
F.F. Martens – Man of the Enlightenment: Drawing Parallels between Martens’ Times and Today’s Problems

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Abstract

This article concentrates on two controversial aspects of the writings of Friedrich Fromhold Martens – his treatment of the so-called mission civilisatrice of European nations and the potential clash of the two roles an international lawyer may have to perform: in the service of international law and representing national interests of his/her country or other clients. Both of these aspects in Martens’ work have not lost their topicality; it is illuminating to draw parallels between his time and today’s world.

For many years I have been intrigued by Friedrich Fromhold (Fyodor Fyodorovich) Martens mostly for personal reasons. We both moved, with a century’s difference, from an Estonian countryside to the imperial capital. As an orphan, Martens was sent to school in the capital of the Russian Empire, St Petersburg, where he finished his formal education by graduating from the local university. I found myself, after many misadventures and adventures, at the University of Moscow, then the capital of the Soviet Union. He became a professor of international law in St Petersburg where he also served the Russian Empire advising the last Emperor Nicolas II and a series of foreign ministers, including the greatest Russia has ever had, Prince Alexander Gorchakov, on matters of international law. I turned out to be a professor of international law at Moscow University, where during the years of *perestroika* and *glasnost* I also advised the Soviet leadership, including the first and the last President of the USSR Mikhail Gorbachev, on issues of international law. Martens took, *inter alia*, a keen interest in the Great Game played out in Central Asia between England and Russia. His book, *Russia and England in Central Asia* (1880), served as one of the stimuli (the other one being my conversation with the legendary British diplomat and spy Fitzroy MacLean at the beginning of the

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1990s in Foyle's bookshop in London and reading his fantastic *Eastern Approaches*) that inspired me to take up an offer to serve as UN regional advisor for Central Asia – the mission that ended with a book entitled *Central Asia: A Chessboard and Player in the New Great Game* (2007). However, there are also less personal and much more important reasons for drawing parallels between Martens' times and today's world.

Whilst serving the Russian Empire, Martens also served international law. If it sounds paradoxical, then only to an extent, since the very reality that international law is called upon to govern is more often than not contradictory and paradoxical. So are often those who study or practise this multifaceted phenomenon. In this article I would like to concentrate on two controversial aspects in Martens' writings – his treatment of the so-called *mission civilisatrice* of European nations and the potential clash of the two roles an international lawyer may have to perform: in the service of international law and representing the national interests of his/her country or other clients. Both of these aspects of Martens' work have not lost their topicality; it would be illuminating to draw parallels between his time and today's world.

1 *Mission civilisatrice* Then and Now

Martens' *Russia and England in Central Asia*¹ is imbued with humanitarian concerns and justifications mainly for the Russian but also, surprise surprise, the British expansion in the mountains, valleys, and deserts of this fascinating region. He argued what was the prevalent view at the time, that international law, which was then often called (by Martens among others) the 'international law of civilized nations', did not and could not govern relations between all the peoples (nations) of the world; it governed relations only between so-called 'civilized' nations. Martens divided nations into civilized peoples, i.e., Europeans and those of European extraction; organized peoples, such as those in Persia, China, and Japan;² and non-civilized or semi-barbarous peoples who, like the tribes of Khiva, Bukhara, Eastern Turkestan, and Afghanistan, were 'nomadic, semi-savage peoples living off theft and pillage'.³ In his opinion, the international law of civilized peoples, i.e., the only possible positive international law (he believed that only natural law could govern relations of civilized peoples with non-civilized ones), could not extend to non-civilized or semi-barbarous peoples since, as he opined, 'non-civilized peoples cannot be responsible for behaviour that is contrary to international law since they are unable to understand elementary juridical and moral ideas underlying relations between European and educated peoples. In the absence of this vital and necessary condition for the binding force of international law it is impossible, in our opinion, to think of international law as of a cosmopolitan law common for all of humankind'.⁴ However, even then there were authors who thought otherwise, i.e., those who held, at least from today's point of view, more progressive ideas on the issue. Martens, for example, being critical of Johann Bluntschli's view that international law

¹ F.F. Martens, *Russia and England in Central Asia* (1880).

² *Ibid.*, at 19.

³ *Ibid.*, at 20.

⁴ *Ibid.*, at 13.

was a law of all mankind, called such views ‘a noble and lofty cosmopolitanism, which deprived international law of its practical significance’.⁵

Already then another Russian international lawyer, V.P. Danevskii, who mocked Martens’ concept of applicability of only natural law to the peoples of Asia, wrote, ‘Natural law in our view represents a bottomless pit from which the bearers of European civilization, with the merchants at their head, derive the rules by which they are guided in their relations with “stupid Asians”, still “insufficiently mature” for “Christian civilization” and “international law”’.⁶ Isn’t this quite an interesting and insightful observation that may not have entirely lost its relevance even today?

It may seem that the fact that Martens confined the application and applicability of international law only to civilized peoples, considering other peoples as semi-savages who were beyond the pale of international law and unable to understand its norms, should put him, and not just from today’s ‘enlightened’ vantage point but even in comparison with some of his contemporaries, on the wrong and politically incorrect side of the road. However, I would not jump to such a conclusion. There seems to be a necessary link between the emphasis (unusual for his time) that Martens put on the correlation between respect for human rights at home and the possibility of having international law as a law of ‘civilized’ nations.⁷ What is of interest in the context of the very emergence of international law, as described by Martens, and its effectiveness is the link Martens made between the internal life of a state and its external relations. He wrote that, for example, ‘the [Ancient] Greeks, who did not recognize the existence of certain inalienable rights of human beings without any distinction such as descent or nationality could not either recognize that in relations between states equality should prevail’.⁸ Therefore he concluded that ‘the attitude towards foreigners that was dominant in the Ancient world made it impossible for Greece to guarantee any order in its international relations either’.⁹ That is why Martens believed that international law can govern relations only between so-called ‘civilized’ peoples, i.e., peoples that enjoy rule of law at home and respect basic human rights, that international law is possible only as law of ‘civilized’ nations. In the context of the time when Martens was writing the idea that without rule of law and without respect for basic human rights at home there cannot be international law either was quite amazing and advanced.

However, Martens was wrong in the sense that most of the peoples he considered to be civilized had little respect for human rights at home (e.g., the Russian Empire which Martens represented in various international fora) and quite a few of them (e.g., Belgium, Spain, or Portugal) behaved like barbarians or savages in their relations with those whom they called ‘non-civilized’ nations.¹⁰ But he may have been rather

⁵ E.F. Martens, *Contemporary International Law of Civilized Peoples* (reprint of 1904 edn, 1996), at 145.

⁶ Quoted from V.E. Grabar, *The History of International Law in Russia, 1647–1917* (1990), at 385.

⁷ Martens, *supra* note 5.

⁸ *Ibid.*, at 38.

⁹ *Ibid.*

¹⁰ Martens was rather critical of colonial practices of virtually all states except Russia. In his voluminous article ‘La conférence du Congo à Berlin et la politique colonial des États moderne’, XVII *Revue General de Droit International et Legislation Comparé* (1886) 127, Martens’ main critical thrust was on the practices of Spain and Portugal though he made a few positive remarks on the British experience.

prescient in the sense that rule-of-law and human-rights-friendly states are usually more law-abiding in their external relations than human-rights-hostile states. The very emergence and development of contemporary international human rights law is to a large extent premised on the perceived link between respect (or rather disrespect) for basic rights and freedoms at home and states' external behaviour. Hitler's atrocities at home (the Holocaust started within Germany) and the aggressive foreign policy of the Nazi regime were the two sides of the same coin.¹¹

Martens' attitude towards colonialism had quite a few ambiguities,¹² but his very division of peoples into civilized and semi-barbarians as well as his strong views on the inevitable and positive role of the Russian Empire in the Caucasus and Central Asia does not leave much room for doubt that he wholeheartedly supported the *mission civilisatrice* of 'civilized peoples' (the white man's burden) and especially that of the Russian Empire. Being concerned about the clash between two civilized European nations – England and Russia – in Central Asia, Martens passionately wrote:

In the issue of Central Asia, common interests of civilization absolutely coincide with particular and national interests of Russia and England. ... Their mission in Asia imposes on them an unconditional obligation to act in harmony in Asia; their genuine and real interests advise them to reach to each other on the heights of Hindu Kush and courageously defend their conquests carried out for the sake of civilization and humanity. The future of Asia and the fate of the territories they own force them never to take an eye from the lofty mission they are endowed by the Providence for the benefit of semi-savage and barbarous peoples in this part of the world.¹³

This was also the official position of the Russian Empire. Prince Alexander Gorchakov, the Chancellor of the Russian Empire, in his circular of 1864 on the foreign policy of Russia in Central Asia, wrote:

The position of Russia in Central Asia is that of all civilized States which are brought into contact with half-savage, nomad populations, possessing of no fixed organization. Interests of border security and trade relations impel the civilized state to exert a certain authority over its neighbours whose savage and impetuous nature makes their vicinity quite uncomfortable and who primarily respect only visible and palpable force.¹⁴

¹¹ Taken without qualifications this would be a kind of Nazi-centric interpretation of history. If in Nazi Germany internal repression and external aggression indeed fed on each other, there have been xenophobic dictatorships that have closed themselves to the outside world and have not caused much trouble abroad. Sometimes, on the contrary, these are missionary democrats or so-called liberal-interventionists, who may be tolerant and liberal at home but whose policies may have a disruptive impact on international relations, especially when they try to 'enlighten' other nations and make them more civilized. This was so at the time of the Western *mission civilisatrice* and 'open door' policies. It unfortunately, as we will discuss below, continues today in the form of promotion of democracy and liberal markets in the non-Western world.

¹² Martens' two most significant writings on the issue of colonialism, *Russia and England in Central Asia*, *supra* note 1, and 'La conférence du Congo à Berlin et la politique colonial des états moderne', *supra* note 10, are so different in the assessment of the role of colonialism and the *mission civilisatrice* that they seem to be written by two different people. However, if we take into account that the first was written on the role of Russia in Central Asia and the second concentrated on the practices of Spain, Portugal, Belgium, and England in Africa and Latin America, we may be able to understand the contradiction in the approach to this issue and something in the nature of the man himself as well as the prevailing situation in Russia.

¹³ Martens, *supra* note 1, at 9.

¹⁴ *Ibid.*, at 22.

So, what were the results of the 18th and especially 19th century *mission civilisatrice* for the targets of such missions? One may reframe the question à la Monty Python's *Life of Brian* asking: 'What have the Romans ever done for us?' Such a view has been forcefully expressed, for example, by Niall Ferguson: '[t]he rulers of western Africa prior to the European empires were not running some kind of scout camp. They were engaged in the slave trade. They showed zero sign of developing the country's economic resources. Did Senegal ultimately benefit from French rule? Yes, it's clear. And the counterfactual idea that somehow the indigenous rulers would have been more successful in economic development doesn't have any credibility at all.'¹⁵ So, colonialism and its *mission civilisatrice* were beneficial for those who were at the receiving end. However, Ian Morris observes:

When we look at reactions to Western rule within a longer time frame, we in fact see two striking correlations. The first is that those regions that had relatively high social development before the Western rule, like the Eastern core, tended to industrialize themselves faster than those that had relatively low development scores; the second, that those regions that avoided direct European colonization tended to industrialize faster than those that did become colonies. Japan had high social development before 1853 and was not colonized; its modernization took off in the 1870s. China had high development and was partly colonized; its modernization took off in the 1950s. India had moderate development and was fully colonized; its modernization did not take off until the 1990s. Sub-Saharan Africa had low development and full colonization, and is only now starting to catch up.¹⁶

It seems that, as in many other cases, the truth is somewhere in between, and even more importantly, it is much more nuanced and contingent. There were certain benefits for some in various places but generally destructive effects on societies whose natural evolution was disrupted, to say nothing about practices carried out by virtually all the colonizers that today would be qualified as crimes against humanity or genocide. Although colonialism brought certain benefits for some colonized peoples (railways, roads, other elements of infrastructure, even languages of their colonial masters that helped some of their representatives enjoy Western cultural achievements and in some places also traditions of civil administration and judiciary) and under some empires and in certain places colonial practices were less brutal than in others, there is no doubt that on the whole colonialism had an extremely negative impact on the development of colonized peoples. Equally, even if some missionaries may have had in mind the interests of those whom they converted, these were not necessarily what the latter would have wanted had they had any say. Moreover, many of today's conflicts in the so-called developing world have their roots in the colonial past. As Steven Pinker writes, 'One of the tragic ironies of the second half of the 20th century is that when colonies in the developing world freed themselves from European rule, they often slid back into warfare, this time intensified by modern weaponry, organized militias, and the freedom of young men to defy tribal elders.'¹⁷ And it is difficult to disagree

¹⁵ Skidelsky, 'Niall Ferguson: Westerners don't understand how vulnerable freedom is', *The Observer*, 20 Feb. 2011.

¹⁶ I. Morris, *Why the West Rules – For Now. The Patterns of History and What They Reveal about the Future* (2011), at 522.

¹⁷ S. Pinker, *The Better Angels of Our Nature. The Decline of Violence in History and its Causes* (2011), at 56.

with Antony Anghie who writes that the division of the African ‘continent, which occurred with no regard to the complex system of political organisation that operated within that territory, has created enduring problems’.¹⁸

One of the intriguing questions is how much continuity and discontinuity, parallels and differences are there between the *mission civilisatrice* or ‘white man’s burden’ of Martens’ time and today’s promotion of democracy and human rights, including use of military force to ‘protect civilians’ or effecting ‘regime change’ in places that in Martens’ days belonged to a barbarian or semi-barbarian world. Gorchakov’s and Martens’ statements, though sounding out of date in form and vocabulary as well as politically incorrect, in substance are not so alien to today’s legal and political discourse. Of course, today people don’t use such words. Today they divide the world not into civilized nations, barbarians, and semi-barbarians but into liberal-democracies, authoritarian regimes, failed states, and other categories of entities. John Rawls, for example, wrote of liberal, well-ordered, and decent countries, outlaw states, as well as of hierarchical and tyrannical regimes.¹⁹ And though under the UN Charter all member states are considered to be sovereign and equal, in practice different categories of states are treated differently.

There are certainly some common features between the 19th century Great Game in the Central Asian region between the British and Russian Empires (GGI), of which Martens wrote, and the current Great Game (GGII), where once again Central Asia and the Caucasus are among the flashpoints of the geopolitical struggle, though the greatest game unfolding today is going to take place in the Asia-Pacific region where the rising China is challenging the today’s hegemonic power, the United States, using its ‘Asia pivot’ to counter this challenge. Of course, there are also significant differences. Today, there are rules and principles concerning acceptable behaviour of governments, not only *vis-à-vis* other governments but also towards their own people. Genghis Khan and Tamerlane (Timur) may or may not have surpassed Alexander the Great in cruelty, but what they did and how they did it was not only acceptable from the point of view of the standards that existed at that time; it was even laudable and heroic. But already in the 19th century, when the British and the Russians competed for influence in this part of the world, they felt the need to refer to the cruelty and inhumanity of local rulers and their barbaric customs (Russian sources were especially prolific in such references, though it may be understandable since these were mostly Russian, not British, subjects that were held in slavery in Khiva and Bukhara²⁰) in justification of their territorial advancements. In this context, it is important to note that the purpose officially declared by the Russian authorities of the Russian advancement to Khiva in the winter of 1839–1840 was the liberation of thousands of Russians and subjects of other nations who were kept in slavery by the Khivans. In addition, it was allegedly necessary to punish the Turkmen robbers (called *alamans*) and slave-traders,

¹⁸ Anghie, ‘The Evolution of International Law: Colonial and Post-colonial Realities’, 27 *Third World Q* (2006) 746; see also Chimni, ‘Third World Approaches to International Law: A Manifest’, 8 *Int’l Community L Rev* (2006) 27.

¹⁹ Rawls, ‘The Law of Peoples’, 20 *Critical Inquiry* (1993) 36.

²⁰ P. Hopkirk, *The Great Game. On the Secret Service in High Asia* (1990), at 203.

who regularly robbed local caravans which were often loaded with Russian goods, and change the incumbent ruler to one who would care more about the interests of the Russian Empire (in today's parlance, to effect a 'regime change').²¹ However, humanitarian concerns, even when they did not simply serve as a pretext for *casus belli*, were clearly subordinated to the interests of *Realpolitik*. For example, Lieutenant Richmond Shakespeare²² successfully concluded an adventurous and dangerous mission to liberate Russian slaves in Khiva. However, he did not do it out of altruistic concerns but in order to deny Russia any pretext to conquer Khiva. That is why Tzar Nicolas I, whilst officially granting an audience to the young British officer, was privately outraged since the success of the Lieutenant's mission had indeed denied Russia the most effective justification for the invasion of Khiva.²³ This, of course, did not prevent the Russians from conquering the Khanate. As today, so then, there was more than one justification for invasion.

I find that though it would be wide of the mark to believe that there are no substantial differences between the policies carried out more than 100 years ago by Western powers, including the Russian Empire, and today's policies, it would also be wrong to think that they have nothing in common. First of all, both of these policies are based on Enlightenment's legacy and its belief in universal, unidirectional, and progressive evolution of humankind or, using Immanuel Kant's words, on 'universal history from a cosmopolitan point of view'.²⁴ Another Enlightenment figure, Karl Marx, wrote about 'tendencies working with iron necessity towards inevitable results' and therefore he believed that 'the country that is more developed industrially only shows, to the less developed, the image of its own future'.²⁵ Such a deterministic view of history characterizes not only Marx and Marxists. For example, already a century ago, American Baptists, in their attempts to civilize Russia, believed that 'for Russia, sooner or later, there will be Runnymede and a Magna Carta, if not a Bunker Hill

²¹ 'Slave contribution to the [slave] markets [of Central Asia] was, according to Maurice Lombard', writes Luce Boulnois, 'such that their homeland, the forests of Central and Eastern Europe, was called Bilād as-Saqāliba, "the land of the slaves": L. Boulnois, *Silk Road. Monks, Warriors & Merchants* (2005), at 291–292.

²² No relation to William Shakespeare but nevertheless a near-literary personality because Richmond was a cousin of William Thackeray.

²³ Hopkirk, *supra* note 20, at 226–227. It is interesting to note that the Russian translation of Peter Hopkirk's book has a different title, *The Great Game against Russia. An Asian Syndrome* (2004). This slight change in the title seems to carry the message that Russia was less an aggressive penetrator than an innocent victim. Hopkirk is quite balanced in his assessment of the British and Russian behaviour in the region and his British sympathies are not as obvious as are those of some Russian authors. Russian and Soviet historians wrote about, and still insist on, the benefits of the expansion of the Russian and Soviet Empires for indigenous populations and sharply distinguished it, e.g., from the British, French, or Belgian colonial conquests. As to the expansion of the Russian Empire into Central Asia, Soviet historian Y.A. Sokolov, for instance, indignantly wrote that 'it is absolutely wrong to compare the policy of Russia in the eighteenth-century Central Asia and the advancement of England into Africa': Y.A. Sokolov, *Tashkent: the Population of Tashkent and Russia* (1965), at 68.

²⁴ E. Kant, 'Idea for a Universal History with a Cosmopolitan Purpose' (1784), in I. Kant, *On History* (trans. L. White Beck, 1963).

²⁵ K. Marx, *Das Kapital. A Critique of Political Economy*, i, The Process of Capitalist Production (Preface to the 1st edn, 1906), at 3.

and Yorktown'.²⁶ Many of those who today promote democracy also see the development of different societies as going through the same linear historical path. This line of thought was not so long ago well expressed by President George W. Bush who stated, 'As the self-evident truths of our founding are true for us, they are true for all'.²⁷ If politically, economically, or intellectually George W. Bush and Karl Marx are as far apart as is possible, methodologically they are rather close, though Marx did not always use such simplistic sound-bites.²⁸

In his recent book *Liberal Leviathan: the Origins, Crisis, and Transformation of the American World Order*²⁹ G. John Ikenberry, being critical of George W. Bush's unilateralism, calls upon the American leadership to rely more on multilateralism. Nevertheless, he strongly believes that American hegemonic power and liberal international order are fused, since America's domestic rules and regulations have become the world's rules and regulations, and therefore globalization means Americanization. Here we see, more sophisticated and sounding rather benevolent, but nevertheless the same universalistic and unidirectional approach to history. As Richard Betts writes on his review of Ikenberry's book, 'The United States is daddy, but the world is one big happy family, gratefully educated and disciplined by his standards of proper behaviour.'³⁰

The current process of the promotion of democracy has, like its predecessor the *mission civilisatrice* of the 19th century, though in different degrees and forms, two aspects: idealistic humanitarian and hypocritical. Both of these aspects have their roots in the Enlightenment's dual legacy: desire for freedom and tendency for domination. Within Europe, Enlightenment ideas served, to a great extent, the liberating purpose while also creating material, intellectual, as well as psychological conditions for colonial domination outside Europe. Dan Hind has observed that 'we can certainly trace one history of Enlightenment from Bacon to the British Empire and to the modern global administration. The insurgent European powers of the period after 1700 depended heavily on the "enlightened" institutions for a technological base that in turn empowered global domination. The desire for total knowledge, in the service of total power, which we find in the Department of Defence and the Ministry of Defence is an expression of Enlightenment. But this history must ignore the sense of Enlightenment as freedom of inquiry and freedom to publish. For the Enlightenment could not be contained within those institutions and their equivalents in Soviet Russia and Nazi Germany. Enlightenment informed the movements of national and social liberation within and outside Europe as surely as it informed the colonial powers' war-making technology'.³¹ Swedish writer Per Olov Enquist observes that 'if the Enlightenment has a rational and hard face, which is the belief in reason and

²⁶ D.S. Foglesong, *The American Mission and the 'Evil Empire'* (2007), at 38.

²⁷ President G. W. Bush, Commencement Address to the US Coast Guard Academy, 21 May 2003, available at: <http://georgewbush-whitehouse.archives.gov/news/releases/2003/05/20030521-2.html>.

²⁸ E.g., in *The Eighteenth Brumaire of Louis Bonaparte*, Marx was more cautious and specific: '[m]en make their own history, but they do not make it as they please; they do not make it under self-selected circumstances, but under circumstances existing already, given and transmitted from the past'; K. Marx, *The Eighteenth Brumaire of Louis Bonaparte* (2008), at 15.

²⁹ G. J. Ikenberry, *Liberal Leviathan: the Origins, Crisis, and Transformation of the American World Order* (2011).

³⁰ Betts, 'Institutional Imperialism', *The National Interest*, May–June 2011 (19 April 2011 online), at 14.

³¹ D. Hind, *The Threat to Reason* (2007), at 104.

empiricism within mathematics, physics and astronomy, it has also a soft face, which is the Enlightenment as freedom of thought, tolerance and liberty'.³² This 'hard face', which is morally neutral, has indeed been used not only to liberate men and women from political oppression, economic hardships, and dependence on the blind forces of nature but also, for the purposes of domination, especially, though not exclusively, over colonial peoples. Even today the 'hard face' of Enlightenment's legacy, which is morally neutral and whose purpose may be not only liberation but also domination, has a tendency that Martti Koskenniemi defined as a hegemonic struggle to make one's partial view seem like the universal preference.³³

That there is a hegemonic struggle going on seems to be quite obvious. Globally there is still only one hegemonic power – the United States, sometimes acting unilaterally, often together with its allies. President G.W. Bush's aide explained to Ron Suskind how reality is created in today's world: 'We're an empire now, and when we act, we create our own reality. And while you're studying that reality – judiciously, as you will – we'll act again, creating other new realities, which you can study too, and that's how things will sort out. We're history's actors . . . and you, all of you, will be left to just study what we do.'³⁴ This statement is not only arrogant but also delusionary since Washington's ability to control and guide events is increasingly diminishing. However, such attempts are not innocuous and though they indeed help create new realities, they have often nothing in common even with what Washington intends. Yet, when some regional powers like China or Russia claim to have their special spheres of interest, the global hegemon immediately cries wolf: in today's world there should not be any place for spheres of interest; there are universal values and interests and their content (free market, democracy, secularism, etc.) is defined in the West. There is a serious problem also with this soft and humane face of Enlightenment's legacy when used as an export item. Though there are more than a handful of Western educated or influenced people in many non-Western countries, who cry for liberties and democracy, in practice often such Western supported revolutions end up in chaos, frustration, reversals to dictatorships, or emergence of failed states. Why so?

Even if Western values are, in principle, universalizable, not all societies are ready for the immediate introduction of them. Sometimes such a medicine is too strong, and instead of curing the patient it may kill her. How things end up depends on many variables. Samuel Huntington has identified the following conditions that are favourable for the consolidation of emerging democracies: (1) the experience of a previous effort at democratization, even if it failed; (2) rather high levels of economic development; (3) a favourable international political environment, with outside assistance; (4) early timing of the transition to democracy, relative to a worldwide 'wave', indicating that the drive to democracy derived primarily from indigenous rather than outside influences; and (5) experience of a relatively peaceful rather than violent transition.³⁵ Thomas

³² P.O. Enquist, *The Visit of the Royal Physician* (2004), at 92.

³³ Koskenniemi, 'International Law in Europe: Between Tradition and Renewal', 16 *EJIL* (2005) 1, at 119.

³⁴ R. Suskind, 'Faith, Certainty and the Presidency of George W. Bush', *The New York Times Magazine* (2004) 17 October.

³⁵ S. Huntington, *The Third Wave. Democratization in the Late Twentieth Century* (1993).

Carothers does not consider such, or other, factors as preconditions but rather as core ‘facilitators or nonfacilitators’ that would make democratization ‘harder or easier’.³⁶ I would agree with such an approach, if we were to add that some combinations of such ‘nonfacilitators’ make democratisation impossible, at least for the time being. It is important to note that democratic reforms in societies that have not had any or very little previous experience with democracy are the most serious business that cannot be approached slightly. Democratic institutions, if introduced from outside without being called for domestically, as Jürgen Habermas observes, ‘disintegrate without the initiatives of a population *accustomed* to freedom’.³⁷ In the export-import business of democracy it is necessary to bear in mind that democratization has to be demand-induced, not supply-stimulated. Only if there is a strong desire among a people to build democratic institutions as well as at least a minimum of material and cultural preconditions can the supply side play a positive role. Otherwise its role will be destructive, and in contradistinction to what Joseph Schumpeter’s theory of ‘creative destruction’³⁸ predicts in matters economic, there is nothing creative in such destruction in political matters.

When Martens and his colleagues Baron Edouard Descamps and Gustav Rolin-Jaequemyns from Belgium, as well as other international lawyers representing ‘civilized’ nations, made the legal case for the *mission civilisatrice*, the world was indeed sharply divided into the West and the Rest, into colonial empires and colonies, with some ‘organised peoples’ in between. Today the world is increasingly becoming one. The Cold War East-West divide is also in the past. Even without purposeful efforts on the part of Western societies and international organizations the world is slowly and painfully becoming in some important respects a bit more homogenous while individual societies are becoming, painfully and not so slowly, culturally, religiously, and ethnically more heterogeneous. One of factors that has made the world more homogeneous is the proliferation of human rights and democracy into places that in Martens’ time were considered to be beyond the pale of the international law of ‘civilized peoples’. It is impossible to deny that there are some significant differences between the old *mission civilisatrice* and today’s promotion of values and interests that originated in the West. Many in the non-Western world are eagerly looking for those values and sharing these interests. There are thousands and even millions who revolt against oppression and the absence of freedom of choice, as they are doing today in the Arab world. Unfortunately, in many cases these two faces of the Enlightenment – hard, self-interested, and soft, humane – become mixed up, especially if the stronger believes that the weaker necessarily desires to be like the stronger and craves for the same values.

International Lawyers in the Service of Two Masters

There is no doubt that through his academic writings and also as a practitioner of international law Martens contributed to the progressive development of his discipline. His

³⁶ Carothers, ‘The “Sequence” Fallacy’, 18 *J Democracy* (2007) 1, at 24.

³⁷ J. Habermas, *Between Facts and Norms, Contributions to a Discourse Theory of Law and Democracy* (1996), at 130.

³⁸ J. Schumpeter, *Capitalism, Socialism and Democracy* (3rd edn, 1984).

intellectual legacy certainly extends beyond the famous ‘Martens Clause’. At the same time, he was an ardent advocate of interests of the Russian Empire and skilfully justified the behaviour of one of the most autocratic regimes of his time. In the aftermath of the 1899 Hague Peace Conference, speaking of the role of Russia in the world, Martens wrote that he was ‘not aware of any other civilized nation that would have done so much for finding peaceful and lawful solutions for international problems’.³⁹ He was also of the opinion that ‘if a state recognises the individual as such as a source of civil and political rights, the international life of this state equally exemplifies high degree of respect for law and order’.⁴⁰ Such statements could lead one to conclude that the Russian Empire was a law and order state both externally and internally. Yet, to his diary Martens confided that ‘in Russia despotism is reaching the limits of mindless arbitrariness’ and that ‘the systematic persecution of the Jews, Finns and Baltic Germans [it is interesting that he does not mention the Baltic Estonian, Latvians, and Lithuanians] had considerably increased the centrifugal tendencies in the Russian Empire’.⁴¹ Here we see that there is a huge difference between what Martens said in public and what he divulged in his diary.

My reading of such discrepancies between Martens’ public statements and his private thoughts is that being a European man by education, profession, and way of life, but living in and serving an autocratic regime, he was forced, at least in many situations, to use his professional skills in a way contrary to his convictions. Of course, there is nothing exceptional in such a situation. Lawyers more often than not represent clients whose behaviour is on the wrong side of the law, usually doing their best to win their cases. At the same time, understanding of international law and its interpretation to a great extent depends on a person’s background and position. Therefore, it should not surprise us if Martens had genuinely believed that, say, Russian colonialism might have been kinder, more beneficial for ‘semi-savage’ peoples, and generally more natural than, say, the French or Belgian colonialisms.

Today we also see in complicated, and sometimes even in not so complicated, situations that the international lawyer’s understanding and interpretation of law depends on his/her background and position. Most international lawyers even today, even if they are educated and work in various countries and for different clients, are not cosmopolitans; they all have different backgrounds, embody different cultures, religions, and legal systems. Some of them represent their states. Therefore, even without being hypocritical or without lacking objectivity (though objectivity of international law is often at best in its inter-subjectivity), international lawyers, like people of many other professions, have genuinely differing, often contradictory, understandings of legal issues. One recent contentious issue has been the attitude towards the independence of Kosovo, on the one hand, and South Ossetia and Abkhazia, on the other. Some

³⁹ Martens, ‘The Hague Peace Conference’, *European Herald (Vestnik Yevropy)*, Feb. 1900 (in Russian), at 25.

⁴⁰ Martens, *supra* note 5, at 9.

⁴¹ *The Diary of E.F. Martens* quoted by V.V. Pustogarov in his *With the Olive Branch of Peace. Martens – Jurist, Diplomat* (1993), at 208. I am greatly indebted in my understanding of Martens to Pustogarov’s thorough research and study of Martens life and work in the archives of the Foreign Ministry of Russia as well as in the libraries of various universities.

international lawyers, condemning recognition of the independence of Georgian break-away territories (Abkhazia and South Ossetia) have at the same time welcomed Kosovo's independence from Serbia, and *vice versa*, without noticing any irony in their attitude. There is no doubt that there are a lot of factual differences between what is going on in these two mountainous regions of Europe. In many respects, all cases are unique. Lawyers know all too well the saying that 'hard cases make bad law' and one may well want to add that unique cases do not make any law at all. However, in international relations, all cases of any significance are hard cases and only hard, not easy, cases make law for hard cases. Moreover, in the domain where international law functions, where around 200 states hugely differing as to their size, power, political regimes, and other characteristics operate, all situations are markedly more unique than in relations between individuals and legal persons within a particular state; therefore in international society most situations are relatively more unique than cases covered by domestic law. Here even a few cases tend to serve as precedents. If all situations in interstate relations were seen as unique, having nothing in common, international law would become not only theoretical but also a practical impossibility.

However, states, especially most powerful ones, more and more often, referring to the uniqueness of circumstances they are acting upon and also to the purity of their own motives that are incomparable with the self-serving motives of their opponents, consider that their behaviour *vis-à-vis* certain situations or certain states should not serve as a precedent. For example, Condoleezza Rice, the then US Secretary of State, claimed that situations in the Balkans and Caucasus had nothing in common: 'I don't want to try to judge the motives, but we've been very clear that Kosovo is *sui generis* and that that is because of the special circumstances out of which the breakup of Yugoslavia came.'⁴² Her Russian counterpart, Sergei Lavrov, justifying the recognition of South Ossetia and Abkhazia as independent states, did not refer to the Kosovo precedent though he, like quite a few commentators, may well have had Kosovo in mind as a precedent when he talked about recognition of the break-away Georgian territories. However, Lavrov, like Rice, claimed that 'the recognition by Russia of Georgia's Abkhazia and South Ossetia as independent States does not set a precedent for other post-Soviet break-away regions. . . . There can be no parallels here.'⁴³ The problem with Rice's and Lavrov's certainty is how to persuade the Transdnistrians, Nagorno-Karabach Armenians, and the host of other separatists that Kosovo, Abkhazia, and South Ossetia are so unique, so *sui generis* that they cannot serve as precedents for others.

The matter is that differences, or parallels for that matter, are often in the eye of the beholder only. Whether certain situations, facts, or acts can serve as precedents depends to a great extent on whether one is interested in seeing them as precedents or not. Too many people too often act upon their ideologies, beliefs, and prejudices, not upon facts; the latter are interpreted in the light of preconceived ideas. All these

⁴² 6 March 2008, Briefing by Secretary Rice en route to Brussels, Belgium, available at: www.usembassy.org.uk/forpo1244/html.

⁴³ 'Abkhazia, S. Ossetia no precedents for other rebel regions – Lavrov', *RIA Novosti*, 18 Sept. 2008, available at: en.rian.ru.

secessionist conflicts and situations, notwithstanding many differences, have something quite essential in common: there is always a group of people who, being a part of a bigger political entity, want to secede from that entity in order to form an independent state or become a part of another political entity. In this essential respect, say, Quebec in Canada, Nagorno-Karabakh in Azerbaijan, and Abkhazia in Georgia are all in the same boat, and if they refer to their uniqueness, it is only to show that they deserve independence more than anybody else. When the Québécois claim their right to independence, they refer to the fact that their distinct culture and language are flourishing, that they have effective democratic governmental institutions and other positive achievements that, in their view, serve as a basis for Quebec's independence. Other secessionist movements, on the contrary, emphasize the lack of such achievements and believe that only through secession can they achieve those characteristics that, as they believe, are denied for them by oppressive alien regimes.

However, international lawyers often fare better than politicians. Quite a few international lawyers, and not only university professors, but even governmental legal advisers, have shown independence of mind and strength of spine. And this is not only independence and courage *vis-à-vis* their governments; in mature democracies those whose advice is not welcome by the government may have to resign; but they are not tortured or incarcerated. There is also independence of mind and intellectual courage in one's ability to rise above one's background, upbringing, and context and to make where one stands independent from where one sits.

First of all, I have in mind what I would call the tradition of British Foreign Office legal advisers from Sir Gerald Fitzmaurice and his colleagues during the 1956 Suez crisis to Elizabeth Wilmshurst and Sir Michael Wood almost half a century later when in 2003 Great Britain, supinely following Washington, was going to effect a regime change in Iraq. Parallels are amazing. Half a century earlier Sir Gerald had written on the margins of the Lord Chancellor's brief to Prime Minister Anthony Eden that argued for the legality of intervention of Egypt '[a] lot of dubious arguments and half truths'.⁴⁴ The Prime Minister in turn, when asked whether to invite the FCO's legal adviser to the meeting that was going to discuss issues of invasion remarked, 'Fitz [Sir Gerald Fitzmaurice] is the last person I want consulted. The lawyers are always against our doing anything. For God's sake, keep them out of it. This is a political affair.'⁴⁵ In 2003 Jack Straw, the then Foreign Secretary, was as dismissive, though not as blunt as Anthony Eden had been, of the advice given by the then Legal Adviser, Sir Michael Wood, who in 2003 advised that an invasion of Iraq without the Security Council's authorization would be contrary to international law. The Foreign Secretary used the arguments of the inherent indeterminacy of international law in comparison with domestic law and referred to the absence of international courts, which could decide what is legal and what is illegal.⁴⁶ The results of the Suez crisis, its impact on Great Britain and on the political career of Prime Minister Eden were wholly negative. Sir

⁴⁴ Marston, 'Armed Intervention in the 1956 Suez Canal Crisis: The Legal Advice Tendered to the British Government', 37 *ICLQ* (1988) 791, at 814.

⁴⁵ *Ibid.*, at 798.

⁴⁶ See www.iraqinquiry.org.uk/media/43511/doc_2010_01_26_11_04_18_456.pdf.

Gerald's and his Foreign Office colleagues' views were not only proven to be legally correct; they were politically vindicated as well. The same can be said about the FCO legal advisers' position in 2003.

Martens lived in a different country and gave his advice to the Tzar Nicolas II more than half a century before Sir Gerald Fitzmaurice advised the British Government on questions of international law. The time and location both conditioned the views and actions of this diligent and able man. Martens may have been a practical man as a diplomat and arbitrator, but his philosophy of international law was idealistic with considerable elements of eclecticism; he was certainly neither a materialist nor a cynic. Although it is possible to be a consistent eclectic (because the world is hardly non-eclectic), Martens' eclecticism often led him to obvious contradictions (probably because he was not a conscious eclectic). For example, paying tribute to Lassa Oppenheim's course, Martens nevertheless criticized him for having raised political issues. In his opinion, 'there is no place for such issues in a scientific treatise'.⁴⁷ At the same time, in his own *Contemporary Law of Civilised Nations* Martens constantly discussed politically sensitive topics and some of his works, like *Russia and England in Central Asia*, are not so much legal treatises as political pamphlets sprinkled with drops of excellent knowledge of legal aspects.

International law, much more than domestic law, is intertwined with politics. The latter emerges from the cauldron of domestic politics through parliamentary and other processes, but once in existence it covers relations that are mostly non-political in nature and where functioning of law has to be as free as possible from political influences (expressed, first of all, in the ideas of separation of powers and independence of the judiciary). International law, on the contrary, not only results from political processes but it mainly, though not any more exclusively, covers relations between states, i.e., between entities that are political *par excellence*. Therefore, the problem is not whether to raise political issues in legal treatises; it is simply inevitable because when we speak of international law we also speak of international politics using legal language. What is important is that lawyers, and even non-lawyers, try as critically, honestly, and with as little bias as possible to distinguish between politics, expressed in principles and norms of international law (*lex lata*) or corresponding to the tendencies of its evolution (*lege ferenda*), from politics that is either clearly contrary to what international law requires or is questionable in the light of the latter. Therefore, as the former President of the International Court of Justice Dame Rosalyn Higgins has emphasized, 'it is desirable that the policy factors are dealt with systematically and openly'⁴⁸ also by international lawyers. In that respect, of course, Martens was not blameless, but neither are many contemporary international lawyers, especially if they want to serve not only international law as an imperfect expression of shared values and common interests, but also some particular interests that they pass off as expressions of common values.

⁴⁷ Martens, *supra* note 5, at 137.

⁴⁸ R. Higgins, *Problems and Process. International Law and How We Use It* (1994), at 5.

Conclusions

Friedrich Fromhold Martens often confided to his diary his frustrations with politicians who underestimated international law and did not appreciate the role of international lawyers. Such diary entries usually occurred after his meetings and discussions with Tzar Nicholas II or his ministers. After his last *tête-à-tête* audience with the Tzar in January 1909 (Martens died in June of the same year) he wrote that ‘the Tzar was amiable; I was the only person with the Czar; he invited me to take a seat in an arm-chair next to his table; we talked a lot. But what were the results of our conversation? Everything remained as it had been before.’⁴⁹ Martens was equally frustrated by his meetings in European capitals. During his pre-1907 Hague Peace Conference journey to Europe he had audiences with Kaiser William II in Berlin, with King Edward VII in London, with King Victor-Emmanuel III in Rome, and with Emperor Franz-Joseph in Vienna, as well as meetings with prime and foreign ministers of various European powers.⁵⁰ He may have had weighty reasons for not being satisfied. But can somebody think of a contemporary professor of international law, even if also a legal adviser to his/her foreign ministry, even if a successful arbitrator (or today a judge of the ICJ) who could be regularly received, if ever, by his own head of state or government, to say nothing of frequent talks with foreign dignitaries? Does this comparison say something about the role of international law and lawyers in the times of Martens and in our world?

Although world leaders regularly received Martens, practical results of his efforts, with the exception of successful arbitrations, on issues of peace and security were rather negligible. Some of his ideas (e.g., the Martens clause) have had more practical impact long after Martens’ death than during his lifetime. Soon after his death ‘civilized nations’ with the active participation of ‘organized peoples’ unleashed two big and many smaller barbarous wars. There may have been too much naïvety about and too high expectations of the ability of international law to change the world. It was not by chance that after World War II George Kennan complained that ‘the most serious fault of our past policy formulation lies in something that I might call the legalistic-moralistic approach to international problems’.⁵¹ This may have been another extreme. It seems that today the world has more realistic expectations of international law. There is also much more of international law than in Martens’ time. On the level of “maritime delimitation” cases, in the meaning used by Martti Koskenniemi, it is quite effective, and one should not neglect the effect of international law on issues of peace and security either. There are many international courts and tribunals that not only develop international law but also resolve actual disputes between states. As there is not only more international law but also many more international lawyers, it is not surprising that only a few of them meet presidents, kings, or prime ministers.

Today we have documentary evidence of what some 20th century top politicians thought about legal advice given to them in controversial, even extreme, circumstances

⁴⁹ Pustogarov, *supra* note 41, at 207.

⁵⁰ *Ibid.*, at 248–256.

⁵¹ G. Kennan, *American Diplomacy* (1957), at 98.

when clashes between law and politics were most acute. Unfortunately, we know next to nothing about what Martens' political masters thought of his advice. There is only one comment by Count Sergei Yulyevich Witte (1849–1915) who was the Chairman of the Council of Ministers (Prime Minister) of the Russian Empire under Nicholas II. Count Witte was also the chief plenipotentiary at the 1905 peace negotiations with Japan in Portsmouth after the disastrous for Russia Russian-Japanese war of 1904–1905. Professor Martens was a member of the Russian delegation. As Sidney Harcave opined, 'Witte performed brilliantly at the peace conference, winning better terms for Russia than she had a right to expect'.⁵² However, Witte was not of such a high opinion of Martens when writing that 'Professor Martens is a fine man, a very knowledgeable professor of international law with many years of service at Petersburg University, an honorary member of the faculties of many foreign universities. However, the reputation he enjoys abroad is inflated. He is a limited person, in a number of respects, to say the least, a man afflicted with a pathological vanity.'⁵³ Whether it was Martens' 'pathological vanity' (a feature common not only amongst international lawyers) or his advice on legal matters that Count Witte did not like we do not know. It may well have been that what the politician objected to was the lawyer's advice that may have constrained what the *raison d'état* demanded.

⁵² Harcave, 'Introduction', in M.E. Sharpe, *The Memoirs of Count Witte* (1990), at xiv.

⁵³ *Ibid.*, at 425.