
Friedrich F. Martens on ‘The Office of Consul and Consular Jurisdiction in the East’

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Abstract

Friedrich F. Martens is famous for the clause named after him and his Cours of 1882. Much less known is his doctoral thesis of 1873 on ‘The Office of Consul and Consular Jurisdiction in the East’. Apart from dealing with consular rights and duties in the Oriental states in general, Martens’ special interest is in a particular institution of consular law in the ‘East’, i.e., consular jurisdiction. By virtue of so-called capitulations entered into in favour of Western states from the 16th century on, nationals of the latter nations were exempted from the territorial jurisdiction of their Oriental host states. In lieu of it, Western consuls exercised judicial authority over their fellow countrymen. Martens’ analysis of consular jurisdiction is deeply immersed in the 19th century dichotomy of civilized and non-civilized nations, with this institution, from his point of view, assuming a key role in managing the relations between the two. He is convinced that intercourse between the West and the East and consequently a rise in the level of civilization of the Oriental states is only possible by mediation of consular jurisdiction. Thus, studying Martens’ doctoral thesis contributes both to a better balanced assessment of Martens as an international lawyer and reminds us how quickly humanitarian arguments and purported promotion of civilizational purposes can turn into paternalistic reasoning.

Introduction

The Baltic-Russian international lawyer and diplomat Friedrich Fromholz (Fedor Fedorovich) Martens (1845–1909)¹ is mostly known for the clause named after him.² In addition, he is hailed for having authored one of the leading international

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¹ As to the spelling of Martens’ name see V.V. Pustogarov, *Our Martens. FF Martens – International Lawyer and Architect of Peace* (ed. and trans. W.E. Butler, 2000), at 9.

² First included in the 9th preambular para. of the Second Hague Convention of 29 July 1899; see for further references Giladi, ‘Critical Thoughts on the History of the Martens Clause’ in this volume.

law textbooks of his time, i.e., the *Contemporary International Law of Civilised Nations* (1882–1883),³ as well as for having edited the 15-volume *Recueil*, a collection of the international treaties concluded by Russia with other powers (1874–1909).⁴

Much less known⁵ – and maybe even a bit obscure – is Martens' doctoral thesis of 1873 on 'The Office of Consul and Consular Jurisdiction in the East'.⁶ It deserves attention as it is Martens' first major work on international law⁷ and contributed to his appointment as Professor Ordinarius at the Imperial University of St Petersburg in 1876⁸ and his life-long career in the Ministry of Foreign Affairs of Imperial Russia. At the same time, the thesis presents somewhat unsettling features of Martens' legacy and draws an ambiguous picture of Martens as an international lawyer. Whereas, for many, the Martens clause stands for humanistic, universalistic, egalitarian aspirations,⁹ Martens' work on consular jurisdiction is deeply rooted in the 19th century dichotomization, and discrimination, of civilized and non-civilized states.¹⁰

1 Objective and Overall Structure of the Book

Martens' doctoral thesis is a study, from the perspective of the last third of the 19th century, of consular rights and duties in general and consular jurisdiction in particular, notably inasmuch as these become manifest in the East. To Martens, 'East' means the Oriental states including both the Middle and the Far East, namely the Ottoman Empire, Egypt, Persia, but also China, Japan, and Siam, i.e., today's Thailand (at 51 ff). Martens acknowledges that consular law represents a standard subject of the international law treatises of his days.¹¹ At the same time, he observes that, apart from ephemeral and generic references, the peculiar situation of consular law in the East

³ The textbook was published in German in 1883; see F. Martens, *Völkerrecht. Das internationale Recht der civilisirten Nationen* (2 vols, 1883) (hereinafter: the *Cours*).

⁴ *Recueil des traités et conventions, conclus par la Russie avec les états étrangers* (15 vols, 1874–1909). This edition is not to be confounded with the *Recueil des traités* and the *Nouveau recueil* of his German namesake, Georg Friedrich von Martens (1756–1821).

⁵ Pustogarov's otherwise comprehensive biography of Martens (*supra* note 1) only ephemerally refers to Martens' doctoral thesis (*ibid.*, at 102), but without further elaborating on it. It is startling that not even the title of Martens' doctoral thesis (as opposed to that of his master's dissertation) is mentioned in the chapters covering the 1870s, i.e., his late student years and his first years as a professor of international law in St Petersburg.

⁶ The edition used is the German translation of Martens' thesis (bearing the original title: *O konsulakh i konsulskoj jurisdiksii na vostokje*); see F. Martens, *Das Consularwesen und die Consularjurisdiction im Orient* (1874). Page numbers without further reference relate to this edition; the translation is mine.

⁷ Apart from his master's thesis on *The Right of Private Property in War* (1869).

⁸ See Pustogarov, *supra* note 1, at 26; Martens had already assumed the chair of international law at the same University in 1870; see *ibid.*, at 23.

⁹ The text of the so-called *Martens clause* (*supra* note 2) reads: '[u]ntil 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 conscience.'; emphasis added.

¹⁰ As to (non-)civilized nations see the aforementioned *Martens clause* as well as section 4 below.

¹¹ See, e.g., H. Wheaton, *Elements of International Law* (1836), at 51; L. Renault, *Introduction à l'étude de droit international* (1879), at 16; see further W.G. Grewe, *Epochen der Völkerrechtsgeschichte* (1988), at 532.

has widely escaped the interest of the academic literature, with the notable exception of the work of the French lawyer Louis Joseph Delphin Féraud-Giraud¹² (at iii, iv). The book thus aims at filling this gap by providing an in-depth analysis – covering almost 600 pages – of the case of consular law in the East.

The organization of the book is straightforward: After a general overview on the international community and its organs (at 1–43), Martens delves into the history of the office of consul and consular jurisdiction in the East from its beginnings until the present (First Part, at 44–276). In this part, Martens provides more than a succinct account of the historic events, but seeks to present a relatively comprehensive picture of the development the institutions of consulate and consular jurisdiction underwent from the Middle Ages to Martens' lifetime.

Subsequently, the book's Second Part is dedicated to exploring the judicial function of consuls (at 277–550), while the Third Part (at 551–570) addresses the executive responsibilities of consular authorities. The uneven distribution of pages indicates that the analysis of the *judicial* rights and duties of consuls – both in civil and commercial matters (at 315–430) and in criminal matters (at 431–488) as well as in regard to voluntary jurisdiction (at 489–499) – constitutes the very core of the book. The reason for this, as Martens emphasizes repeatedly, lies in the fact that the investiture of consular authorities with judicial powers and responsibilities, i.e., *consular jurisdiction*, is symptomatic, the *differentia specifica*, as it were, of the exercise of the consular function in the East.

2 Theoretical Background and Methodological Options

A A Historicizing Worldview

Already the fact that the first, historical section covers more than 200 pages, i.e., virtually half of the book, illustrates that from Martens' point of view a thorough historical analysis is not an insignificant prelude, but an indispensable foundation for the subsequent systematic analysis. Starting with his doctoral thesis, this historic interest was to become a characteristic trait of Martens' style of reasoning and writing to the extent that it can be stated that his oeuvre in general and the *Cours* as its doctrinal flagship are 'permeated with historicism'.¹³

This interest is rooted in Martens' fundamental conviction that international law is intrinsically linked to, and reflective of, the inner life and development of peoples and states (at 3). The view that there exists what he calls an 'organic link' (*ibid.*) between legal institutions and the actual needs of peoples and states is indeed one of main hypotheses of Martens' thesis – or perhaps one should rather say background assumptions, for, in spite of its length, the theoretical framework underlying the analysis is not further explored. Yet, what was contained in the doctoral thesis *in nuce* reflects

¹² L.J.D. Féraud-Giraud, *De la juridiction française dans les échelles du Levant et de Barbarie: Étude sur la condition légale des étrangers dans les pays hors Chrétienté* (1859).

¹³ Pustogarov, *supra* note 1, at 64; as to the role of history in international law see also *Cours*, *supra* note 3, i, at viii.

methodological options that become manifest, and are elaborated upon, in his subsequent work more explicitly.¹⁴

It is a common, and plausible, assumption that Martens' scholarly profile and style of reasoning – he was in his late twenties when we wrote the doctoral thesis – were influenced during a study trip to Central Europe in 1870 and his exposure to the theories of Lorenz von Stein (1815–1890), professor of State and administrative law at the University of Vienna, and Johann Caspar Bluntschli (1808–1881), professor of State law and public international law at the University of Heidelberg.¹⁵ At the same time, apart from some noteworthy exceptions¹⁶ as well as the telling fact that Martens devoted his *Cours* to Professor von Stein 'in respect and friendship',¹⁷ it is not easy to point to specific ideas Martens would have borrowed from his academic teachers. The theoretical assumptions underpinning the analysis in Martens' doctoral thesis by and large appear to reflect general and widespread tenets within the academia of the second half of the 19th century which were arguably also shared by von Stein and Bluntschli but not peculiar to them.¹⁸

These general background assumptions notably comprise different aspects of a 'dynamic' and 'progressivist' worldview which was so popular in 19th century thinking. Law and society are conceived of as cultural products that are subject to *historic* development. In addition, it is commonly assumed that this development has a direction, not moving in circles, as often assumed in antiquity, but progressing towards perfection (as exemplified by Auguste Comte's law of three stages). The firm belief in the continuous *progress* and improvement of human affairs, in terms of not only scientific but also moral progress of humankind (e.g., at 505 ff and 532 ff), is one of the most symptomatic, and from the perspective of later generations naïve, commonplaces of 19th century theorizing.¹⁹ Furthermore, that development is conceived of as being *organic*, i.e., the state and the international community are typically compared to living bodies which flourish, or perish, in the given living conditions of the time.

It will not be surprising, therefore, that Martens emphasizes that (international) legal norms are a *function* of actual life conditions. In his opinion, only those institutions of international law which correspond to the actual state of international

¹⁴ See, e.g., *ibid.*, i, at vii, 13, 177 ff.; see notably *ibid.*, at 8 qualifying the science of international law as 'positive' in the sense that it must be based on the analysis of 'the real conditions of the international law of the civilized peoples'. When taking the chair of international law at Petersburg University in 1870, Martens laid out some of his views on the matter in his inaugural lecture 'On the Tasks of Contemporary International Law' which he delivered on 28 Jan. 1871. He notably criticized that the science of international law 'up to the present has not accepted for research the elements and phenomena of real life, has not even attempted to investigate the internal laws of the community of States and international relations'; cited after Pustogarov, *supra* note 1, at 23, who concludes that in Martens' view 'only history could provide a firm basis for international legal structures' (*ibid.*, at 24).

¹⁵ *Ibid.*, at 19–21, coming to the (albeit very general) conclusion that '[t]he foreign trip had a large impact on the scholarly work of Martens' (*ibid.*, at 21).

¹⁶ E.g., the concept of 'international administration'; see *infra* at head 2B.

¹⁷ See *Cours*, *supra* note 3, i, at v.

¹⁸ As to different nuances regarding the notion of 'civilized nations' see *infra* at head 4.

¹⁹ See also *Cours*, *supra* note 3, i, at 25 in this regard: '[t]he fundamental law of the history of international law as a whole ... is the law of the progressive development of international relations' (translation A.M.).

relations can prove fruitful and will last in time (at 3). Martens does not even shy away from qualifying the relationship between 'real life conditions' and the legal provisions regulating them as 'causality': 'a change in or development of the former must inescapably entail a change in the latter' (at 4). Here, it becomes most obvious that Martens shared another *topos* of 19th century thinking and its fascination for the emerging discipline of sociology, namely that in nature as well as in human society objective laws are at work that can be identified and subsequently be made use of to the benefit of humankind; this positivism and optimism can be traced throughout Martens' œuvre.²⁰ Quite naturally, it is from this perspective that also for the purposes of his doctoral thesis Martens seeks to tackle the question of consular law and consular institutions in the East. He thus claims that a thorough analysis of the intricate history of these institutions is indispensable to reaching an adequate understanding of their very foundations and to discerning the causes which determine the genesis and evolution of these institutions (at 4).

B Exploring Consular Jurisdiction as an Aspect of 'International Administration' to the Benefit of the 'International Community'

In Martens' view, the analysis must depart from two key concepts, i.e., international community and international administration, which he sets out in the Introduction to his doctoral thesis (at 5 ff, 29 ff).

As far as concerns the former, Martens defines 'international community' (*internationale Gemeinschaft*) as a community whose elements are the 'modern civilized States' which 'maintain their full autonomy and independence' within that community (at 9). He then specifies that membership thereof is based on the 'essentially identical culture and civilization' of the respective states which are linked 'through common social, political and cultural interests on the broad basis of essentially identical aspirations and congruent worldviews' (at 12). This degree of likeness is, in Martens' view, only fully realized for the European Christian states (at 14) and, importantly for our topic, at its most rudimentary for the Oriental states. 'International community' also became one of the cardinal concepts in Martens' *Cours*,²¹ to the extent that at times his whole doctrine was referred to as the 'theory of the international community'.²² In any event, the concept is the key to understanding the manner in which Martens absorbs the distinction of civilized and non-civilized peoples which was so common for his time²³ into his own reasoning.²⁴ To him, having reached a certain level of 'culture and civilization' is both the necessary and sufficient condition to be a member of the international community, since it coincides with the ability to be an effective and constructive player in the life of international relations and international law.

²⁰ See, in particular, Pustogarov, *supra* note 1, at 62–63 and 88–89.

²¹ *Cours*, *supra* note 3, i, at 199 ff.

²² See Pustogarov, *supra* note 1, at 66.

²³ As to this aspect see *infra* notes 48 ff.

²⁴ See the very title of his *Cours*, *supra* note 3, and *ibid.*, i, at 203–205; F.E. Martens, *Russia and England in Central Asia* (1880), at 19 ff.; see also Pustogarov, *supra* note 1, at 34 as well as section 4 below.

Martens was therefore convinced that the degree of participation in the international community is a direct reflection of the degree of development of any given state: ‘the higher the level of culture and civilization of a people ... the more diverse and the closer must be its relations to other peoples’ (at 9). And further, ‘the active or passive participation of a particular State in the international economic exchange must be an indicator for its level of culture and its interconnectedness with other peoples’ (at 17). Hence, ‘as soon as one knows the inner life and the public institutions of a country, it is no longer difficult to understand the maxims and rules on the basis of which it conducts its relation with foreign peoples ... The degree of recognition of the human person as such provides the scale for the level of development of the international life and the international law of a time. If there exists a high degree of recognition ... international life also reaches a high level of order and legality. In contrast, if the inalienable rights of the human person are negated in the inner life of the States, we cannot hope to find either order or even appreciation for orderliness in the external relations of those States.’²⁵

It is in this context that Martens introduces the second concept, i.e., ‘international administration’ (*internationale Verwaltung*) which is ‘the activity of the states being members of the community of peoples [i.e. the international community] whose subject-matter are the life relations and aspirations which bring peoples into contact and link them to each other’ (at 19). In his thesis, Martens ascribes the authorship of the concept expressly to Professor von Stein and his *Verwaltungslehre* (*ibid.*). Von Stein had coined the term to describe an emerging phenomenon of the time, i.e., the increasingly institutionalized interaction of peoples with their neighbouring peoples in Europe and the development of administrative structures in that regard.²⁶ Martens’ fondness for the concept was of an obviously lasting nature since the whole second volume of the *Cours* is devoted to developing Martens’ own views on international administration, which for him is the appropriate lens to analyse ‘all the various spheres of international life of contemporary civilized peoples’ as well as to ‘attempt to envelop in a single system the entire immense wealth of international relations and to turn more or less well-known facts into the content of organic international activity of States’.²⁷

Furthermore, the Austrian professor had already distinguished two manifestations of the phenomenon, i.e., the international interaction of states on the political level on the one hand and the interaction on the economic and social level on the other hand.²⁸ Martens took inspiration from this distinction for the purposes of his own thesis (and later on for the *Cours*²⁹) and applied it to the two types of organs in international administrations: the one type being mainly charged with representing the political interests of states, i.e., the diplomats, with the other type rather being entrusted with safeguarding and promoting the social, economic, and cultural interests of the

²⁵ *Cours*, *supra* note 3, i, at 25 (translation A.M.).

²⁶ See L. von Stein, *Handbuch der Verwaltungslehre* (2nd edn, 1876), at 91–97; however, the concept of ‘international administration’ was not contained in the 1st edn of 1870.

²⁷ See *Cours*, *supra* note 3, ii, *passim*; already anticipated in *ibid.*, i, at viii and 21; see further Pustogarov, *supra* note 1, at 71–76.

²⁸ See von Stein, *supra* note 26, at 95.

²⁹ *Cours*, *supra* note 3, ii, at 12–14.

nationals of their sending state, i.e., the consuls (at 23, 25). It is this latter segment of international administration that is the focus of Martens' thesis.

C *The Paradox of Consular Powers*

Martens does not seek to cover the whole realm of questions relating to the role of consuls in international administration, however.³⁰ His thesis' core interest is in delving into a peculiar regime, i.e., the functioning of consular authority in the East.³¹ In accordance with his general views on the functionality of international law, Martens' analysis claims to be modelled upon the laws of development and progress of peoples and states towards the realization of an ever improving international community. Yet, the hypotheses Martens draws upon appear to be inconsistent, and the analysis thus flawed: on the one hand, Martens observes that 'the sphere of competence of consuls and the degree of power assigned to them is proportionate to the degree of likeness and commonality of the cultural, social and political interests and relations uniting the States. In other words, the closer the bonds that tie peoples to each other ... the more fruitful and diversified consular activity will be' (at 5, 27). This would suggest that the scope of functions of consular officers should be most far-reaching among the civilized states. In contrast, Martens insists that consular officers should have the most extensive powers in relation to the (unequal) Oriental states, and derives this from the presumed existence of a 'causal nexus between the scope of consular powers and the cultural level of a State' (at 276), but in an inversely proportional sense. Accordingly, 'the less ... a given State is capable of fulfilling the duties arising out of the concept of international community, the more comprehensive will the rights of the consuls and the more diverse will their administrative functions be' (at 28).

What at first sight presents itself as an outright contradiction in Martens' view testifies to the very essence of the consular function in the East – and the dichotomy of civilized and non-civilized states more generally. When he somewhat vaguely speaks of the 'specific status' of the consuls of Christian states in the East (at 28), he refers to the exceptional, extraordinary function of Western consuls *vis-à-vis* the so-called uncivilized states. Their (in Martens' eyes) evident civilizational inferiority reverses the presumption of equality between civilized states – becoming manifest, *inter alia*, in the *par in parem non habet jurisdictionem* principle as a corollary of the principle of sovereign equality – into one of inequality, and thus gives rise to a legal institution unknown, and unacceptable, to civilized states, i.e., consular jurisdiction. No wonder then that it is the (idiosyncratic) judicial function of consular officers in the East which Martens is particularly interested in and to whose treatment he devotes almost 300 pages.

3 The Phenomenon of Consular Jurisdiction

Consular jurisdiction, which constitutes an anachronism from a contemporary point of view,³² played a crucial role in international relations through several centuries up to the

³⁰ See the more extensive treatment in *ibid.*, at 66–100.

³¹ See also *ibid.*, at 85–100.

³² Czubik and Szewdo, 'Consular Jurisdiction', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, online edition (2009), at para. 1.

first half of the 20th century. The exercise of judicial authority by consuls over the nationals of their sending states, i.e., over their fellow countrymen, can be traced back to medieval times when Italian city states such as Venice, Genoa, Pisa, Amalfi, but also cities like Montpellier and Barcelona, entered into trading relations with the Byzantine Empire as well as Crusader states in the Levant, but also with Muslim states of that time (e.g., Egypt, Muslim potentates in Southern Spain and in North Africa). In this context, it became common to nominate persons of the nationality of the merchants – in the beginning well-recognized merchants, later on more and more government officials – in order to exercise judicial functions with regard to their compatriots engaged in overseas trade (at 45 ff).³³

Initially, this was an internal arrangement of the merchant states, with the consuls sitting in the merchant cities' own ports. Later on, however, the merchants' target states began to recognize judicial powers of foreign consuls residing in these states' territories with respect to situations in which the fellow countrymen of those consuls were involved. This practice of *extraterritorial* consular jurisdiction was formalized from the 12th and 13th centuries on (at 49 ff, 109 ff, 181 ff).³⁴ It thus became common for European states to conclude special agreements with the target states of Western trade in the Orient. Typically, these agreements (a) guaranteed certain substantive rights to the Western merchants (above all inviolability of their person and property), (b) allowed the Western states to establish consulates in the Oriental states (so-called *consuls d'outre-mer*), and (c) submitted Western merchants to the (often exclusive) jurisdiction of their respective consuls, first in civil and commercial matters, later also as regards criminal law.

These treaties were commonly referred to as *capitulations* as they contained a series of articles which were called *capitula*, i.e., chapters (at 107).³⁵ Without going into the subtleties of these agreements, one of the most important principles on the basis of which jurisdiction was allocated was that of *actio sequit forum rei*. Accordingly, a legal action had to be started with the court of the defendant or accused. In the event of a European merchant being sued or prosecuted this meant that the respective consul had to act as the competent judge. These capitulations had several important implications:

- (a) First, in many cases they led to the *exemption* of nationals of the Western states from the *territorial* jurisdiction of the Oriental states. For Martens, the *fiction of extraterritoriality* is the very essence of consular jurisdiction: while being present in the non-Christian states, the nationals of the European and American nations must be deemed to continue living on the soil of their home state (at 318 ff, 434).³⁶

The nationals of the civilized nations in the Orient ... are exempted from the jurisdiction of the host State's authorities because this is an indispensable prerequisite for international intercourse with the non-Christian nations. The difference in terms of the degree of cultural development is so big that only the assurance of full independence from the host State's government can maintain international intercourse and commerce with the non-Christian and

³³ See *ibid.*, at para. 4.

³⁴ *Ibid.*, at para. 5; see also the extensive case studies in Martens' doctoral thesis: Egypt (at 108–128), Syria and Palestine (at 128–133), North Africa (at 133–148).

³⁵ As to capitulation regime see in general Bell, 'Capitulations', in Wolfrum (ed.), *supra* note 32, with further references.

³⁶ See also the treatment of the question of extraterritoriality in *Cours*, *supra* note 3, ii, at 85 ff.

half-civilized States. The right to extraterritoriality provides the necessary guarantee against Muslim fanaticism and Asian arbitrariness [at 319; see also similarly at 275].

While Martens' reasoning obviously testifies to his contempt for the civilizational state of the Oriental states and chauvinist attitudes he shared with most of his contemporaries,³⁷ it should be noted that the institution of consular jurisdiction was not problematic in itself, at least not in the early phase of consular jurisdiction. It has been rightly pointed out that the Ottoman Empire, when granting its first capitulations in the 16th century, was at the zenith of its power;³⁸ it was only later that the term 'capitulation' became synonymous with surrender.³⁹

To begin with, in the Middle Ages it was considered a principle of law that people were to be treated and judged according to their law of provenience, i.e., their group or home state, without this automatically implying the weakness or inferiority of the host state making such concession (at 46).⁴⁰ In addition, this principle of *personalism* was not alien to Islamic law at all, which endowed the so-called '*aḥl al-kitāb*' ('people of the Book'), i.e., non-Muslims whose faith was nonetheless based on a revealed scripture (Jews, Christians, Zoroastrians), with a considerable degree of autonomy in regulating their affairs, including exercising jurisdiction in that regard. If they paid a *per capita* tax (*jizyah*), they received protected status as so-called 'people of the *dhimma*' and enjoyed a measure of communal autonomy. This system was, for instance, institutionalized in the so-called *millet* system which existed in the Ottoman Empire from the 16th century on: the religious minority populations were organized in confessional corporations which were allowed to settle their internal conflicts before their own courts (thus acting on the basis of the principle of personality) with generally little interference on the part of the Ottoman government, and which were represented to the outside world by a religious leader reporting directly to the Sultan.⁴¹ However, with the rise of the territorial state in the modern era, territorial jurisdiction became the primordial basis of jurisdiction.⁴² This made the exemption of the subjects of Christian/Western states from the jurisdiction of Muslim/Eastern states increasingly appear as an anomaly or a privilege. Such exception called for an explanation.

(b) Secondly, what made things all the more problematic was the *asymmetric* character of the capitulations.⁴³ The judicial powers conceded to the European (and later American) consuls in the oriental states did not have a counterpart in the sense that the latter could have exercised similar rights *vis-à-vis* their subjects residing in the European states. Martens, who was a staunch supporter of this asymmetry, was well

³⁷ As to variations in the approach towards the distinction between civilized and non-civilized people see *infra* at section 4.

³⁸ See S.S. Liu, *Extraterritoriality. Its Rise and Its Decline* (1925), at 61.

³⁹ Bell, *supra* note 35, at para. 3.

⁴⁰ See, e.g., Czubik and Szewo, *supra* note 32, at para. 5.

⁴¹ *Ibid.*

⁴² See, e.g., Simma and Müller, 'Exercise and Limits of Jurisdiction', in J. Crawford and M. Koskeniemi (eds), *The Cambridge Companion to International Law* (2012), at 134, 141 ff.

⁴³ See Peters, 'Unequal Treaties', in Wolfrum (ed.), *supra* note 32, at paras 1, 5; Czubik and Szewo, *supra* note 32, at para. 5.

aware that this required additional justification beyond the mere explanation for the exception from the territorial principle referred to before.⁴⁴ As already pointed out, it found its basis in the distinction between civilized and non-civilized states.

- (c) Thirdly, the discriminatory effect of the capitulations was further reinforced by the widespread use of the technique of the most-favoured nation clause. This signified that if the host state conceded certain rights and privileges to one Western state, this concession would automatically apply to all other states engaged in the country in question.⁴⁵

4 Consular Jurisdiction and the Dichotomy of Civilized and Non-civilized Nations

As has already been pointed out, while the fiction of extraterritoriality is Martens' justification for the legal institution of consular jurisdiction in general, its asymmetrical character is rooted in the distinction between civilized and non-civilized nations. Only the former take part in the international community in the full sense and in terms of complete equality. The distinction between civilized and non-civilized nations is fundamental for Martens' book and, more than that, for his whole oeuvre and reasoning.⁴⁶ At the same time, this distinction was far from being new or unusual, but a symptomatic feature of 19th century international legal reasoning.⁴⁷

While feelings of European superiority *vis-à-vis* the rest of the world were shared by most of Martens' contemporaries,⁴⁸ there were obviously differences as to how they framed the distinction of civilized and non-civilized peoples in more detail. When comparing those different approaches, some characteristic nuances may be identified among them, with variations of tone and emphasis depending on whether they took inspiration from historical, cultural, religious, or ethnographic considerations. Each author, therefore, deserves an analysis in his own right. For instance, James Lorimer has earned the reputation of imbuing his supremacy reasoning with a good measure of social Darwinism and racist inclinations.⁴⁹ Martens' teacher Bluntschli who is more commonly seen as departing

⁴⁴ See, however, the example given *infra* at section 4D *in fine*.

⁴⁵ As to the working of the most-favoured nation clauses in regard to capitulations see, e.g., Martens, *supra* note 6, at 259; see also Czubik and Szewedo, *supra* note 32, at para. 6; Peters, *supra* note 43, at para. 10, with further references.

⁴⁶ See *supra* note 24.

⁴⁷ See in general Grewe, *supra* note 11, at 520 ff, 686 ff, with further references.

⁴⁸ For instance, Koskenniemi makes the case that, in spite of (and partly because of) their humanist inclinations, the founding members of the *Institut de droit international* generally adhered to the notion of 'civilization' and consequently to a distinction between civilized and non-civilized peoples and states; see M. Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870–1960* (2002), at 102 ff, 114 ff, and 134 ff.

⁴⁹ See J. Lorimer, *The Institutes of the Law of Nations* (1883), at 101 ff; Lorimer, 'La doctrine de la reconnaissance. Fondement du droit international', 16 *RDI* (1884) 333; see in this regard also Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', 40 *Harvard Int'l LJ* (1999) 1, at 4 ff, 20 ff, with further references.

from humanistic notions,⁵⁰ wrote an article for the German *Staatswörterbuch* in 1857 in which he elaborated upon the 'Aryan race'. In contrast to the Semitic race which, in his view, was characterized by emotion and religion, the Aryan race is one of rationalism and philosophy. Consequently, Bluntschli identified the modern state as a distinctly 'European-Aryan' political institution which clearly exceeded the 'hollow religiousness which is an ancient inheritance from Asia'.⁵¹ Of particular interest in terms of consular jurisdiction, Bluntschli had particularly the Ottoman Empire in mind when he wrote that to the extent that non-Aryan races had actually succeeded in establishing states, those were theocracies lacking a balanced relationship between state and religion.⁵² As regards Martens himself, his take on the matter departs from the afore-described 'realism' as to the 'actual life conditions' of the international community. The gist of Martens' reasoning can be boiled down to one single principle according to which it is 'the fundamental law of international relations that between peoples of a significantly different degree of culture and civilization intercourse and exchange on the basis of full equality cannot be established' (at 501). It is against the background of this principle that Martens develops his thoughts on the division of the world into civilized and non-civilized nations and the role of consular jurisdiction therein in a peculiar blend of historical, cultural, religious, political, and economic considerations.

A Consular Jurisdiction as an Instrument of Raising the Level of Civilization

For Martens, the exemption of Western nationals from the jurisdiction of the oriental states is not an end in itself, but serves a purpose. Its *function* is the maintenance, stabilization, and promotion of the interaction between the civilized and the non-civilized nations in order to elevate the latter to a higher level of civilization. Thus, consular jurisdiction serves as a motor for intercourse among nations which, to Martens, is the unmistakable indicator for progress and civilizational eminence. The crucial role of interchange is present from the first pages of Martens' book, where he suggests the following general principle: 'the higher the cultural level and civilization of a people, the more differentiated its needs and aspirations, the more varied and narrower its relations to other peoples must be' (at 9).

Hence, while very much interested in the *genesis* of consular jurisdiction – which is necessary to understand the forces underlying the development of this institution – for Martens the *justification* of consular jurisdiction does not arise from historic title, but consists in a pressing need for the international community of his time. Thus, he specifically points out that 'the Europeans are extraterritorial in Turkey not so much because this right was given to their ancestors in the 15th century, but because it is

⁵⁰ J.C. Bluntschli, *Das moderne Völkerrecht der civilisirten Staaten* (1878), at 61.

⁵¹ Bluntschli, 'Arische Völker und arische Rechte', in J.C. Bluntschli, *Gesammelte kleine Schriften* (1879), i, 63, at 89 ('*dumpe Religiosität, welche ein alter Erbeil Asiens ist*'; translation A.M.); see also in this regard Koskenniemi, *supra* note 48, at 77, 103 ff.

⁵² See Bluntschli, 'Le Congrès de Berlin et sa portée au point de vue de droit international', 11 *RDI* (1879) 420.

still required by the current state of the social and political life of the non-Christian nations' (at 319 ff).⁵³

At the same time, Martens is convinced that extraterritoriality and consular jurisdiction, even though certainly constituting a privilege, represent also and in particular a responsibility or even *duty* on the part of the Western *vis-à-vis* the Oriental states. Renouncing these prerogatives would not so much mean uninhibited jurisdiction for the Oriental states. It would rather put an end to the intercourse between the civilized and non-civilized nations which Martens considered to be eventually more beneficial to the East than to the West. This high – and one rushes to add: wishful and self-serving – thinking of the role of the Christian states in regard to the non-Christian rest of the world brings to mind the notion of *mission civilisatrice* or 'The White Man's Burden' so commonly propagated in the 19th and early 20th centuries in the context of the colonization movement.⁵⁴ Martens fully embraces the common perception of his time of the Orient as the kingdom of darkness and backwardness. In no passage of his book would he raise doubts, let alone challenge the virtually unanimous perception of the Western nations as being superior and acting with the vocation to bring light to the moral, political, social, economic obscurity of the Orient. In that regard, he does not hesitate to use very harsh and deprecatory language throughout his book, as exemplified by his speaking of 'Muslim fanaticism and Asian arbitrariness' (at 319; for further examples see at 84 ff, 102 ff, 406, and 532 ff).

Apart from reflecting the *opinio communis* of the 'enlightened' circles of the 19th century where Martens presents himself as a son of his time for all intents and purposes, his opinions were certainly also affected by his negative bias *vis-à-vis* the Ottoman empire as the political competitor, opponent, and, more than once, wartime enemy of the Russian Empire which Martens served as a loyal diplomat through his lifetime.⁵⁵ But even those who had a more benevolent view of the 'old man at the Bosphorus' generally held views that were deeply imbued with attitudes of 'Orientalism',⁵⁶ i.e., a romanticizing, but eventually still contemptuous and patronizing view of the political system, and societal structure and cultural life in the 'Orient'.

B *Uncivilized Nations as a Provisional Category*

Furthermore, given his strong historic orientation, Martens does not promote a 'natural law' theory of consular jurisdiction, at least not in the sense that he would claim to preach consular jurisdiction as an unalterable truth. For him, consular jurisdiction is a provisional mechanism, i.e., 'a question of time, but not of principle' (at 539). It is therefore an extraordinary measure only justified by the 'current' state of development of the oriental states, but open to development (at 148). As soon as there is equality between Eastern and Western states in terms of the abolition of absolute

⁵³ As to this aspect see also Koskenniemi, *supra* note 48, at 115, 133.

⁵⁴ Anghie, *supra* note 49, at 20 ff.

⁵⁵ See Mälksoo, 'F.F. Martens and His Time: When Russia was an Integral Part of the European Tradition of International Law', in this issue, at 811. Martens had already joined the Russian Ministry for Foreign Affairs in 1869 and remained in its service ever since; see Pustogarov, *supra* note 1, at 105.

⁵⁶ E.W. Said, *Orientalism* (1979).

monarchy, the guarantee of individual rights and security, the separation of church and state, the firm establishment of the rule of law, etc., there is no longer any need for the asymmetrical treatment of Oriental states. Consequently, Martens argues that 'if the relevant conditions in the Orient change and the governments of the respective States provide sufficient guarantees to foreigners regarding the inviolability of their person and their property, then and only then will extraterritoriality lose its relevance and its legal foundation' (at 320).

Alas, while speaking of process and dynamics, development is clearly understood as a one-way street: the Oriental states have to adapt to the Western standards, not the other way round. In addition, Martens was convinced that, at the time of writing his thesis, there was still a long way to go until Oriental powers could be treated as on par with Western nations (at 406, 478 ff). He is therefore highly critical of the decision at the Paris Conference of 1856 formally to admit the Ottoman Empire to the European 'concert'⁵⁷ and thus to treat it as an equal to the other European powers (at 249 ff, 503 ff). Furthermore, he shows strong reluctance in regard to the proposals of the Egyptian government for the reform and modernization of its court system which were much debated in Martens' time (at 401, 509 ff). Nonetheless, these proposals found the support of the Great Powers, so that in 1874, shortly after the publication of Martens' book, consular jurisdiction in Egypt was abolished and replaced by a system of mixed tribunals composed of European and Egyptian judges.⁵⁸

C Religion as a Mirror, and Determining Factor, of the Level of Civilization

As we have seen, Martens' approach towards consular jurisdiction is based on the dichotomy of civilized and non-civilized nations. Throughout the book, the terms Western/Eastern and European(American)/Oriental are used as synonyms to express this difference. However, also the pair of terms Christian/non-Christian (Muslim) is drawn upon to address the further progressed and thus superior states of the West as opposed to the less developed and thus inferior states of the East.

It has already been pointed out that Martens uses very harsh language *vis-à-vis* Muslims and Islam. For him, Islam is the epitome of backwardness and fanaticism, of hostility towards scientific progress and intercourse between states, and therefore the direct opposite, and fiercest enemy, of the so much longed for progress in international relations. Accordingly, it is presented as the root cause for the lagging behind of the Orient. 'But it is obvious that the social and political life progressed whereas the precepts of Quran appeared several centuries ago and were based on the conditions of

⁵⁷ Art. 7 of the Treaty of Paris of 30 Mar. 1856, settling the Crimean War between Russia and the Ottoman Empire, declared the Sublime Porte to be 'admitted to participate in the advantages of public law and of the European concert' (my translation; in the French authentic version: '*déclarent la Sublime-Porte admise à participer aux avantages du droit public et du concert européen*'); see also the treatment in Martens' thesis, *supra* note 6, at 503 ff.

⁵⁸ See Czubik and Szwedo, *supra* note 32, at para. 8; see the benevolent discussion of the reform in Bluntschli, *supra* note 50, at 159 and 164 ff as well as – obviously with the benefit of hindsight – Cours, *supra* note 3, ii, at 99 ff.

that time ... The immediate consequence of the government of Quran and its religious and political precepts, in the Muslim States in general and in Turkey in particular, is a complete standstill and the governments of most obscure fatalism' (at 533).

Conversely, Christendom becomes the embodiment of liberalism and progressive thinking. Martens strongly emphasizes that beyond confessional splits all European states (notably including Russia) are linked by the bond of Christian belief: '[t]here exist, among the Christian peoples, not only common national bonds, but also, from their nature, a common religious belief, common ideas and aspirations ... The culture of the modern civilized States is based on Christian foundations and this is why they have served as the original base of the international society' (at 14). By benevolently ignoring the virtually permanent belligerent exchanges between the 'Christian' nations of Europe in Martens' time, the reference to civilization and civilized states becomes a strongly Christian – and Islamophobic – connotation.⁵⁹

Yet, such approach bears the risk that international law comes to be conceived of as being the offspring of one religious tradition only, and thus as missing out on its universal aspirations and its potential to transcend religious borders. This would mean jeopardizing the very essence of the international law project which was seen as a privileged instrument in managing the confessional split across the continent and the tensions and conflicts arising from it. Being well aware of the dangers of a religiously overly narrow construction of international law, Martens underscores that 'international law is not exclusively based on religious or Christian principles and that the binding force of the legal norms developed in the international life of the civilized States may also be accepted and observed by the non-Christian peoples' (at 505).⁶⁰ Moreover, he expressly acknowledges that the Muslim states can progress towards civilization (at 539 ff), but in Martens' opinion this would mean that they renounced Islam as the basis of the political constitution of the states in question (at 39 ff, 539).

When Martens concludes that 'the rational and unshakable foundation of [international] law consists in the huge amount of social, spiritual-intellectual, economic and other cultural bonds which unite the civilized peoples in view of common aspirations and solidary interests' (at 506), the question remains whether his seemingly religiously neutral approach to international law and to the civilized states to whom the project of international law is entrusted does not keep the latter still hostage to the Christian tradition. Martens' reasoning suggests that Christianity is seen not only as the point of departure for the development of international law in historic terms, but as its continuous source of inspiration and permanent point of reference.

⁵⁹ See, in a similar vein, the report of Sir Travers Twiss to his colleagues at the *Institut de droit international* in 1880 where he noted the Qur'an, as opposed to the Bible, prohibited equality between the *dār al-Islām* (i.e., the abode of Islam) and the infidel states. Thus, '*la civilisation turque sera toujours incompatible avec la nôtre*'. Interestingly, he concluded from this fact that there was no reason to give up the practice of consular jurisdiction: see Twiss, 'Rapport', in *Annuaire de l'Institut de droit international* (1879–1880), i, at 303–305 (cited from Koskeniemi, 'International Law in Europe: Between Tradition and Renewal', 16 *EJIL* (2005) 113, at 115).

⁶⁰ See in this sense also Bluntschli, *supra* note 50, at 61.

D Power Realism and the Cloak of Civilization

Finally, there is another set of underlying assumptions as far as the notion of civilized versus non-civilized nations is concerned. In Martens' view, the former are essentially the Great Powers of the European continent (and the United States). These happen to be the states which have a consular presence in the Oriental states as well as important strategic – political and economic (at 48 ff) – interests in the 'East'. In that regard, Martens readily admits, although still disguised in the 'language of duty', that the policy of these states also includes naked power politics, including physical force, to gain and maintain the Oriental states' consent to asymmetrical consular jurisdiction: '[t]he ports [of the Oriental states] *had to* be opened by the use of force, and many treaties *had to* be concluded under the thunder of the cannons which guaranteed generally recognized rights to the subjects of the civilized nations' (at 275; emphasis added).

While the nationals of the Western states and their economic interests are the immediate beneficiaries of such iron fist politics, in Martens' worldview the actions of the Great Powers are, via the promotion of intercourse and the ensuing rise in civilization, vicarious acts on behalf of the affected Oriental states, as it were, which in a longer term perspective work to the best of the international community as a whole. Alas, beyond the paternalistic intuitions Martens takes inspiration from, it is not clear at all where the line between the *bonum commune* of the international society and the self-interest of the Great Powers is to be drawn, and to what extent the latter use (or rather abuse) the promotion of civilization as a camouflage for pursuing their own ends.

Such 'realistic' reasoning in terms of existing power structures does not fail to influence Martens' reasoning as an international lawyer, notably his approach to legal interpretation, and this at a very early stage of his career.⁶¹ This becomes manifest, for instance, in the context of discussing a treaty between Great Britain and the Ottoman Empire of 1809.⁶² This instrument contained a clause providing the Sublime Porte with the right to open consulates on the island of Malta and all other British possessions, so that those rights and privileges which the British consuls enjoyed in Turkey should also apply to the Turkish consuls on British soil, i.e., a rare instance of a symmetrical arrangement in the consular treaties of that time. Ironically, Martens expressly concedes that 'following a strict interpretation of this article, the Turkish consuls on British territory should obtain extraterritoriality and their own jurisdiction'. Yet, he immediately retreats by adding that this 'obviously contradicts all existing customs and the legal system as it has developed in the Christian States' and that therefore 'this article can only be explained by imprecise drafting or inadvertence of the English delegates' (at 255). Instead of concluding that the clear meaning of the terms used should be relied upon or of arguing that such 'imprecision' should come out to the disadvantage of those using it, Martens opts – blending elements of historical, systematic, and teleological interpretation in a quite peculiar fashion – for a construction of the clause which bows to what Martens deems to be the tradition and

⁶¹ See Mälksoo, *supra* note 55; see also Koskeniemi, *supra* note 60, at 113 ff.

⁶² Available at Martens, *Recueil*, *supra* note 4, Suppl., v. at 160; see the discussion of the treaty in Martens' doctoral thesis, *supra* note 6, at 254–256.

purpose of the regime of consular jurisdiction, i.e., in favour of the civilized states (only).

Martens is well aware of the relevance of the institution of consular jurisdiction as an element of power politics, notably regarding the relationship of the most important 'Eastern' state, i.e., the Ottoman Empire, with his own country, i.e., Russia. Even though he was not yet working for the Russian Foreign Ministry at the time of writing his doctoral thesis,⁶³ one can already observe an obvious 'patriotic' bias towards Russian interests in this treatment of the relations between the Sublime Porte and the Tzar (at 233–248). As regards consular jurisdiction more particularly, he states – once again cloaked in a 'language of duty' – that 'in view of the standstill of Ottoman public life and its antagonism *vis-à-vis* the social and cultural efforts of the European states, the extraordinary guarantees which were given to Russian nationals on Turkish soil were not only not to be restricted, but had to be enlarged continuously' (at 240).

5 The Relevance of Martens' Book Today

It has already been mentioned that the question of consular jurisdiction is an anachronistic one in our days, since this legal institution was abolished in the course of the 20th century. While it still became the object of cases both before the Permanent Court of International Justice⁶⁴ and the International Court of Justice,⁶⁵ the last instances of consular jurisdiction were eliminated after World War II.⁶⁶ Likewise, the entire reasoning in Martens' thesis appears to be so deeply immersed in the mindset of the 19th century, and in a tradition of imperialism and colonization, that it seems difficult to see parallels, let alone to draw conclusions for contemporary purposes. Yet, it may be claimed that at least traces of consular jurisdiction and of the distinction of civilized and non-civilized states have survived in the contemporary international legal order and the related academic discourses.

A Splinters of Consular Jurisdiction

A pale reflection of consular jurisdiction has been identified in Article 36 of the 1963 Vienna Convention on Consular Relations as well as Articles 36 and 37 of the (albeit not widely ratified) 1967 European Convention on Consular Functions.⁶⁷ According to the latter provisions, the consular officer shall be given prior notice in the event of intervention by the authorities of the receiving state on a vessel sailing under the flag of the consul's state. As regards the former, pursuant to Article 36(1)(c) of the Vienna

⁶³ See in this context Arthur Nussbaum's critique of Martens' bias towards Russian interests: Nussbaum, 'Frederic de Martens. Representative Tsarist Writer on International Law', 22 *Nordisk Tidsskrift for International Ret og Jus Gentium* (1952) 51; Mälksoo, *supra* note 55.

⁶⁴ *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion, 7 Feb. 1923, PCIJ Series B, No. 4, at 28 ff.

⁶⁵ *Case Concerning Rights of Nationals of the United States of America in Morocco (France v. USA)*, Judgment, [1952] ICJ Rep 176, at 190 ff.

⁶⁶ See Czubik and Szewedo, *supra* note 32, at paras 1 and 8.

⁶⁷ See *ibid.*, at paras 12 and 15, referring to these provisions as a 'remnant of consular jurisdiction'.

Convention, consular officers shall have the right to visit their nationals if they are arrested in the receiving state, to converse and correspond with them, and to arrange for their legal representation.

Considering that consular jurisdiction was a manifestation of personal jurisdiction of the state of nationality of the individuals in question – and thus weakened the territorial jurisdiction of the receiving state – other parallels might come to mind: apart from the jurisdictional privileges accompanying diplomatic or consular immunities,⁶⁸ there are other forms of treaty exemption from territorial jurisdiction, e.g., in the context of Status of Forces Agreements (SOFAs). One might also mention the so-called 'article 98 agreements' concluded by the US under the Bush administration with a considerable number of States Parties to the ICC.⁶⁹

To be sure, the resemblance is at most superficial: in the case of consular assistance, the consuls' role is institutionalized, but purely supportive. Consuls do not have any decision-making power, as was the characteristic trait of consular jurisdiction in the proper sense. Moreover, the aforementioned exemptions from territorial jurisdiction do not give consuls any powers at all. However, they testify, at least partly, to a similarly negative attitude of the state of nationality regarding the exercise of (notably criminal) jurisdiction *vis-à-vis* their nationals, as in the case of consular jurisdiction. That an exemption in favour of exclusive personal jurisdiction of the sending state is at times still considered indispensable for 'humanitarian' purposes and to guarantee the participation of (notably Western) states in the work of the United Nations becomes manifest in a number of UN Security Council resolutions.⁷⁰

B Remains (and Recurrence?) of the Civilized/Non-civilized Nations Dichotomy

There appear to exist stronger analogies as regards the distinction of civilized and non-civilized nations. Yet, they do not so much relate to a number of international conventions which still use the term 'civilized nations', e.g., Article 38(1)(c) of the ICJ Statute⁷¹ and Article 7(2) of the European Human Rights Convention.⁷² While 'civilized nations' thus remains a term of art of international law, there is broad consensus

⁶⁸ See notably Art. 31 of the 1961 Vienna Convention on Diplomatic Relations as well as Art. 43 of the Vienna Convention on Consular Relations.

⁶⁹ As regards both aspects see Peters, *supra* note 43, at para. 63; concerning the functioning of Art. 98 and the US efforts in this regard see, e.g., Krefß and Prost, 'Article 98', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, 2008), at paras 29 ff.

⁷⁰ See, for instance, SC Res. 1593 (2005), at para. 6 (Sudan); SC Res. 1970 (2011), at para. 6 (Libya); see also Bell, *supra* note 35, at para. 13 in this regard.

⁷¹ Pursuant to this provision, the ICJ 'shall apply ... c) the general principles of law recognized by civilized nations'.

⁷² After stating the non-retroactivity principle in criminal procedures in para. 1, para. 2 qualifies: 'This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations'; see, in contrast, Art. 15(2) of the 1966 International Covenant on Civil and Political Rights which contains a virtually identical provision, but has the following wording at the end of the provision: '... according to the general principles of law recognised by the community of nations'.

that today *every* state is to be regarded a ‘civilized’ one in the meaning of these provisions.⁷³ The contemporary international legal order is not governed by distinction between two classes of states, but by the basic principle of sovereign equality of states, as prominently enshrined in Article 2(1) of the UN Charter.⁷⁴

Notwithstanding the paramount role the principle of sovereign equality plays in international law, proposals have been submitted which would lead to a reintroduction of distinctions among states, of ‘classes’ of states, as it were – partly in combination with attributing a different scope of rights to them.⁷⁵ Even though the differentiations proposed do not go along the line of the civilized/non-civilized states dichotomy as such, they nonetheless draw on intuitions we have encountered in Martens’ reasoning on consular jurisdiction. It appears that the distinction of states in a comprehensive sense which deserve to be accorded the full panoply of rights under international law and states which fall short of this standard, due to a lack of ‘development’ or for failing to live up to certain democracy or human rights benchmarks, still has some attraction. The various approaches which might come into view in this regard are quite heterogeneous in nature and can only be presented here in exemplary fashion.

To begin with, already under the Clinton administration, the concept of ‘rogue states’ was used to pillory states sponsoring international terrorism, threatening world peace, or systematically violating human rights. With the Bush administration, this concept was replaced by the no less infamous notion of the ‘axis of evil’.⁷⁶ Yet, these were political rather than legal notions, and it is not clear whether and to what extent they sought to imply discrimination against states in any juridically relevant sense.

Furthermore, the idea that sovereignty can be *forfeited*⁷⁷ has earned some attention in recent years. In this context, it has prominently been argued (namely in the *Kosovo* case before the ICJ⁷⁸) that – even outside the colonial context – balancing of the

⁷³ See, e.g., Pellet, ‘Article 38’, in A. Zimmermann *et al.* (eds), *The Statute of the International Court of Justice* (2nd edn, 2012), at para. 261, pointing out that apparently the members of the Committee drafting the PCIJ Statute ‘considered “all nations” to be civilized’ and adding that ‘this formula ... is nowadays entirely devoid of any particular meaning’ and that it can be ‘firmly admitted that, for the time being, all States must be considered as “civilized nations”’; as to the genesis of the provision see further *ibid.*, at paras 251, 256.

⁷⁴ See in this context notably Peters, ‘The Growth of International Law between Globalization and Great Power’, 8 *Austrian Rev Int’l and European L* (2003) 109, at 130 ff.

⁷⁵ However, the focus of the subsequent reasoning is not on regimes of legal differentiation applying to the so-called ‘P 5’ and other States under the UN Charter or the Nuclear Non-Proliferation Treaty; nor will arrangements for weighted voting powers for the Bretton Woods institutions be discussed.

⁷⁶ See US President George W. Bush’s State of the Union Address of 29 Jan. 2002, available at: www.presidency.ucsb.edu/ws/index.php?pid=29644 (accessed 21 Dec. 2012).

⁷⁷ See also J. Crawford, *The Creation of States in International Law* (2nd edn, 2006), at 126, referring to the analogous concept of *carence de souveraineté*.

⁷⁸ While the concept has figured prominently in many of the written and oral submissions (see www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=1, accessed 21 Dec. 2012) as well as, e.g., in the Separate Opinion of Judge Cançado Trindade (at paras 178 ff), the majority of the bench restricted itself to stating: ‘[radically different views] existed regarding whether international law provides for a right to “remedial secession” and, if so, in what circumstances’; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion [2010] ICJ Rep. 403, at para. 82.

principles of sovereignty, on the one hand, and self-determination on the other may, under certain circumstances, authorize to lawfully secede from an existing state without its right to territorial sovereignty being violated (so-called *remedial secession*).⁷⁹ If accepted, such theories tend to create two classes of states, i.e., those paying due respect to human rights and self-determination and thus enjoying the full range of rights, and those having violated peremptory norms or other fundamental rules of international law. In the latter case, a state risks having its sovereign rights suspended or even annihilated.

In a different, but related context, it has been submitted that various techniques of *conditionality* applied in the human rights and economic development context evoke memories of civilized states patronizing not (yet) civilized ones. It is telling in this regard that one commentator has gone as far as to qualify the structural adjustment policies (SAPs) of the IMF and the World Bank as 'the capitulations of the era of globalization'.⁸⁰ In spite of certainly important differences *vis-à-vis* the predecessor, there is merit indeed in not simply taking for granted the standard argument – that conditionality clauses are freely accepted and therefore do not question but confirm sovereign equality – and in taking seriously the asymmetrical settings under which agreements of this kind are often concluded.

On a more theoretical level, ideas have been brought to the academic fore, notably in the context of the debate on the *constitutionalization* of international law, according to which a state's respect for human rights could serve as a criterion for *legal* distinctions between states.⁸¹ While such approach is not compatible with a notion of absolute equality, it is argued that it leaves *proportionate* equality intact: 'a formally differentiated treatment of states, notably within concrete legal regimes, is permissible if and as long as this is necessary and adequate to fulfil objectives enshrined in international law'.⁸² The proponents of such proposals are eager to underscore that such differentiation does not imply the creation of fixed categories of states as in 19th century doctrine. In contrast to a distinction between civilized and non-civilized states, it is claimed, the presumptive right to formally equal treatment may only be relativized in 'concrete legal contexts'.⁸³

The decisive question then becomes how such distinction may be proceduralized, i.e., whether it becomes just another means in the hand of powerful actors on the

⁷⁹ See Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res. 2625 (1970), Principle 4, at para. 7.

⁸⁰ Fidler, 'A Kinder, Gentler System of Capitulations? International Law, Structural Adjustment Policies, and the Standard of Liberal, Globalized Civilization', 35 *Texas Int'l LJ* (2000) 387, at 388, 407.

⁸¹ See, for instance, Peters, 'Membership in the Global Constitutional Community', in J. Klabbers *et al.* (eds), *The Constitutionalization of International Law* (2011), at 153, 190–195; Peters, 'Humanity as the Λ and Ω of Sovereignty', 20 *EJIL* (2009) 513, at 528–530; see also the literature cited in Mälksoo, *supra* note 55, nn 85 and 86; as a general theoretical background see J. Rawls, *The Law of Peoples* (2001), at 5, 59 ff, 90, opposing 'liberal peoples' and 'decent peoples' to 'outlaw states' (and 'societies burdened by unfavourable conditions' and 'benevolent absolutisms') in his distinction of five types of domestic societies.

⁸² See Peters, 'Humanity', *supra* note 81, at 529; see also Peters, 'Membership', *supra* note 81, at 192.

⁸³ Peters, 'Humanity', *supra* note 81, at 530.

international plane or to what extent the decision-making process can be made transparent and representative. Indeed, there are legal vehicles at hand that promise to allow differentiation on an ‘objective’ level. In this regard, many authors have notably referred to the virtually stillborn Article 5 of the UN Charter⁸⁴ authorizing the General Assembly, upon the recommendation of the Security Council, to suspend a UN Member State from the exercise of the rights and privileges of membership in the event that preventive or enforcement action has been taken against it by the Security Council.⁸⁵ One might also mention the analogous mechanism created by Article 7 of the Treaty on European Union which provides for the suspension of EU membership rights in the event of a serious and persistent breach by a Member State of the values set out in Article 2 of the EU Treaty.

In sum, while there may be good reasons to ‘qualify’ the rule of sovereign equality and while there may exist mechanisms to put such theories of ‘conditioned’⁸⁶ sovereignty into operation, they remain subject to the risk of being abused in the context of existing power structures.⁸⁷ In particular, as becomes manifest in the reluctance of some observers *vis-à-vis* the strongly humanist and moralizing aspirations of such approaches,⁸⁸ one cannot be careful enough as regards the danger of, if only indirectly, reviving ways of reasoning which are deemed to have landed on the pile of rubbish of history a long time ago.

6 Conclusion

F.F. Martens’ doctoral thesis on the ‘Office of Consul and Consular Jurisdiction in the East’ is, as the previous discussion has shown, worth studying above all from the point of view of the historiography of international law, since this may contribute to a proper assessment of the international law discourse in the 19th century in general as well as of one of its foremost proponents in particular. As regards the latter, such endeavour must be considered especially promising, given the fact that the work in question originates from the formative period of the young scholar. Moreover, it has hitherto not caught a comparable degree of attention as is the case for some other of his works, let alone the *Cours*.⁸⁹

⁸⁴ Peters, ‘Membership’, *supra* note 81, at 195; Peters, ‘Humanity’, *supra* note 81, at 529, n. 74.

⁸⁵ See Tams, ‘Article 5’, in B. Simma *et al.* (eds), *The Charter of the United Nations* (3rd edn, 2012), at para. 2, referring to Art. 5’s ‘limited role in practice’. See also Art. 6 of the UN Charter according to which a Member State which has persistently violated the Principles contained in the Charter may be expelled from the UN by the General Assembly upon recommendation of the Security Council. This provision has never been used: see Tams, ‘Article 6’, in *ibid.*, at paras 1, 28.

⁸⁶ Peters, ‘Humanity’, *supra* note 81, at 528.

⁸⁷ The proponents of constitutionalist theories are often conscious of the dangers arising from promoting a legally differentiated treatment of states: see, e.g., Peters, ‘Membership’, *supra* note 81, at 193.

⁸⁸ See, for instance, Kingsbury, ‘Sovereignty and Inequality’, in A. Hurrell and N. Woods (eds), *Inequality, Globalization, Liberalization, and Inequality* (1999), at 66, 90; Koskenniemi, *supra* note 60, at 117.

⁸⁹ As has been mentioned, there exists only a German translation of the thesis in addition to the Russian original; in addition, the thesis has almost completely escaped the attention of the otherwise comprehensive biography by Pustogarov: see *supra* notes 5 and 6.

The thesis' focus on consular jurisdiction as an outdated institution of international law as well as on the distinction between civilized and non-civilized nations as a contaminated differentiation does not make the book easily digestible for a contemporary reader. It exhibits many not so sympathetic traits of 19th century thinking and testifies to colonialist and imperialist attitudes, with Martens presenting himself as being deeply immersed in the prejudice of his time.

At the same time, Martens remains not readily classifiable. Some may see in him the *conservative* inasmuch as he argues in favour of maintaining the existing world order which only admits a limited number of sufficiently civilized states to full membership of the international community. Others may describe him as a *pragmatic* or *realistic* thinker with a good measure of sensitivity for existing power structures, if not as an outright *opportunist* since Martens, simultaneously being scholar and diplomat in the Russian Empire's service, typically embraces positions that serve the Russian interest. Again another group may emphasize the *idealistic* potential in Martens' thinking, considering the fact that he firmly believes in the progress of the international community and seeks to promote the humanitarian aspirations of international law inasmuch as this reflects the increasing refinement and cultivation of humankind.

Martens' oeuvre can be drawn upon to justify all these takes on Martens, irrespective of whether one prefers to point to *contradictions* in his work or, more benevolently, to ascribe to Martens a certain *eclecticism*. As regards his doctoral thesis where all the tension is already visible, we see above all a young scholar and diplomat, talented and ambitious in equal measure, seeking to excel in the academic community of his time. The thesis certainly contributed to establishing Martens' reputation as a leading scholar in international law, within Russia and beyond, and thus prepared the ground for the publications to follow.

In view of his rich legacy, Martens remains without doubt one of the lodestars of international law. At the same time, studying his doctoral thesis may also serve as a pedagogical device of sorts, reminding us how quickly humanitarian arguments and purported promotion of civilizational purposes can turn into paternalism and justification for repression. Especially when working with concepts such as humanitarian intervention, regime change, and, for that matter, R2P, Martens' work invites us to adopt a sober approach and humble attitude when it comes to dividing the world into different categories of actors – then as nowadays.