

# The origins, causes and enduring significance of the Martens Clause: A view from Russia

**Vitaliy Ivanenko\***

Vitaliy Ivanenko, PhD in Law, is an Associate Professor at the Department of International Law of St Petersburg State University.

## Abstract

*The Martens Clause owes its name to the diplomat and jurist Fyodor Fyodorovich Martens, a representative of the Russian Empire at the First Hague Conference in 1899. Drafted and proposed by Martens during the negotiations, yet as a spontaneous compromise, the Clause has been included in the preamble of the Hague Convention with Respect to the Laws and Customs of War on Land and is still considered an important principle of international humanitarian law today. This article traces the biography and academic path of F. F. Martens and explores the enduring significance of the Martens Clause.*

**Keywords:** international humanitarian law, laws of armed conflict, Martens Clause, F. F. Martens, humanization of warfare, protection of civilians, protection of combatants, First Hague Conference, Hague Convention II, principles of international law.

: : : : : :

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

\* This article was originally written in Russian. Unless otherwise stated, all citations refer to the Russian version of the cited work. All quotations are the *Review's* own translation.

and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.

Hague Convention (II) with Respect to the Laws and Customs of War on Land<sup>1</sup>

The above paragraph was drawn up by Fyodor Fyodorovich Martens<sup>2</sup> – one of the official representatives of Russia at the First Hague International Peace Conference of 1899 – during the elaboration and negotiation of the text of the Hague Convention with Respect to the Laws and Customs of War on Land. The clause has gone down in history and is known in international law as the Martens Declaration, Martens Reservation or, more usually, Martens Clause. It is quite unique, in the field of international law, for a treaty provision to bear the name of the legal scholar who proposed it; privileges of this kind are normally reserved for natural scientists, for their major discoveries and undertakings.

The Martens Clause has become a central principle of contemporary international military and humanitarian law, and continues to play a key role in ensuring the ongoing humanization of warfare. Its humanistic essence and purpose stem from the fact that it regulates military situations occurring in the course of hostilities between conflicting parties that are not covered by existing international and national legal standards. All of this further reaffirms Martens' special role in the development of international humanitarian law (IHL) – that is, international law applied to protect human rights in time of war.

It is an interesting and paradoxical fact that the more time has passed since the Martens Clause was drafted, and the more new IHL rules have been adopted regulating more and more facets of the protection of victims of armed conflict, the more often we turn to the provisions of this more than century-old declaration. It can indeed be said that truly great and significant things become more visible when seen from a greater distance, including across time.

A retrospective analysis of the place and role of the Russian professor, diplomat and international arbitrator in the emergence and development of IHL in the nineteenth century leads us to conclude that the name Martens rightfully ranks alongside those of the outstanding humanists of the day, who paved the way for the broad humanization of the means and methods of warfare through international law. These include the Swiss social activist Henry Dunant, who was behind the establishment in 1863 of the International Committee for the Relief of

1 Hague Convention (II) with Respect to the Laws and Customs of War on Land, The Hague, 29 July 1899, preamble, para. 9 (in English).

2 Fyodor Fyodorovich Martens (1845–1909), as he was and is known in Russia, or Friedrich Fromhold Martens, as he was named at birth, or Friedrich von Martens (in English and German) or Frédéric de Martens (in Spanish and French), as he was and is known outside Russia, was a professor of St Petersburg University, world-renowned academic, international lawyer, diplomat, legal adviser and international arbitrator, corresponding member of the Russian Academy of Sciences and honorary member of several foreign universities and scientific societies, and the most famous Russian international lawyer worldwide.

the Wounded (the forerunner of the International Committee of the Red Cross) and the adoption in 1864 of the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field; and the American jurist Francis Lieber, who in 1863 compiled the *Instructions for the Government of the Armies of the United States in the Field*, the first ever set of domestic rules for the conduct of armed forces in warfare – the so-called Lieber Code. Martens has gone down in history not just as an outstanding academic, advocate of the universal theory of international law, world-renowned diplomat and international arbitrator, but also as a prominent theoretician and practitioner, whose work helped lay the scholarly groundwork for and secure the formal embodiment of the general principles of IHL.

Martens' humanistic international legal views were formed at a moment in history when serious changes were germinating with regard to the theory and practice of the "law of war". During the almost unceasing wars of the nineteenth century, gross and massive violations of the established customs and laws of war and the use of increasingly sophisticated means of warfare had led to a manifold increase in the toll of victims and destruction, and were sharply at odds with the general process of the humanization of social relations under way everywhere. Public attitudes to war were gradually changing. From the enthusiastic exaltation of war and military prowess and the perception of war as "the exercise of the natural right of the strong over the weak", unfettered by any restrictions or laws (Baruch Spinoza), society was moving to an understanding of war as an unnatural state, a fateful evil, "the most terrible scourge that violates the laws of humanity" (Immanuel Kant), which must be combated. The broad spread of enlightened and humanistic ideas, the emergence across Europe and North America of Friends of Peace and Red Cross societies, which waged "war on war" and demanded the humane treatment of its victims, and the content of pacifist publicistic and academic literature could not fail to affect State governments and the conduct of belligerents.

These changes coincided with the coming of age of the young Martens, who began to study law at St Petersburg University in 1863. Naturally, such developments awakened great interest in and influenced the views of this gifted and inquisitive student. It was also during Martens' student years that two very important international conferences took place, which laid the basis for the legal and treaty framework of international military and humanitarian law.

Thus, the Geneva International Conference, held on the proposal of Switzerland, adopted the aforementioned First Geneva Convention in 1864. For the first time in history, a multilateral treaty set forth unified rules for the protection of enemy wounded and sick and medical facilities and personnel. Four years later, in 1868, an international military conference was held in St Petersburg on the initiative of Russia. On 11 December (29 November, according to the old Russian calendar), the conference adopted the Declaration to the Effect of Prohibiting the Use of Certain Projectiles in Wartime, which was signed by most States of the day. In this international treaty, the States finally recognized that "the progress of civilization should have the effect of alleviating as much as

possible the calamities of war”, and therefore the “only legitimate object” of war was not the wholesale extermination and plundering of the enemy, but solely “to weaken the military forces of the enemy”. The Declaration also proclaimed that “this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable”.

Given the atmosphere of heightened public concern about the problems of “war and peace”, the scholarly interest in military-humanitarian issues awakened in the recent law graduate Martens is quite understandable. Having stayed on at the university’s Department of International Law “to prepare for a professorship”, in 1867 Martens turned his attention to a very important, but barely explored, question – that of the inviolability of private property in wartime. He laboriously collected and summarized from English, Italian, German, French and medieval Latin sources a vast amount of factual, statutory and doctrinal material, and one year later (in December 1868, just as the above-mentioned St Petersburg conference was taking place), he submitted to the Law Faculty his master’s thesis *On the Law of Private Property in Time of War*. He successfully defended this thesis on 5 October 1869 and was awarded a master’s degree in international law by the Faculty Council. The thesis presented by Martens was such a serious study, both in terms of its relevance and its scholarly depth, that it was published as a separate book by decision of the university’s Faculty of Law.<sup>3</sup>

Martens’ work *On the Law of Private Property in Time of War* was the first specific Russian academic study dedicated to the problems of international military and humanitarian law. In all objectivity, it must be acknowledged that the depth, scope, erudition and diligence of the young researcher are striking. Having recognized the insufficient research into the problems of “war and law” in Russian legal literature of the time, Martens collected, systematized, analyzed and, with the publication of his book, brought into domestic academic circulation a huge quantity of factual and doctrinal material that he had discovered in multilingual academic publications by foreign scholars. Nor did the author restrict himself to a formal investigation of the announced topic alone. Considering the multifaceted nature of the very problem of protecting private property during war, he examined many aspects of the whole system of the “law of war” as a collection of legal standards regulating war.

The opinions and positions of both Martens himself and the foreign scholars quoted by him in his thesis are of undoubted academic value in providing a clearer picture of the starting point from which Martens’ humanistic worldview grew 150 years ago – and which led him, with time, to become one of the founders of IHL and, among other things, the author of the famous Martens Clause. It is clear from the book’s opening pages that the then still very young academic (it is hard to refer to a 22- to 23-year-old as an “expert”), defying prevailing academic tradition and authority, took a radically different stance and clearly and precisely defined his views on the very complex and controversial

3 Fyodor Fyodorovich Martens, *On the Law of Private Property in Time of War*, V. Golovin, St Petersburg, 1869.

issues of the day regarding the relationship between the categories of “law and strength”, “war and law”, “war and peace” and “authority and the individual” – views from which he (most significantly) did not waver throughout his entire professional life.

Martens firmly opposed the prevailing concepts of the day regarding the dominance of might over right. Such ideas, he believed, were unworthy of human beings and pernicious for international relations. Martens was a humanist, and he laid out a logical basis for his humanist international legal views. He believed that all manifestations of social life – whether within or between States, whether based on brute force or on law – were not externally imposed but were rooted in human nature itself. All human beings were driven by the pursuit of “self-determination and self-purpose” and “communion with others”. (Here, Martens had already laid the foundation for his well-known original theory of international communication, which later formed the basis of his entire theory of international law.) But “since everyone, naturally, pursues his own individual goals, it is clear that confrontations must occur between people living in community”.<sup>4</sup> To resolve “the misunderstandings and confrontations that arise”, human beings should rely not on force but on the law:

The law determines relations between individuals, protects both the weak against the strong and the interests of the community when personal interests seek their subjugation. It follows from this that the law is the *sine qua non* of all development and progress, because only through the law can there be a free and multilateral exchange of human relations.<sup>5</sup>

Based on the above, Martens drew the following significant conclusion: “International law is also founded on human nature and has exerted its influence ever since peoples recognized the need for international relations, when hostile isolationism disappeared and international life started to demand recognition and definition.” Here, too, he strongly opposed the then prevailing religious justification of the nature and essence of international law, including the right of war:

It seems to us erroneous ... to seek to elevate faith and the spirit of Christianity as the sole source of international law, to explain by them alone all progress to alleviate the calamities of war and develop related law. Religion is, by essence, immutable, and does not and cannot brook any kind of self-transformation without denying itself. We therefore see that writers on international law who base their ideas solely on the spirit of Christianity, on divine and natural law, go so far as to deprive the human enemy of all rights and leave him fully in the hands of the enraged enemy. ... The belligerent is told he has an inalienable right to harm his opponent by all possible means, for example, to

<sup>4</sup> *Ibid.*, p. 2.

<sup>5</sup> *Ibid.*, p. 3.

kill his defenceless subjects, rob them, take them captive, dishonour them, etc., and then he begs for mercy, indulgence and compassion.<sup>6</sup>

Martens argued that the development of humanity and international law was founded not on religion but on the objective historical process of the continuous progression of society:

If we take a brief look at the history of the development of international life, we cannot fail to see how international law is gradually changing, how the scourge of war is being alleviated and the benefits of peaceful coexistence among peoples are increasing. ... [W]e understand international life as being in constant progression, and the aggregate of the conditions of its development determines the international law of the given age; so a change in the conditions of international life inevitably requires a change in existing law.<sup>7</sup>

Here he drew the following very important conclusion regarding the topic under study:

From this point of view, the development of the *idea of humanity* [emphasis added] is nothing other than a stage in the development of the law; that is, much of what could previously have been *requested* in the name of humanity or universal human relations must, at another time and under different conditions of life, be *demande*d in fulfilment of the law.<sup>8</sup>

And that moment had come, Martens was convinced.

After examining the causes of interpersonal and international confrontations and finding them to be rooted in the very nature of human beings, society and the State, Martens considered the causes of conflict between States in particular:

The State, like a private person, may violate the rights to honour, self-preservation, independence, etc. of another State and not fulfil the positive and negative obligations assumed in the treaties concluded. There is no such thing as an international tribunal for resolving the resulting misunderstandings and disputes. Therefore, States must fall back on the right and possibility to obtain satisfaction by their own means, to restore the violated right and to establish peace. But if international justice, formally speaking, is now still at the same stage of development as civil (criminal) justice was in the Middle Ages, when the rule of force prevailed, does it really follow from this that the State is not bound by any precepts of law and justice?

Martens responded to his own question by noting that “States are conscious of the need to accord their conduct with the eternal laws of truth and justice” and to strive to resolve their conflicts by peaceful and lawful means.<sup>9</sup>

6 *Ibid.*, p. 6.

7 *Ibid.*, p. 7.

8 *Ibid.*, p. 7.

9 *Ibid.*, p. 20.

In speaking out against the senseless cruelty of war and advocating for the need for belligerents to respect established international rules, Martens voiced his belief in the triumph of the law. “No matter what political considerations statesmen and politicians may advance, no matter how fiercely patriotic publicists may rise up against the law ..., we have no doubt at all but that the legal consciousness of civilized nations shall soon prevail.”<sup>10</sup>

*On the Law of Private Property in Time of War* has lost none of its relevance today, and is still used by academics and practitioners alike. Although it was published by a 23-year-old student based on his master’s thesis, for over 150 years the world’s most venerable scholars have repeatedly referred to it as the work by “Professor Martens”. The book received recognition and the highest appreciation at the time of its appearance, and continues to do so in modern legal literature. In a very comprehensive study of international legal literature in the nineteenth century, the 1882 *Handbook for the Study of the History and System of International Law*, the renowned international legal scholar Professor Vsevolod Pievich Danevskiy devoted five pages to an analysis of Martens’ book, which “first and foremost deserves serious attention and is, in many respects, worthy of the highest approval”.<sup>11</sup> Danevskiy gave it the kind of appraisal to which any academic would aspire:

Martens’ monograph is, in our opinion, the most talented Russian work and is extraordinarily rich in historical and legal information. It is a real pleasure to read and should be a reference book for anyone studying international law, especially military law, in Russia.<sup>12</sup>

Almost one century later, the leading scholar of international legal literature in Russia, Professor Vladimir Emmanuilovich Grabar, assessing the state of pre-revolutionary studies of the problem of the legal status of enemy subjects and private property in war, noted that “one of the best works on this issue, not only in Russian but also in world literature, is the one by *Professor F. F. Martens*”.<sup>13</sup>

Martens’ book is optimistic and imbued with faith in the triumph of the law. He concluded his study with the following words: “We know of no force that could successfully resist the progressive movement of life or fail to fulfil the *inexorable* precepts of the law”.<sup>14</sup>

However, the Franco-Prussian War of 1870–71, which broke out soon after, showed that belligerents continued to inflict cruelty on one another that was not justified by military necessity. Martens, who had been sent abroad by the university, as a postgraduate member of the Department of International Law, to attend lectures at the universities of Vienna, Leipzig and Heidelberg, involuntarily

10 *Ibid.*, p. 453.

11 Vsevolod Pievich Danevskiy, *Handbook for the Study of the History and System of International Law*, A. N. Gusev, Kharkov, 1882.

12 *Ibid.*, p. 237.

13 Vladimir Emmanuilovich Grabar, *Materials on the History of International Legal Literature in Russia (1647–1917)*, USSR Academy of Sciences, Moscow, 1958, p. 440 (emphasis added).

14 F. F. Martens, above note 3, p. 453 (emphasis added).

found himself near the scene of the fighting, and collected extensive investigative material on the war. Later, in the preface to the French edition of his book on the Brussels Conference of 1874 and the Hague Conference of 1899, *Peace and War*, he recalled:

During the 1870–1871 war, being close to the theatre of war, I collected from the newspapers of all countries and through personal interaction all the information I could about violations of the laws and usages of war. Already then I had reached the conclusion that it was essential that governments themselves determine these laws and usages in order to prevent endless recriminations and ruthless reprisals.<sup>15</sup>

The evidence obtained of the senseless atrocities of war and the very important conclusion reached by Martens – about the need to render the conduct of belligerent States more humane and to establish a more precise, formal international legal mechanism regulating war and limiting the means and methods of warfare – all played an important role in Martens’ subsequent academic, pedagogical and diplomatic activities, and were constantly at the centre of his attention.

It is noteworthy that, after being recalled prematurely from a foreign assignment to take over the chair of international law from his teacher, Professor Ignatij Iakinovich Ivanovskiy, Martens departed from the existing tradition whereby new lecturers usually dedicated their first lecture to their predecessor and started teaching the course where their predecessor had left off.

The young associate professor (now aged 25) chose as his topic “The tasks of contemporary international law” and began his first public lecture to the students of the faculty on 28 January 1871 with the following significant words:

Gracious Sirs! It is not without some confusion that I begin, at the present time, to teach the science of international law. When two of Europe’s most civilized nations are locked in a terrible war, when the fruit of centuries of peaceful labour and competition in the fields of trade and industry are perishing in the vortex of popular passions aroused to the greatest obduracy, when, lastly, the universally recognized principles of international law are frequently trampled under foot – then it seems that many ideas about the peaceful and progressive development of peoples must collapse before these manifestations of the opposite order of things.<sup>16</sup>

After this introduction, however, the entire content and zeal of Martens’ lecture were imbued with an optimistic spirit, with faith in the reason of mankind and its humanistic essence, and in the great potentialities of the theory and practice of

15 Fyodor Fyodorovich Martens, *La paix et la guerre: La Conférence de Bruxelles, 1874, droits et devoirs des belligérants (leur application pendant la guerre d’Orient 1874–1878), la Conférence de La Haye, 1899*, translated from Russian into French by M. le comte N. de Sancé, A. Rousseau, Paris, 1901, p. viii.

16 Fyodor Fyodorovich Martens, “The Tasks of Contemporary International Law”, inaugural lecture delivered on 28 January 1871 at St Petersburg University, *Journal of the Ministry of Public Education*, No. 6, 1871, p. 251.



international law. After critically analyzing the condition of inter-State relations and the level of compliance by States with the rules of international law in times of both peace and war, Martens sharply condemned war as a barbaric means of settling international disputes, which should not triumph over peaceful, legal methods. He proclaimed:

No, brute force shall never triumph definitively over law; never shall the pitiful theory of *faits accomplis* stifle in us the sense of truth and justice. ... This is why, with unshakable faith in the progressive development of international life and humanity, and in the deep conviction that the idea of development is the highest principle of life and law, I embark on teaching the science of international law.<sup>17</sup>

With these elevated and humane feelings of “truth and justice”, with his expression of “unshakable faith” and “deep conviction” in progress, development and the rule of law, Martens proceeded not only to teach international law, but also to further both its study and its practical development. His underlying humanistic positions, both with regard to his overall world view and international law, as outlined in his first academic work *On the Law of Private Property in Time of War*, proved objectively and historically so correct, and theoretically and practically so fruitful, that they received not only wide acclaim in academic literature but also (and even more importantly) endorsement by the entire further course of the humanization of international relations and the emergence and development of IHL. They were further developed by Martens in his subsequent academic work<sup>18</sup> and diplomatic activity.

Employed concurrently by the Russian Ministry of Foreign Affairs in the position of collegiate secretary, Martens, still affected by the brutality of the Franco-Prussian War (as he himself acknowledged in the above-mentioned preface to the French edition of *Peace and War*), soon submitted to the minister of foreign affairs, Alexander Mikhailovich Gorchakov, and the minister of war, Dmitry Alekseyevich Milyutin, his first (and highly successful!) foreign policy proposal, regarding the holding of an international conference to adopt a convention on the laws and customs of war. In a letter to Milyutin dated 25 April 1872, Martens, after analyzing the Franco-Prussian War, concluded that its excessive brutality had stemmed in large part from existing differences between the belligerents “in the understanding of their obligations and in the interpretation of international military laws and established customs”. Further, Martens posed the following fundamentally important question:

Is it not essential, for a more lawful conduct of war and the establishment of a beneficial peace, that States determine precisely those military laws and usages that they intend to observe in time of war? In other words: is it not possible to codify the universally recognized military laws and usages ...? I dare to think

17 *Ibid.*, p. 268.

18 See, for example, Fyodor Fyodorovich Martens, *The Contemporary International Law of Civilized Nations*, Vol. 2, USSR Ministry of Railways, St Petersburg, 1883, Section 4.

that the codification of military laws and usages is not only possible but necessary, if it is desirable that war, that inevitable evil, be placed within precisely defined boundaries, and that the rights and obligations of belligerent forces, with respect both to each other and unarmed private individuals, be clarified in a comprehensive manner.<sup>19</sup>

Martens not only made the above proposal, but he also drew up and presented a draft international convention on the laws and customs of war. This draft, after review by a commission headed by Minister of War Milyutin (with Martens' very active participation), was circulated by order of Emperor Alexander II of Russia, with a note by the Ministry of Foreign Affairs, to other States for consultation. After receiving a favourable response from the States, Russia set about convening the international Brussels Conference on the codification of the laws and customs of war in 1874. (Significantly, the Russian delegation included the 29-year-old Professor Martens, then still little known in Russia or the wider world; this was the first time in Russian diplomatic practice that a scholar in international law was involved in the work of an international conference.)

Russia submitted the aforementioned draft convention, drawn up based on Martens' proposals, to the conference participants.<sup>20</sup> The text aimed at formally limiting the means and methods of warfare, alleviating the suffering of the civilian population and reducing the destruction caused by military action. Pursuant to the draft, belligerents were obliged strictly to observe the existing laws and customs of war and, in a very important innovation, to apply them not only to armies but also to militias and volunteer corps ("partisans"). To this end, they should fulfil the following conditions: (1) they should be commanded by a person responsible for his subordinates; (2) they should have a distinctive emblem clearly visible to the enemy; (3) they should carry arms openly; and (4) they should conduct their actions in accordance with the laws and customs of war.<sup>21</sup> (These conditions were reproduced almost word for word in the Hague Conventions of 1899 and 1907, still in force today.)

The draft also stipulated that belligerents did not enjoy an unlimited right to choose their means of warfare. It prohibited the following: the use of poison and poisoned arms as well as arms, projectiles and material of a nature to cause unnecessary suffering; the seizure and destruction of enemy property without military necessity; and the improper use of the enemy's flags, military ensigns and uniform. In sieges and bombardments, the draft set forth that all necessary steps should be taken to spare, as far as possible, historical monuments and buildings devoted to science, art and charity, and not to damage hospitals with wounded. The pillaging of a town or place, even when taken by assault, was

19 Letter by Fyodor Fyodorovich Martens to Minister of War Dmitry Alekseyevich Milyutin, 25 April 1872, Russian State Library, Manuscript Department, collection 169, carton 38, storage unit 2, sheets 1–2.

20 Fyodor Fyodorovich Martens, "Draft International Convention on the Laws and Customs of War", in *The Eastern War and the Brussels Conference 1874–1878*, USSR Ministry of Railways, St Petersburg, 1879, Annex 1.

21 *Ibid.*, pp. 4–5.

prohibited. The draft convention included provisions on spies, parlementaires, capitulations and armistices. Special attention was paid to regulating the conduct of military authorities in occupied enemy territory; in such territory, the Occupying Power was obliged to re-establish and ensure, as far as possible, public order, while respecting the laws in force in the country. Belligerents were duty-bound to respect family honours and rights, individual lives, private property and religious convictions. Rules were foreseen for the collection of taxes, other tolls, contributions and requisitions in kind in the occupied territories. The legal status of prisoners of war was regulated in detail, including their conditions of internment and labour, food, liberty on parole and the creation of information bureaus relative to prisoners of war. It was laid down that prisoners of war were subject to the laws and other regulations in force in the army of the State into whose hands they had fallen. Prisoners of war were to be treated “humanely”.

To Martens’ great disappointment, however, “given the complete discord that emerged during the discussions”, the State delegations participating in the Brussels Conference did not support the idea of adopting a legally binding convention based on the proposed draft, but merely adopted a political declaration.<sup>22</sup> At that time, States, which had an unlimited right to war, could not yet accept the very idea of limiting warfare by any kind of international legal rules.

On reading the draft convention, one is struck by the high degree of humanism and brilliant foresight of its authors, primarily Martens. The text already contained detailed provisions that were later embodied (with the same wording) in the 1899 Convention on the Laws and Customs of War on Land and in subsequent twentieth-century conventions: the Hague Convention of 1907, the Geneva Conventions of 1949 and the Additional Protocols of 1977, which now form the core of international humanitarian and military law.

The failure to secure the adoption of a convention did not deter Martens, but rather spurred him to defend his humanistic ideas with renewed vigour. The provisions set forth in his draft soon received deep and detailed academic substantiation in his seminal work on the Russo-Turkish War, *The Eastern War and the Brussels Conference 1874–1878*. In this book Martens made, in his own words, “a first attempt to present the history of [the Russo-Turkish War] from the perspective of the observance of the usages and laws of war, as proclaimed at the Brussels Conference and commonly recognized by civilized nations at war”.<sup>23</sup> This was the first such comprehensive and in-depth study of the customs and laws of war in Russian literature. The limited scope of the current article does not permit us to delve in detail into the content of this work, but a glance at the chapter titles gives a clear picture of the range of topics covered: “War and Right”, “War and Law”, “The Brussels Conference of 1874”, “From Peace to War”, “Russia and Turkey as Belligerent Powers”, “The Russian Army in a

22 Fyodor Fyodorovich Martens, “The Hague Peace Conference. A Cultural and Historical Sketch”, *The European Herald*, St Petersburg, No. 3, 1900, p. 16.

23 Fyodor Fyodorovich Martens, *The Eastern War and the Brussels Conference 1874–1878*, USSR Ministry of Railways, St Petersburg, 1879, p. 3.

Hostile Land”, “The Russian Army on the Battlefield”, “On Wounded and Sick Soldiers and Prisoners of War” and “On Relations between Belligerent States and Neutral Powers”.

Martens continued to develop his ideas on the humanization of warfare and the protection of its victims in subsequent years. Thus, in 1881 he gave a lecture entitled “On the Need to Define International Rules of War” at the Russian Technical Society, which caused heated debate, including on the lawfulness or unlawfulness of partisan warfare in occupied territory.<sup>24</sup>

His unshakable faith in the triumph of reason and the rule of law, his belief in the necessity and possibility of codifying the customs and laws of war, his in-depth scholarly study of the problems of humanitarian law and his productive humanistic initiatives and their active defence, which brought him worldwide fame and respect, all spurred Martens to come forward with a new proposal. Nearly a quarter of a century after the failure of the Brussels Conference, Martens, now a world-renowned international legal scholar, diplomat and international arbitrator, and a permanent member of the Council of the Ministry of Foreign Affairs of the Russian Empire, again put forward an initiative by Russia to convene a new international conference devoted to limiting the means and methods of warfare, and prepared a draft programme for the proposed conference.

Russia’s note to foreign States proposing the holding of such a conference met with support. The scourge of endless wars, the ever-growing burden of the arms race, the expanding peace movement and the active work of the International Red Cross and Red Crescent Movement prompted the States to agree to the conference.

As is well known, the First Peace Conference, convened on Russia’s initiative, was held in The Hague from 18 May to 29 July 1899. Martens was elected chairman of the second commission, tasked with drawing up a convention on the laws and customs of war on land. To his great satisfaction, the commission based its deliberations on his draft convention on the laws and customs of war, which had been rejected by the Brussels Conference in 1874.

It was during the work of the 1899 Hague Conference that Martens’ proposal, which has become forever associated with his name and has gone down in history as the Martens Clause, came into being. After weeks of exhausting wrangling and debate, the delegates finally managed to agree on the wording of each of the fifty-six articles of the Convention. But before the final vote, the Belgian delegate, Édouard Descamps, suddenly spoke up and, on behalf of Europe’s smaller States, insisted that amendments be made to the agreed text giving the population of (fully or partially) occupied States the right to armed resistance against occupying forces. In the course of the ceaseless wars, smaller nations had constantly been the victims. However, the delegations of the major European powers, which were constantly at war with each other, strongly opposed such a modification, arguing that recognition of the right of the population to resist would legalize acts of perfidy, treachery and brutality against

24 Fyodor Fyodorovich Martens, “On the Need to Define International Rules of War”, lecture at the meeting of the Russian Technical Society, 25 April 1881, in *Notes of the Russian Technical Society*, Vol. 4, 1881.

the members of invading or occupying enemy forces. The delegations of the smaller nations thereupon declared that they did not accept the draft and that, if their demand were not heeded, they would leave the Conference. There was a real risk that the fine balance between the demands of war and the protection of the belligerents and the civilian population, so painstakingly achieved in the articles of the Convention, would be destroyed, and thus would the Conference fail and, indeed, Martens' entire dream collapse.

Martens had one night to find a way out of this unexpected deadlock. And, indeed, "von Martens' genius" (to quote the patriarch of humanitarian law, eminent Swiss lawyer Jean Pictet<sup>25</sup>) came up with a brilliant solution to save the Convention. The following morning, on the opening of the meeting, he proposed it to the delegates.

In order not to make any changes to the hard-won text of the Convention and to avoid a new vote on its articles, Martens proposed inserting in the text of the preamble to the Convention a clause stating that in all specific military situations that were not reflected or regulated in international treaties, all belligerents should still act humanely, in accordance with the laws of humanity. All the delegations welcomed this proposal with enthusiasm and voted unanimously to adopt the entire text of the Convention. With this, Martens noted, "the question of humanism and law, raised by Russia in 1874 and which had lain dormant until 1899, was finally resolved".<sup>26</sup>

The wording of the clause was fully preserved in the revised Convention on the Laws and Customs of War on Land adopted on 18 October 1907 at the Second Hague Peace Conference, in which Martens also took part. This Convention is still in force today and constitutes one of the basic legal and regulatory foundations of IHL, applicable in times of armed conflict. Martens' proposal, which was incorporated into the preamble of the 1899 Convention, later became known as the Martens Clause or Martens Declaration in academic literature.

Thus, at the Hague Peace Conferences of 1899 and 1907, Martens was able to realize his humanistic ideas: as one of the most energetic participants in these conferences, he secured the inclusion in the 1899 and 1907 Conventions of all the main provisions of the draft text, drawn up on his initiative and with his active participation for the 1874 Brussels Conference. The Hague Conventions, according to the figurative appraisal by the Russian professor Vladimir Vasilevich Pustogarov, "are a memorial to the outstanding Russian jurist F. F. Martens, a memorial all the more remarkable because they continue to serve people today".<sup>27</sup>

The Martens Clause has gained broad international recognition and has entered international law as a separate provision in a range of instruments, sometimes with editorial adjustments or with evolved content widening the scope of its protection. Differences in wording and normative status are present in the

25 Jean Pictet, *Development and Principles of International Humanitarian Law*, ICRC, Moscow, 1994, p. 78.

26 F. F. Martens, above note 22, p. 18.

27 Vladimir Vasilevich Pustogarov, *Fyodor Fyodorovich Martens – Lawyer, Diplomat*, International Relations, Moscow, 1999, p. 268.

Geneva Conventions and their Additional Protocols. Thus, in Additional Protocol I (AP I) of 1977, the Martens Clause is rendered as follows:

In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

A number of points are noteworthy here. Firstly, AP I provides not only for cases that are not covered by itself, but also for those not covered by “other international agreements”. Secondly, the original expression “civilized nations” has been dropped, as it is clearly outdated. For the same reason, modern legal terms are used: “authority” instead of “empire”, “combatants” instead of “belligerents”, “principles of humanity” instead of “laws of humanity”, and the more precise term “civilians” rather than “population”. Thirdly, and perhaps even more importantly, the Martens Clause has been moved from the traditional preambles of earlier instruments to the main body of AP I, becoming part of Article 1 (“General Principles and Scope of Application”), which undoubtedly strengthens its legal status. Thus, in Article 1, the Martens Clause is effectively enshrined as one of the regulatory legal principles of IHL.

Additional Protocol II, meanwhile, retains a traditional approach. The Martens Clause is included in the preamble, but with slightly modified content: “... in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience”. As we can see, the source of customs has been excluded from the Clause, and “population and belligerents” has been replaced by the more general term “human person”, which does not limit the subjects of protection.

States continue to include the Martens Clause in the international humanitarian treaties they conclude. Thus, the preamble to the 1980 Convention on the Prohibition of Certain Conventional Weapons reiterates almost entirely the text of the Clause from AP I, with the only – very positive – addition being that the civilian population and combatants henceforth “shall at all times” remain under the protection of international law. The International Court of Justice also referred to the Martens Clause in its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*,<sup>28</sup> confirming its legal importance, effectiveness and applicability.

All this attests to Martens’ high level of professional intuition and outstanding foresight. Having started to fight, over 150 years ago, for the adoption of international legal rules to limit the scourge of war, he achieved the adoption of the above-mentioned 1899 Convention based on the draft he had produced, and wrote a “saving” clause, seemingly intended only for the Convention in question, but which proved so successful that it ultimately received

28 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, UN Doc. A/51/218, 19 July 1996, available in English at: [www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-00-EN.pdf](http://www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-00-EN.pdf).

his name. The Martens Clause outlived its author, safely passing through the twentieth and into the twenty-first century, where it continues today to fulfil its noble mission of protecting the victims of war in different unforeseen situations.

In spite of this, though, academic recognition of and interest in the Clause were a long time in coming. In his scholarly writings, Martens himself did not focus his or his readers' attention on the proposal he had made to the Convention or on the role of this provision in humanizing the means and methods of war. He also ignored the question in his renowned work *The Contemporary International Law of Civilized Nations*, the fifth edition of which was published in 1905 – that is, well after the First Hague Conference of 1899.

For many years the Martens Clause also received little scholarly attention in Russian legal literature, but interest in the Clause and its significance for IHL has intensified in Russia over the last quarter of a century. Specialized publications have appeared on the problem of the humanization of armed conflict which examine, among other things, the Martens Clause, and dissertations are written on the subject. It should be noted that the Moscow delegation of the International Committee of the Red Cross (ICRC) has played a significant role in boosting interest in this field within the academic community of the post-Soviet area. Its active organizational and publishing work aimed at spreading knowledge of IHL has prompted an increasing number of both faculty and students to focus on the problem of the humanization of armed conflict.

A huge positive role in this process is also played by the International Academic and Practical Martens Readings Conference, which has taken place regularly over the past twenty years, traditionally organized by the ICRC, the Russian Association of International Law and St Petersburg State University, and held at the university's Faculty of Law. A question frequently discussed at these sessions is the scope and application of the Martens Clause in the changing conditions of modern armed conflicts. The outcomes of these deliberations are then often taken up in Russian and foreign academic publications.

So, how should the provisions of the Martens Clause be viewed and treated from today's perspective? On the one hand, there is nothing extraordinary about the provisions of the Martens Clause. It is a well-known fact that no convention, law, order or other regulatory act can cover the entire range of possible life situations, and there always are and will be some unregulated social "gaps" that lie outside the defined framework. This is typical of all regulatory and legal systems. On the other hand, with regard to armed conflicts and IHL, the lack of specific rules for specific situations often gives rise to numerous unwarranted disasters and atrocities. Therefore, for the international community and international law, as for the millions of actual and potential victims of armed conflict, the Martens Clause is of the utmost importance.

However, as is often the case with jurisprudence in relation to seemingly straightforward provisions, there is disagreement over the understanding and application of the Martens Clause. For example, there is controversy as to whether the provisions of the Clause belong to positive international treaty law or are a rule of customary international law. Yet, if one considers that no

international treaty can foresee all possible situations of armed conflict, and that the general rules of IHL are *erga omnes* in the modern world, then undoubtedly the Clause must fulfil its protective function precisely as a treaty-based rule for the parties to humanitarian conventions, and as a rule of customary law applicable to those parties to armed conflicts that, for one reason or another, have not signed up to the conventions. The inclusion of the Martens Clause in the main body of AP I means that it can be interpreted as a treaty-based *jus cogens* rule of IHL, but on the understanding that, in the absence of a positive treaty-based norm applicable to a given situation, the Clause must be invoked.

There are also differences in the perception and interpretation of the Martens Clause in the legal doctrine and practice of large, developed countries and smaller ones, and it is not easy to strike the right balance between the categories of “security requirements”, “military necessity” and “humanity”.

All of this is of particular importance in today’s world. Recent scientific and technical advances have led to the widespread use by States of information and telecommunications technology for military purposes, including the creation of cyber troops and the waging of cyber sabotage, cyber operations and cyber attacks on enemy targets, which inevitably cause increased destruction and intensify the suffering of their victims. In recent years, various means of information warfare have been actively used, ranging from media warfare to direct cyber attacks on the computer networks of enemy States. Information wars are increasingly becoming a new digital channel for transmitting aggression, and global information technology and social media are becoming a new kind of weapon.

In recent years, the modern world has faced a new global threat to all mankind – the COVID-19 pandemic, the danger of the spread of which increases significantly during military conflicts. This requires urgent discussion between scientists and practitioners of emerging military epidemiological situations in order to develop proposals for taking the necessary legal measures to address the situation. In this regard, it is worth welcoming the prompt appearance of a thorough scientific study on this issue by Patrick Leisure.<sup>29</sup> Leisure’s article comprehensively analyzes various approaches to dealing with the issue in order to contribute, as the author writes, to achieving the main goals of IHL – ensuring respect for the principles of humanity during armed conflicts, limiting unnecessary harm and suffering, and mitigating the devastating consequences of such conflicts, which are complicated by the pandemic.

Obviously, IHL is unable to regulate promptly all newly emerging military situations involving the use of information and telecommunications technologies or epidemiological threats. In the absence of clear international treaty norms governing the use of new technologies in the conduct of military operations and information wars and prohibiting their use in armed conflicts, the question arises as to whether it is possible and necessary to apply the Martens Clause to unregulated situations of

29 Patrick Leisure, “The Martens Clause, Global Pandemics, and the Law of Armed Conflict”. *Harvard International Law Journal*, Vol. 62, No. 2, 2021.



modern armed conflict. And here too, one must conclude, it is important for all parties to armed and associated conflicts that arise to be guided by the provisions of the Martens Clause.

That being said, the situation is complicated by the fact that the various actions enumerated above are often committed outside armed conflicts and do not fall formally and legally within the concept of armed aggression, although their consequences can seriously threaten the political independence, and sometimes the territorial integrity, of States.

All of this requires an in-depth legal analysis and should be the subject of a special group discussion. This was highlighted at the 14th International Academic and Practical Martens Readings Conference, held on 27 May 2021 at the Faculty of Law of St Petersburg University, which reaffirmed the need for a special consideration of the issue at the next conference.

Thus, to sum up, Martens' academic ideas and vision, his practical proposals and the unique clause he formulated, and to which the global academic community gave his name, are reflected in current IHL treaties – which is unequivocal recognition of the outstanding contribution of the Russian scholar and diplomat to humanizing the means and methods of warfare. Through his academic and diplomatic work, and his participation as a permanent delegate of Russia in all conferences of the Red Cross, Martens strove tirelessly to bring about the acceptance and consolidation of humane rules of warfare, earning for this the unofficial but honorary titles of the “soul of the Hague Peace Conferences” and “judge of the Christian world”, and going down in history as the author of a widely known, internationally acknowledged and noble legal principle that bears his name. With further adjustments and refinements to its content, the Martens Clause will continue to serve the protection of human rights in times of armed conflict and struggle, alas, for many years to come.