

In the service of two masters: some facets of Professor Martens as seen through my personal and subjective lenses

Professor Rein Müllerson

University Nord, Rector

Member of the Institute of International Law

For years I have had my own biased thoughts on Friedrich Fromhold (Fyodor Fyodorovich) Martens. We both moved, with a hundred years difference, from Estonian countryside to the imperial capitals; as an orphan, he was sent to school to St Petersburg; I found myself, after many adventures and misadventures, at Moscow University. He became a professor of international law in St Petersburg University and was also in the service of the Empire advising the last Emperor Nicolas II and a series of foreign ministers, including the greatest Russia has ever had **Prince** Alexander Gorchakov. I turned out to be a professor of international law in the capital of the USSR where during the years of *perestroika* and *glasnost* I used to advise the Soviet leadership, including the first and the last President of the USSR Michael Gorbachev, on issues of international law; i.e. I too was in the service of the successor Empire. Among many other matters, Martens took keen interest in the Great Game between England and Russia in Central Asia and his book, *Russia and England in Central Asia* (St Petersburg, 1880), served as a stimulus inspiring me to take up an offer to serve as the 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* (Kegan Paul and Columbia University Press 2007). However, whilst serving the Empire, Martens also served international law. If it sounds paradoxical, then only to an extent since the very reality which international law is called to govern is more often than not contradictory and paradoxical. So are usually best of those who study this multifaceted phenomenon.

Martens' book, *Russia and England in Central Asia* is imbued with humanitarian concerns and justifications for the Russian but also surprisingly for the British expansion in the mountains, valleys and deserts of this fascinating region. He argued, and this was the prevalent view at the time, that international law, which was then often called (by Martens among others) 'international law of civilised nations', does not and cannot govern relations between all the peoples

(nations) of the world; it governed relations only between so-called 'civilised' nations. However, even then there were authors who thought otherwise, i.e. those who held more progressive ideas on this issue. Martens, for example, was critical of Johann Bluntschli's view that international law is a law of all mankind, calling it 'a noble and lofty cosmopolitanism that deprived international law of its practical significance' (F. F. Martens *Contemporary International Law of Civilized Peoples*, Moscow University Press, 1996, p. 145).

Martens divided nations into civilised peoples, i.e., Europeans and those of European extraction; organised peoples, such as those in Persia, China, and Japan,¹⁶⁴ and non-civilised or semi-barbarous peoples who, like the tribes of Khiva, Bukhara, Eastern Turkestan and Afghanistan, are 'nomadic, semi-savage peoples living off theft and pillage'.¹⁶⁵ In his opinion, international law of civilised peoples, i.e., the only possible positive international law (he believed that natural law governed relations of civilised peoples with non-civilised ones), could not extend to non-civilised or semi-barbarous peoples since, as he opined, 'non-civilised peoples cannot be responsible for their behaviour, which is contrary to international law; 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'.¹⁶⁶ However, already then another Russian international lawyer - V. P. Danevskii mocked the Martens concept of applicability of only natural law to the peoples of Asia writing: 'Natural law represents in our view a bottomless pit from which the bearers of European civilisation, 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 civilisation" and "international law"' (quoted from V. E. Grabar, *The History of International Law in Russia, 1647-1917*, Clarendon Press, 1990, p. 385). Isn't this quite an interesting and insightful observation?

It may seem that the fact that Martens confined international law only to 'civilised' nations, considering other peoples as semi-savages beyond the pale of international law and the ability to understand its norms, should put him, and not only from today's 'enlightened' vantage point but even in comparison with some of his contemporaries, on the wrong, 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) made by Martens on the correlation between the

¹⁶⁴ F.F. Martens, *Russia and England in Central Asia.*, St Petersburg, 1880, p. 19

¹⁶⁵ *Ibid.* p. 20.

¹⁶⁶ *Ibid.*, p. 13.

respect for human rights at home and the possibility of having international law as law of 'civilised' nations.¹⁶⁷ Martens was wrong in the sense that most of those nations, which he considered to be civilised, had little respect for human rights at home (e.g., the Russian Empire whom 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 so-called 'non-civilised'

peoples. But he may have been rather prescient in the sense that rule-of-law and human-rights-friendly states are usually also better subjects of international law, especially if this law purports to do more than delimit states' respective jurisdictions (sometimes called 'law of coordination' in contradistinction to 'law of cooperation' or 'law of integration') thereby helping them to not be at each other's throats all the time. 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 non-respect) for basic human rights at home and states' external behaviour. Hitler's atrocities at home (the Holocaust started within Germany) were necessarily linked to the Nazi's aggressive foreign policy.¹⁶⁹

Martens' attitude towards colonialism had quite a few ambiguities¹⁷⁰ but his very division of peoples into civilised 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

¹⁶⁷ 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 internal life of a state and its external relations. He wrote that, for example, 'the [Ancient] Greeks, who did not recognise 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' (F.F. Martens *Contemporary International Law of Civilized Peoples*, Moscow University Press in 1996 using Martens' 1904 edition, p. 38). 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' (*ibid.*). That is why Martens believed that international law can exist only between so-called 'civilised' nations, i.e., nations that enjoy at home rule of law and basic human rights, that international law is possible only as law of 'civilised' nations. In the context of the time when Martens was writing the idea that without rule of law within states and without respect for basic human rights there cannot be international law either is quite amazing and advanced.

¹⁶⁸ Martens was rather critical of colonial practices of practically all states except Russia. In his voluminous article 'La conference du Congo a Berlin et la politique colonial des Stats moderne' (Revue General de Droit International et Legislation Comparee, 1886, tome XVII) Martens' main critical thrust was on the practices of Spain and Portugal though he found only a few good remarks for English experience.

¹⁶⁹ Taken without qualifications this would be a kind of Nazi-centric interpretation of history since in Nazi Germany internal repression and external aggression indeed fed on each other. Yet, there have been xenophobic dictatorships that have closed themselves to the outside world and haven't caused much trouble abroad. On the contrary, missionary or evangelical democrats who could be tolerant at home may have a disruptive influence on international relations, especially when they try to "enlighten" other nations, to make them more civilised.

¹⁷⁰ Martens' two most significant writings on the issue of colonialism, *Russia and England in Central Asia* and *La conference du Congo a Berlin et la politique colonial des etats moderne*, are so different in the assessment of the role of colonialism and the *mission civilisatrice* that they seem to be written by two different persons. 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 the issue and something in the nature of the man himself as well as the prevailing situation in Russia.

doubt that he wholeheartedly supported the *mission civilisatrice* of so-called civilised nations (the white man's burden), especially that of the Russian Empire. Being concerned about the clash between two civilised European nations - England and Russia - in Central Asia, Martens passionately wrote:

In the issue of Central Asia, common interests of civilisation 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.^{171 172}

In the attitude of Professor Martens towards colonial problems (towards the 'Eastern question', as it is called in Britain) we see that not always is it possible to serve an empire (or nation-state, for that matter) and uphold international law. This also shows that our attempts of objective analysis of international law are usually coloured by our subjective preferences and biases; where one stands depends on where one sits; it also reminds us that all legal doctrines and approaches are to a great extent political and subjectively coloured but none the worse for being so, and they acquire significance beyond the small circle of legal specialists only by their quality as such. However, as a servant of international law, Professor Martens remains one of the greatest international lawyers of all times and to the lasting effect of his contribution to the development of international law testify his bust on the ground floor of the ICJ in the Hague as well as the quotations of immortal Martens' clause by the World Court as well as many other international bodies.

¹⁷¹ F.F. Martens, *Russia and England in Central Asia*, St. Petersburg, 1880 (in Russian), p. 9. This seemed to be the official position of the state. 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 civilised 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 civilised 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' (Martens, *Russia and England*, p. 22).

¹⁷² *Ibid.*