Beernaert’s speech of 6 June. What Beernaert advocated was leaving matters to ‘the governance of that tacit and common law which arises from the principles of the law of nations’; and, later on, ‘to leave the matter to the law of nations and to that incessant progress’.<sup>79</sup> The final text echoes both: ‘cases not included in the Regulations ... remain under the protection and empire of the principles of international law...’; and ‘[u]ntil a more complete code of the laws of war is issued’.

This irony is compounded by comparing the use Martens had for this language with what this language has since come to represent. Today, many agree that if the clause ‘has acquired a significance far exceeding’ that of the problem of ‘armed resistance in occupied territory’, it is because it is seen as giving normative force to the claim that ‘no matter what states may fail to agree upon, *the conduct of war will always be governed by existing principles of international law*’.<sup>80</sup> The clause, in fact, is seen as incorporating

<sup>75</sup> Eyffinger, *supra* note 14, at 19, referring to the critique by Nussbaum, ‘Frédéric de Martens, Representative Tsarist Writer on International Law’, 22 *Nordisk Tidsskrift Int’l Ret* (1952) 51. G. Best, *Humanity in Warfare* (1980), at 163 questioned ‘the extent to which de Martens was his own man or the Tsar’s’; Nabulsi, *supra* note 38, at 160 retorts that ‘according to his ideology, being the Tsar’s man was identical to being “his own” man’.

<sup>76</sup> Text accompanying *supra* notes 37, 31 respectively.

<sup>77</sup> Text accompanying *supra* note 42.

<sup>78</sup> Text accompanying *supra* note 35; and following *supra* note 41. Giladi, *supra* note 38, offers analysis of similar language in the Lieber Code. There may be an important parallel in how, in 1899, the clause had served the interest of power, and how it was resurrected from relative obscurity in the trials conducted by victorious Allies of War World II: e.g., von Bernstorff, *supra* note 11. I thank Sabrina Safrin for this insight.

<sup>79</sup> Text accompanying *supra* notes 19, 26.

<sup>80</sup> F. Kalshoven and L. Zegveld, *Constraints on the Waging of War* (3rd edn, 2001), at 22, emphasis added.

two normative claims: first, the notion of IHL's completeness; and, secondly, the principle that war is subordinate to law.<sup>81</sup>

Yet Martens had read his declaration precisely at the point when he was advocating the merits of law's incompleteness. He reminded the delegates that the duty of the Hague Conference, just like that of the Brussels Conference before it, 'was *not* to try to formulate a code for cases which cannot be foreseen and codified'.<sup>82</sup> His declaration was meant to ward off amendments containing explicit recognition of the right to resist the occupant. Its primary function was to entrench the *incompleteness* of law. Yet the clause came to represent and is historicized as the exact opposite of its original use. This is more than ironic; it speaks of a deep and persistent epistemic attachment to the idea of IHL's completeness and to the reign of law over war.<sup>83</sup>

This irony is aptly demonstrated by how the clause was historicized by Jean Pictet. Immediately after noting 'the famous Martens clause in the preamble to the Hague Regulations, referring to the "principles of the law of nations, as they result from usages established among civilized peoples"', and just before attributing it to Martens' genius,<sup>84</sup> Pictet lamented that:

Unfortunately we live in a time when formalism and logorrhea flourish in international conferences, for diplomats have discovered the advantages they can derive from long-winded, complex and obscure texts, in much the same way as military commanders employ smoke screens on battlefields. It is a facile way of concealing the basic problems and creates a danger that the letter will prevail over the spirit. It is therefore more necessary than ever, in this smog of verbosity, to use simple, clear and concise language.<sup>85</sup>

Martens, ironically, is revealed as precisely such a diplomat to derive advantage 'from long-winded, complex and obscure texts'; and the Martens clause, considered especially in the light of the circumstances of its making, appears precisely that sort of text.<sup>86</sup>

<sup>81</sup> Meron, *supra* note 8, at 88 (the clause provides an additional argument against a finding of *non liquet*); Fleck, *supra* note 7, at 24; with echoes in *Nuclear Weapon Advisory Opinion*, *supra* note 70, at 257; and the Dissenting Opinion of Judge Weeramantry, at 486, 493–494.

<sup>82</sup> Text accompanying *supra* note 42; emphasis added.

<sup>83</sup> See Giladi, *supra* note 4.

<sup>84</sup> Cited *supra* in note 16.

<sup>85</sup> Pictet, *supra* note 16, at 59–60 (footnotes omitted). It is perhaps even more ironic that Russia would argue, in its submission to the ICJ in the *Nuclear Weapons Advisory Opinion*, that the clause has lost its relevance with the issuing of a 'more complete code of the laws of war' by the diplomatic conferences of 1949 and 1977: Russian Federation, Written Submission on the Opinion Requested by the General Assembly, *Compilation of Written Statements*, ANW, 13 July 1995, at 13 ('today the "Martens clause" may formally be considered inapplicable'). The centrality of Martens in the post-Soviet attempts to reclaim Russia's contribution to the development of modern international law (in the face of accounts emphasizing his Estonian ethnicity) adds another dimension of irony: consider Kovalev, 'Fyodor Martens, Russian Jurist and Diplomat', 5 *Int'l Affairs* (Moscow) (2009) 189; Myles, "'Humanity", "Civilization" and the "International Community" in the Late Imperial Russian Mirror: Three Ideas "Topical for Our Days"', 4 *J Hist Int'l L* (2002) 310; Mälksoo, 'The Liberal Imperialism of Friedrich (Fyodor) Martens (1845–1909)', 1 *Select Proc ESIL* (2006) 173; Mälksoo, 'The History of International Legal Theory in Russia: A Civilization Dialogue with Europe', 19 *EJIL* (2008) 211.

<sup>86</sup> Indeed, Peter Holquist records that Martens wrote in his diary entry for 8–12 July 1899 that the clause was full of 'empty phrases': Holquist, 'Were the Boxers "Legitimate Combatants"? Imperial Russia's Role in Codifying the Hague Conventions on Land Warfare and the Conduct of its Army during the Boxer Rebellion, 1900–1901', Paper presented to "The Early History of International Law of Occupation: A Workshop" Columbia University, 18 Nov. 2005, at 17; I am grateful to Eyal Benvenisti for drawing my attention to this source.



Pictet's metaphor of smoke screens applies, albeit inadvertently, to a subtle irony underpinning the fact that today the clause has come to represent war's subordination to law. This third irony concerns the view that the clause, historicized as affecting deferral of the controversy at the Sub-commission, now represents the 'enduring legacy' of the Hague Conventions.<sup>87</sup> It also concerns the legacy of the Hague Conference for the project to humanize war by legal regulation, and the role Martens played in shaping this legacy.

To appreciate this irony, we need recall that the Hague Conventions on Land Warfare of 1899 and 1907 both sprang out of *Peace Conferences*.<sup>88</sup> The Tzar's Rescript, presented to an unsuspecting diplomatic corps in St. Petersburg on 12/24 August 1898, had nothing to do with regulating war's conduct. Rather, it was about peace, in particular through disarmament.<sup>89</sup> In essence, it proposed to seek 'by means of international discussion, the most effective means of ensuring to all peoples the benefits of a real and lasting peace, and above all of limiting the progressive development of existing armaments'. Its stated 'lofty aim' was:

The maintenance of general peace and a possible reduction of the excessive armaments which weigh upon all nations present themselves, in the existing condition of the whole world, as the ideal towards which the endeavours of all Governments should be directed.<sup>90</sup>

This was about averting war; not a word was said about its regulation.

Diplomats accredited to St. Petersburg, and the world at large, were taken by surprise. So was Russian officialdom, Martens included: other than the Finance, War and Foreign Ministers, few were consulted in advance. Martens' diary described the Russian initiative as a 'flippancy', an 'extravagant project' that would lead to a 'fiasco'; disarmament he found utopian.<sup>91</sup>

Nonetheless, the task of concretizing the initiative and drawing up the conference programme fell to Martens. To ensure Russian interests – including preventing

<sup>87</sup> Meron, *supra* note 8, at 78 (legacy); Cassese, *supra* note 2, at 197–198 ('typical diplomatic ploy to paper over strong disagreement ... by deferring the problem to future discussion'); Strebler, *supra* note 11, at 327 ('The Clause is intended to be applied until such time as a more complete set of rules is established, but it has become clear that a really complete codification of the laws of war may remain impossible to achieve.').

<sup>88</sup> Tuchman, *supra* note 28, at 229; Eyffinger, *supra* note 28, *passim*.

<sup>89</sup> 'Russian Circular Note Proposing the First Peace Conference', *Brit Parl Papers, Russia*, No. I, (1898) i; also repr. in *Documents Relating to the Program of the First Hague Peace Conference* (ed. J.B. Scott, 1921), at 1 [hereinafter, *Documents*]. On the Rescript see C.D. Davis, *The United States and the First Hague Peace Conference* (1962), at 36–53; Eyffinger, *supra* note 28, at 17 ff. The motives behind the Russian initiative remain controversial. The most plausible explanation seems that offered by Tuchman, *supra* note 28, at 236 ff ('Russia was behind in the arms race and could not afford to catch up ... Austria, Russia's chief rival, was planning to adopt the improved rapid-fire field gun firing six rounds a minute, already possessed by Germany and France. The Russians ... could not hope to finance the rearming of their entire artillery, because they were already, at great financial strain, engaged in rearming their infantry. If the Austrians could be persuaded to agree to a ten-year moratorium on new guns, Kuropatkin [Russian War Minister – RG] thought, both countries would be spared the expense – and why not? For whether both rearmed or both agreed not to rearm, "the final result, if the two groups went to war, would be the same ..."' As approaching Austria would 'merely reveal our financial weakness to the whole world', Witte, the Finance Minister instead 'proposed an international, rather than a bilateral, moratorium on new weapons').

<sup>90</sup> *Documents*, *supra* note 89, at 1–2.

<sup>91</sup> Pustogarov, *Our Martens*, *supra* note 4, at 158–163.

embarrassment for the Tzar<sup>92</sup> – he advised reducing the points included in the Rescript to the ‘narrowest framework’. Instead, he proposed to include in the conference agenda ‘those points which would promise the achievement of results on the basis of broad consent’.<sup>93</sup> Presenting some outcomes, however modest in relation to the sentiments and aims expressed in the Rescript, would be paramount. Reviving the Brussels project was one such item he inserted;<sup>94</sup> so were the extension of the 1864 Geneva Convention to naval warfare and discussion of various modes of dispute resolution.

Martens’ advice found its way into the second Russian Circular.<sup>95</sup> This repeated that ‘this humanitarian scheme’ was designed to seek the ‘most effective means of ensuring to all peoples the benefits of a real and lasting peace and, above all, of limiting the progressive development of existing armaments’. It claimed that the Tzar’s Rescript had met with ‘warmest approval’ and ‘cordial reception’.<sup>96</sup> It also asserted, however, that ‘the political horizon has recently undergone a decided change’. This paved the way for a change of direction: what was now possible was ‘a preliminary exchange of ideas between the Powers...’. The object of that exchange was reflected in the eight agenda items that became the Conference Programme, the product of negotiations among the Powers. Item 7 was the revision of the Brussels Declaration.<sup>97</sup>

Regulating war was more than a place-filler on the conference agenda. Its inclusion was designed to steer away from peace *through* disarmament, the thrust of the first Circular. It was a diversion. Most items on the agenda had nothing to do with disarmament or, indeed, with peace. They, as Barbara Tuchman told,

were resented by the peace propagandists, who wished to abolish war, not alleviate it. They suspected that these topics had been included to stir the interest and require the participation of the governments and their military representatives, as was indeed the case.<sup>98</sup>

<sup>92</sup> Not just for Russian diplomats; the Kaiser later wrote: ‘I consented to all this nonsense only in order that the Czar should not lose face before Europe’; Tuchman, *supra* note 28, at 229.

<sup>93</sup> Pustogarov, *Our Martens*, *supra* note 4, at 164, though my interpretation of Martens’ actions differs.

<sup>94</sup> *Ibid.*, at 166.

<sup>95</sup> *Ibid.*, at 167; Eyffinger, *supra* note 14, at 22, 37 (‘it was Martens who had inserted the issues [of the revision of the Brussels Declaration – RG] in the Conference Programme in the first place’); Kovalev, *supra* note 85, at 190 (‘can claim the honor of authorship of the agenda of the First Hague Peace Conference’).

<sup>96</sup> ‘Circular Note, St Petersburg, 30 Dec. 1898’, repr. in *Documents*, *supra* note 89, at 2–3. In reality, reception was a mixture of ‘[j]oy, hope, suspicion – above all, astonishment’: Tuchman, *supra* note 28, at 229 ff. Official reception was far less joyous. See also Davis, *supra* note 89, at 37 ff; Eyffinger, *supra* note 28, *passim*.

<sup>97</sup> All eight items well reflected a shift of direction and withdrawal from the aims stated in the previous note. The agenda also stated, ‘all questions concerning the political relations of States, and the order of things established by treaties, as in general all questions which do not directly fall within the program adopted by the cabinets, must be absolutely excluded from the deliberations of the conference’.

<sup>98</sup> Tuchman, *supra* note 28, at 239; Eyffinger, *supra* note 28, at 67. This supports contemporary critique that IHL legitimizes, or is an apologia for, the use of force: Jochnick and Normand, ‘The Legitimation of Violence, A Critical History of the Laws of War’, 35 *Harvard Int’l LJ* (1994) 49; Jochnick and Normand, ‘The Legitimation of Violence, A Critical Analysis of the Gulf War’, 35 *Harvard Int’l LJ* (1994) 387; Berman, ‘Privileging Combat? Contemporary Conflict and the Legal Construction of War’, 43 *Columbia J Transnat’l L* (2004) 1; D. Kennedy, *The Dark Sides of Virtue* (2004); D. Kennedy, *Of War and Law* (2006).

Peace propagandists did more than suspect the agenda; they saw through it. Baroness von Suttner, who would attend the Conference as a journalist and a peace activist, wrote to Henri Dunant a few days before it was convened:

My dear Sir, my friend,

Your splendid work, which has done so much good, is now – in the hands of reactionaries – being turned into an obstacle in the path of a greater good.

You know what I mean: all the military men, statesmen and governments, who do not want to hear a word about the end of wars, entrench themselves behind the Red Cross and the Geneva Convention to obstruct the entire Conference of The Hague. They are going to discuss additional articles to deal with the evils of future massacres, so as not to have to concern themselves with the means of avoiding such massacres.

So to fend off this danger – this snare which has been laid for pacifists – what we would need is for you to protest.<sup>99</sup>

To assert that Martens, who ‘by now ... did not believe in the feasibility of any reduction of armament ... found a way out by transforming the conference on disarmament into the first peace conference’ exceeds the bounds of irony.<sup>100</sup> Rather, he helped transform it into a conference on war.

The conference proceeded under fear of failure: less, for some, for saving the Tzar’s face and more, for most, for being collectively denounced by public opinion – and proving the Socialists’ claim about the ‘impotence of governments’.<sup>101</sup> As proposal after proposal on arbitration, arms limitation, or the laws of war was rejected as impractical, or unacceptable, by this or that Power, the pressure to produce *anything* that might showcase a measure of success mounted. It was fuelled by the presence at The Hague of peace advocates and ‘propagandists’ and, in some cases, by domestic public opinion.<sup>102</sup>

The outcomes of the Conference created a diversion and affected deferral on a grand scale. Two of the three Conventions it produced dealt with war; the third (by far the weakest normatively) concerned ‘peaceful adjustment of international differences’. The three Declarations limiting specific arms dealt with weapons or armaments that, *if* they existed at all, were peripheral to Europe’s arsenals. What bans they imposed – on launching projectiles and explosives from balloons, the ‘use of projectiles, the only object of which is the diffusion of asphyxiating or deleterious gases’, or on the use of some ‘bullets which expand or flatten easily in the human body’ – were heavily qualified and strictly limited in time. Next came expressions of pure discord and deferral: all that was left of the original proposed moratorium on military charges (i.e., expenditures)

<sup>99</sup> Bertha von Suttner to Henry Dunant, 9 May 1899, cited in Durand, ‘The Development of the Idea of Peace in the Thinking of Henry Dunant’, 250 *IRRC* (1986) 16, at 38, who cites the equivocal response of the Red Cross founder. Eyffinger, *supra* note 28, at 134 cites a diary entry she wrote after encountering Beernaert on the work of the Sub-commission: ‘the question of the humanization of war – especially in a Peace Congress – cannot interest me’.

<sup>100</sup> Pustogarov, *Humanist*, *supra* note 4, at 310.

<sup>101</sup> Münster, the German delegate, wrote that ‘[t]o save Russia’s face the Conference could not be allowed to end in fiasco and its work must be covered with a “cloak of peace”’; cited in Tuchman, *supra* note 28, at 253, 263 (impotence).

<sup>102</sup> *Ibid.*, at 264 (‘necessity of presenting some result to the public was overriding’); also at 257.

was a Resolution expressing the ‘opinion that the restriction of military charges, which are at present a heavy burden on the world, is extremely desirable for the increase of the material and moral welfare of mankind’. Then came six ‘*Vœux*’. One wished that ‘steps may be shortly taken for the assembly of a special Conference having for its object the revision of [the Geneva] Convention’. Others that some future conference will have on its agenda ‘the rights and duties of neutrals’; the ‘inviolability of private property in naval warfare’; and ‘the bombardment of ports, towns, and villages by a naval force’. One *vœu* wished that ‘questions with regard to rifles and naval guns ... may be studied by the Governments’; another that governments examine ‘the possibility of an agreement as to the limitation of armed forces by land and sea, and of war budgets’.<sup>103</sup>

The Martens clause did more than defer the question of resistance to occupation. It was also part of a larger scheme of diversion and deferral. The preamble to Convention II, like the Tzar’s Rescript, began with the search for ‘means to preserve peace and prevent armed conflicts among nations’; but it only dealt with the ‘extreme hypothesis’ of their failure. Instead of progress towards peace, it promised in the ninth paragraph (i.e., the Martens clause) progress towards ‘a more complete code of the laws of war’. The regulation of war, itself deferred by the Martens clause, was a substitute for averting war.<sup>104</sup> The Hague Peace Conference, in regulating war, has turned war into a legal regularity, averting the aversion of war. Beerneart’s concern that regulating war meant that ‘humanity does not give up war’, that regulation ‘in advance legitimate[s] the use of ... force’ and affects its recognition ‘as law’ applies to the entirety of the Hague proceedings, not merely the question of occupation.<sup>105</sup> This, too, is the enduring legacy of the Hague Conference; hence the enduring irony surrounding Martens’ role in authoring, promoting, and implementing this legacy.

## 4 Its Maculate Origins

The final irony underlying the clause’s making may be that credit for the drafting of the declaration Martens had read in the 20 June meeting of the Second Sub-commission – regardless of its motives, uses, or effects – should go to him.<sup>106</sup> The evidence offers only a glimpse into what went on behind the scenes – and what was left outside the official record.

First there is Geoffrey Best’s curious footnote that though Martens ‘has usually been supposed to have shaped the wording himself ... I have found evidence that it was actually drafted by someone else, which I will write about as soon as I have time’.<sup>107</sup> I know of no such product by Best but, considering the source, this evidence

<sup>103</sup> ‘Final Act of the International Peace Conference’, in *Reports to the Hague Conferences of 1899 and 1907* (ed. J.B. Scott, 1917), at 15.

<sup>104</sup> On progress and deferral in IHL historiography see Giladi, *supra* note 4.

<sup>105</sup> Text accompanying *supra* note 23.

<sup>106</sup> Meron, *supra* note 8, at 79 (‘Proposed by the Russian delegate ... the eminent jurist ... Martens’); Pustogarov, *Our Martens*, *supra* note 4, at 177 (‘proposal inserted and formulated by Martens’).

<sup>107</sup> Best, *supra* note 75, at 347, fn60. Elsewhere, he noted that, though named after Martens, ‘it was actually the bright idea of a Belgian’: Best, ‘Peace Conferences and the Century of Total War’, 75 *Int’l Affairs* (1999) 619, at 627.

of evidence cannot be lightly dismissed. Next, Martens' biography, albeit imprecise on the point, offers some corroboration. Pustogarov, possibly with typical generosity, recounts that Martens 'by agreement with the Belgian delegate ... took a document sent from Brussels, edited it and incorporated certain provisions of principle, and proposed that it be adopted in the form of a preamble to the Convention'.<sup>108</sup>

A far more sinister account comes from another author who fills in some of the gaps left by Kross on Martens' outlook on international law, including the law of war, and its service to power, authority, and empire.<sup>109</sup> Nabulsi narrates a far less benevolent account of Martens' role in the Brussels and Hague Conferences, resonating with the interpretation of the record I offer above. She tells of his 'bullying behaviour towards delegates of lesser powers ... (the diplomatic archives in Brussels and Nantes abound with examples of his arrogance and petulance towards what they considered their own vital concerns of self-defence)'.<sup>110</sup> One example, she writes, 'includes a particularly unpleasant episode of legal plagiarism on a grand scale at The Hague'.<sup>111</sup> She proceeds to tell how:

In the archives of the Belgian Ministry of Foreign Affairs, the depressing tale of the real origins of the so-called 'Martens' Clause' ... appears. As one internal report on the matter baldly stated, when matters came to an impasse at The Hague in 1899, the two Russian delegates (de Staal and Giers) appealed for help from the Belgian diplomat Baron Lambermont. He sent them, through the Belgian representative at The Hague, a M. de Beernaert, a draft text of a preamble which he thought might solve the current problems in the text (which the smaller countries had found unacceptable). The next day at the Commission, Beernaert made a shocking discovery: 'M. de Martens simply presented the declaration as if it was his and made no mention of its real origin.' However, this was the least of it. Martens then truncated the Lambermont draft dramatically, vitiating its original substance ('*Peu après, M. de Martens s'occupe de transformer les textes adoptés par la Commission*'). When challenged on this issue, in writing (and after Lambermont sent another, fresh draft of the complete version, highlighting the fact that the original also had the word 'draft' written all over it), Martens then speciously claimed, in a response made ten days later, that he had not received this second draft in time, and that the text was now impossible to change anyway.<sup>112</sup>

<sup>108</sup> Pustogarov, *Our Martens*, *supra* note 4, at 176. The official record suggests that Martens made no such proposal to use his declaration in the preamble. As to the agreement with Beernaert see *infra*.

<sup>109</sup> *Supra* note 75; Nussbaum, *supra* note 75, at 61 notes the 'insincerity permeating his work' resulting from his service to the Tzar. Lammasch, who would serve as a delegate for Austro-Hungary in 1899, wrote in 1884 that the 'objective of de Martens' book consists in laying the scholarly foundation for the Russian policy in the Orient': Lammasch, 'Friedrich von Martens und der Berliner Vertrag', 11 *Zeitschrift für das Privat und öffentliche Recht der Gegenwart* (1884) 405 (reviewing F. Martens, *Völkerrecht: das internationale Recht der civilisirten Nationen* (trans. K. Bergbohm 1884)); cited by Nussbaum, at 61.

<sup>110</sup> Nabulsi, *supra* note 38, at 161. This seems a recurrent theme; other instances of intimidation on behalf of Russia are discussed by Nussbaum, *supra* note 75, at 57; or, academically, in *ibid.*, at 61–62. For arbitration see the critical accounts of Martens' involvement in the Venezuela affair: *ibid.*, at 58–60; Nussbaum, *A Concise History of the Law of Nations* (Rev. edn. 1954), at 219 (award was a political compromise, arrived at by 'a reprehensible proceeding of de Martens'); Schoenrich, 'The Venezuela-British Guiana Boundary Dispute', 43 *AJIL* (1949) 523; cf. Pustogarov, *Our Martens*, *supra* note 4, at 202–216; Child, 'The Venezuela-British Guiana Boundary Arbitration of 1899', 44 *AJIL* (1950) 682. All this tends to support my reading of Martens' handling of the proceedings.

<sup>111</sup> Nabulsi, *supra* note 38, at 161.

<sup>112</sup> *Ibid.*

The final irony, then, is that Martens' name should be remembered by the clause authored, it would appear, by another.

Whether or not the Martens clause stems from an 'original sin' may impinge on the reputation of a man long dead. Albeit entirely speculative, this seems an appropriate reason for the silence of Martens, the real and the fictional. Yet, in a sense, this does not impinge on the import of the clause itself. The instruction of this evidence is limited: that this language was adopted by the conference attests, in all likelihood, to the degree to which it gave expression to the motives, interests, ideas, and sentiments prevailing among the participants in the First Hague Conference. In this respect, what matters is that authorship of the clause is seen as a source of credit, less the identity of its proper recipient. The maculate origins of the clause, if true, do not impinge on its significance, now as then. They do, however, demonstrate the acute need for a greater degree of circumspection in treating the materials from which the history of IHL is woven.

## 5 Last Thoughts

Irony surrounds the Martens clause, the circumstances of its making, Martens' role therein – and how these are historicized. These ironies compel departure from normative inquiries about the clause and pave the way for critical explorations of its epistemic significance.

They suggest, for example, the salience of reflection on the promise of, one day, producing a 'complete code of the laws of war'. They also provide renewed impetus for questioning whether humanity can progress, by the operation of some 'invisible hand',<sup>113</sup> notwithstanding the worst intentions of states.

The instruction of such ironies may be particularly pertinent at a time when the International Committee of the Red Cross asserts that IHL's challenge lies not with formulating legal rules but with '[i]nsufficient respect for the rules' which is 'a constant – and unfortunate – result of the lack of political will and practical ability of states and armed groups ... to abide by their legal obligations'.<sup>114</sup> The ironies surrounding the making of the Martens clause suggest that practitioners and theorists should perhaps stay the attempt to explain why states disregard IHL. Rather, they should turn their attention to why states invest time and capital in negotiating and assuming developed legal obligations restraining their wartime conduct which they have no political will to abide by. Such questions – much like Kross's novel – call on international lawyers to reflect on our profession, its motives, the services it renders, and what these produce.

Some of such questions and, perhaps, some answers may be found in the language of the clause itself. What import should we assign to the claims of authorship and ownership of the laws of war asserted and withdrawn in the clause? What ought we

<sup>113</sup> A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (ed. T. Butler-Bowdon, 2010), at 240.

<sup>114</sup> ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts', 853 *IRRC* (2004) 213, at 236.

to make of its language, entwining as it does the 'protection and empire' of international law? How to decipher the legacy of binding together civilization, 'humanity', and what 'the public conscience' requires? These questions cannot be answered by limiting our reflection on the clause to the normative.

The late Antonio Cassese aptly called the Martens clause a 'legal myth';<sup>115</sup> the ironies of its origins lead one to wonder, finally, about the extent to which other histories of IHL, and international law more broadly, lapse into mythology, its myths pass off as history.

<sup>115</sup> Cassese, *supra* note 2, at 187.