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Georg Friedrich Von Martens (1756-1821)
and the Origins of Modern International Law

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ABSTRACT

There is more than a coincidental resemblance between Samuel Pufendorf's 1667 description of the Holy Roman Empire's constitution as a 'monster' and enduring views of the international order as an 'anarchical society'. Pufendorf provided a sociological grounding for a public law conception of the relations between separate states that was based on the natural human inclinations of self-love and sociability, and brought into this conception some elements of the traditions of the reason of state. This view was integrated into parts of the public law theory of the German states by writers such as Pütter and Moser, and was brought to bear on European public law by G.F. Martens (1756-1821), the most significant representative of the 'internationalist' branch of German public law at the time. Martens assembled and classified European treaty practice and customary usages, and outlined principles of comparative public law, from which he then derived principles of (European) international law in his main treatises. Although focused on positive law, Martens argued the relevance of his approach in part on (Pufendorffian) natural law, in part on a progressivist teleology associated with Kant. Martens' integration of these various theoretical perspectives, combined with his commitment to an industriously practice-oriented and somewhat conservative public law tradition, provided a robust alternative to French revolutionary approaches to international order. The adoption of the views articulated by Martens by the legitimist counter-revolutionary monarchies after 1815 illustrates the political ambivalence of a naturalism that resigns to legitimating present power as the appropriate in a preconceived trajectory of historical progress.

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The way we theorise about international law has grown out of German public law. Of course, much of the substance of international law has been received from Roman law.¹ Its origins are profoundly influenced by Catholic universalism of the 16th and 17th centuries and its basic notions have been developed by Dutch Protestants such as Hugo Grotius and Swiss diplomats such as Emer de Vattel. But the theoretical articulation of the nature and problems of modern international law comes from the tradition of German public law, a tradition with a particular history and points of concern. This is, I believe, a rather natural, though rarely remarked, consequence of fact that the origins of the system - if we can speak of such - emerge from the Westphalian settlement. Among the effects of the Peace Treaties of 1648 was the demise, if not in theory then in practice, of the Holy Roman Empire. But though the Empire was finished as a political actor, it did not come to an end as the ideal frame within which German lawyers and political thinkers continued to contemplate the organisation of the largest part of Europe.² Our received view of the international legal world is the view of the defunct Holy Roman Empire, writ large.

¹ See especially Henry Sumner Maine, *International Law. The Whewell Lectures* (London, Murray 1887)

² There are of course diverging views of the meaning of Westphalia to the constitution of Germany. For a recent assessment, see Ronald G. Asch, 'The *ius foederis* re-examined. The Peace of Westphalia and the Constitution of the Holy Roman Empire', in Randall Lesaffer *Peace Treaties and International Law in European History. From the Late Middle Ages to World War One* (Cambridge University Press, 2004), p. 319-337.

I wish in this paper to sketch briefly the outlines of the "modern view of international law" that emerged from German debates in the late-seventeenth century and peaked in the work of Georg Friedrich von Martens, the Professor of the Law of Nature and of Nations at the University of Göttingen for a quarter of century, from 1783 to 1808. Martens is known as a leading name of international legal positivism. But I want to suggest that "positivism" is a very crude category of thinking about the tradition he helped to inaugurate and hides the way it comes together with its counterpart - natural law - in a distinctive style of legal argument and a complex of problems as acute and unresolvable today as in the late eighteenth century.

I INTRODUCTION

The right place to begin is, perhaps, the work of Samuel Pufendorf (1632-1694) whose study of the status of the Empire, written under the pseudonym of Severinus Monzambano in 1667, famously qualified that entity as *irregulare aliquod corpus et (tantum non) monstro simile* - a monster³ - a characterisation suggestively akin to the standard view of the international political world as an "anarchical society".⁴ Germany after Westphalia was precisely that. Then, like now, Europeans lived in an era where traditional truths about the grounding of legitimate political authority were being put into question. With his *De jure naturae et gentium* of 1672 Pufendorf provided a sociological foundation for the political world that eventually came to set aside the Protestant Aristotelianism that had formed the political theology of *ancien*

³ Samuel Pufendorf, *Severinus de Monzambano Veronese de Statu Imperii germanici ad Laelium Fratrem, Dominum Trezolani, Liber unum - Über die Verfassung des Deutschen Reiches* (transl into German by H. Bresslau, Berlin, Hobbing, 1922), Ch VI § 9.

⁴ Hedley Bull, *The Anarchical Society. A Study of World Order* (London, Macmillan 1977).

régime universities.⁵ From now on, God would be left outside the system as its absent creator. Human self-love would suffice to create the basis of legal obligation for something like the rational egoists Pufendorf saw around himself. The normative relationship between German (and by extension, European) princes was now received from a natural law that accepted novel ideas about *Staatsräson* (*ragione di stato*) as aspects of a sociologically plausible legal system.⁶

From now on, German public law learned to think of the Empire as a composite form of public power - *civitas composita* - a system of sovereigns that nonetheless constituted a whole. Law, instead of theology or philosophy, explained the reality of a fragmenting world. It did this by the twin assumption of human nature as founded on self-love; and the world governed by a natural reason that created community out of selfishness. What Adam Smith did for economics, Pufendorf achieved in legal theory: sovereignty as the public law equivalent to the possessive individualism of capitalism.⁷

It was left for eighteenth century lawyers to find the argument to ensure the compatibility of sovereign statehood with the *monstrum* of the *jus publicum europaeum*. This took place by splitting law into two: natural and positive. The authority and limits to sovereign competence were received from a natural law that

⁵ For a discussion of the "new [protestant] legal science" that legitimated protestant rulers by giving unity to their laws as legal systems, see Harold J. Berman, *Law and Revolution II. The Impact of the Protestant Reformations on the Western Legal Tradition* (Harvard University Press, 2003), p. 108-130.

⁶ Samuel Pufendorf, *On the Law of Nature and Nations (De jure naturae et gentium libri octo, 1688, translated by C.W and W.A. Oldfather, 2 vols, Oxford University Press, 1934)*, II. Pufendorf's role not only as a seculariser of legal theory but as the beginner of something like a sociological approach to law is highlighted in James Tully, 'Introduction' Samuel Pufendorf, *On the Duty of Man and Citizen According to Natural Law (De officio hominis et civis, 1673, ed by James Tully, transl. by M. Silverthorne, Cambridge University Press, 1991)*, p. xxii-xxiii.

⁷ This aspect is highlighted in Istvan Hont, 'The Language of Sociability and Commerce: Samuel Pufendorf and the Theoretical Foundations of the 'Four-Stages

compelled rational egoists into co-operation; what natural law said could be extracted from sovereign behaviour, conceived as necessary modifications to natural law in practice and obligatory owing to the sovereign's power to punish violations.⁸ If the German lawyers in the 18th century oscillated uncertainly between the relative emphasis they laid on natural and positive law, this did not mean they would not have seen those two as intimately linked. One could not exist without the other. The more firmly established the natural basis of the system - or, which amounts to the same, the less we speculate about it - the more freely lawyers could elaborate the laws and practices through the technique that was properly theirs. The new protestant *Reichpublizistik* at Jena and the new universities at Halle (1692), and Göttingen (1737) grounded law as the pragmatic foundation of the new political order.⁹

At the same time, the first articulations of the *Droit public de l'Europe* emerged from those same universities. German *Staatsrecht* and European *Völkerrecht* developed hand in hand, often by the same persons and in view of analogous problems and solutions. The first chair that carried something like that double denomination was occupied by Pufendorf in 1660.¹⁰ As university chairs and fields of specialization at the law schools, natural law, public law and international law tended to be indistinguishable.

Theory', in Anthony Pagden (ed), *The Languages of Political Theory in Early-Modern Europe* (Cambridge University Press, 1987), p. 253-275.

⁸ This compromise between rationalism and empiricism, idea and reality was epitomised in Pufendorf's position "between" Grotius and Hobbes and the odd consequence that his brand of naturalism was amenable for radical and conservative implications alike. This aspect of his work is at the core of Leonard Krieger, *The Politics of Discretion, Pufendorf and the Acceptance of Natural Law* (The University of Chicago Press, 1965). For a useful discussion of the nature of the "social" in Pufendorf and of the paradox of removing God's will only to arrive at the voluntarism of the sovereign, see T. J. Hochstrasser, *Natural Law Theories in the Early Enlightenment* (Cambridge University Press, 2000), p. 95-106

⁹ Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland. Erster band 1600-1800* (Munich, Beck 1988), p. 237 et seq.

¹⁰ But according to Krieger, the position was on international law and philology though Pufendorf "erroneously" recalled it as being on natural and international law, Krieger, *Politics*, supra note 8, p. 19.

This was also the case at the University of Göttingen. Its law faculty was immediately oriented to imperial history and constitutionalism, guided by Johann Stephan Pütter (1725-1807), whose fame rested at least in part on his having been the teacher of most significant German officials in the century.¹¹ A moderniser of the system of imperial public law, Pütter also published in 1750 together with the Professor of law of nature and of nations, Gottfried Achenwall (1719-1772),¹² a treatise on natural law in which he generalised a *jus publicum* and a *jus civile universalis*, unashamedly assuming that what applied as principles of imperial public law would be applicable as *universal public law* as well.¹³

This was where Georg Friedrich von Martens inscribed himself in 1775, in the footsteps of his brother who had thereafter commenced a successful diplomatic career.¹⁴ Martens is likely to have taken Pütter's courses, and reports that as he later taught public law in Göttingen he did this "nach dem Pütter".¹⁵ Martens' doctoral dissertation from 1780 concerned the jurisdiction of imperial courts in disputes between *Landesherrn* (Princes) and their subordinates, making points on general and imperial public law, as well as European and German practice. But no international law issues were discussed.¹⁶ His first series of lectures as the newly appointed (17 January 1783) extraordinary professor were also on German public law.¹⁷

¹¹ Stolleis, *Geschichte*, supra note 9, p. 310.

¹² Achenwall himself taught natural law in a fully empirical way and was particularly keen to create a realistic theory of law and politics - of *Staatsklugheit*.

¹³ Johann Stephan Pütter & Gottfried Achenwall, *Elementa iuris naturae in usum auditorium adornatum* (Göttingen 1750).

¹⁴ Walter Habenicht, *Georg Friedrich von Martens. Eine Biografische und völkerrechtliche Studie* (Göttingen, Vandenhoeck & Ruprecht, 1934), p. 11. Robert Figge, *Georg Friedrich von Martens. Sein Leben und seine Werke. Ein Beitrag zur Geschichte der Völkerrechtswissenschaft* (Gleiwitz, Hill, 1914) gives the year as 1776 - but he had inscribed at the university already in the previous fall.

¹⁵ Habenicht, supra note 14, p. 12.

¹⁶ Figge supra note 14, p. 25-26; Habenicht supra note 14, p. 12-14.

¹⁷ Habenicht, supra note 14, p. 21.

By the 1780's it was widely assumed that the *Droit public de l'Europe* represented the natural interaction of independent political entities that, despite their independence, had the rational need to co-operate with each other and even in war, to refrain from excessive violence. The law of nations was understood as a historical product of the cultural and spiritual community that Europe was. The rules of European public law could be extracted in part from its very nature, in part from the positive acts - treaties and customs - adopted by European sovereigns through an increasingly professionalised system of negotiation and treaty-making.¹⁸ The management of the system needed a well-educated political class.

For his first lectures in international law in Göttingen Martens prepared his own text, the *Primae liniae juris gentium Europaeorum Practici in usum auditorum adumbratae* (Göttingae, Dieterich 1785) and thereafter reproduced in one German and three French editions during his lifetime.¹⁹ After his death two additional French versions of the by then well-known *Précis de droit des gens de l'Europe* came out. The book was translated into several other languages, including the English at the request of the United States government by William Cobbett in 1795.²⁰ This is the work from which it is possible to glean the conception of international law that Martens had. The most important aspect of it is, however, external to its actual substance, namely the fact it was written as a handbook on the practices of European nations, meant to be

¹⁸ Wilhelm Grewe rightly stresses the need to take seriously the treaty formulas of the period stressing the Christian unity of the Monarchs, but goes too far in re-dubbing the age of absolutism as one of "tolerance". *The Epochs of International Law* (Berlin, de Gruyter 2000), p. 288-294. For the professionalisation of the congress practice as part of the formation of the *ius publicum europaeum*, see Heinz Duchhard, 'Peace Treaties from Westphalia to the Revolutionary Era', in Lesaffer, *Peace Treaties*, supra note 2, p. 50-57. For the importance of Mably's *Droit public de l'Europe* (1746-1764) for the consolidation of the international legal system, see Marc Bélissa, 'Peace Treaties, *bonne foi* and European Civility in the Enlightenment, in *ibid.* p. 241-253.

¹⁹ *Précis du droit des gens moderne de l'Europe fondé sur les traités et l'usage* (Göttingue 1789, 1801, 1821). In this paper, most references are to the 1801 edition by Dieterich.

used in connection with teaching future diplomats and State officials on the workings of European public law. Its notion of law was that of a technical craft the more advanced students were expected to learn during the practical exercises that Martens held twice a week, once in French and one in German. In fact, from the date of his appointment in 1783 until his retirement from the University in 1808 and then until his death in 1821 his teaching was always accompanied by practical activities.²¹ Without keeping in sight this linkage, the speciality of modern international law cannot be well understood.²²

Martens was appointed ordinary Professor on 18 August 1784, and received the title of *Professor des Natur- und Völkerrechts* three years later. He taught German public law until 1787 - giving it up perhaps to some extent because Pütter himself was teaching it simultaneously and the subject itself had become of a rather ephemeral existence.²³ The Empire was no longer a living reality. Instead Martens began teaching foreign public law of the most important European States. He wanted to do this because, as he himself recounts, knowing the public law of foreign States was increasingly important not only for diplomats but because in a uniting Europe enlightened persons should be able to assess foreign affairs through understanding the relationship between the sovereign and the citizens in different countries.

²⁰ For detail on Martens' publications, see Habenicht, *supra* note 14, p. 58-59.

²¹ On his appointment, Martens was also appointed to the *Spruchkollegium*, a kind of informal court that also gave advisory opinions - a rather typical practical assignment for a law professor at the time. See Habenicht *supra* note 14, p. 21; Figge *supra* note 14, p. 28.

²² There is a style of writing on international law that originates in Rousseau, Kant, Hegel and later political philosophy, today represented by John Rawls and Jürgen Habermas, which contemplates the subject by reference to larger, often world-historical processes. The "Martens tradition", has been cultivated, by contrast, at law schools and among foreign office lawyers in the 19th and 20th centuries. Interestingly, the opposition between what Ian Hunter calls "metaphysical" and "civil philosophy" in 18th century German public law (in which Martens is situated firmly in the latter camp) is reflected in the continuing split within international legal writing. See Ian Hunter, *Rival Enlightenments. Civil and Metaphysical Philosophy in Early Modern Germany* (Cambridge University Press, 2001).

²³ Habenicht, *supra* note 14, p. 23.

Outside Göttingen, the most famous representative of German public law was Johann Jakob Moser (1701-1785) who shared the view of international law as above all a professional practice. Law teaching would need to transmit the skills that were necessary for young men to become useful servants for the Princes, courts or administrations in which they would spend their professional lives. This required above all two things: up-to-date, comprehensive and well-organised compilations of legal documents and a facility to use and compose such acts in the various languages in which European lawyers needed to work. Moser's own work to compile, organise and publish amounted to something between 500-600 books, 25 journals plus an innumerable amount of smaller writings and comments, with altogether 18 volumes on "modern European international law in times of peace and war".²⁴ Moser was the real hero in the process of making public law an academic science, neutral in method, religious in spirit, but committed to the Enlightenment ideal of a rule of law to replace philosophical speculation on the one hand, and reason of state (*ragione di stato*) on the other.²⁵

In 1786 Martens became the teacher of Britain's Crown Princes as King George - the Elector of Braunschweig-Lüneburg and later of Hanover - sent them to study at Göttingen. The fame of his courses on the theory and practice of European international law led Martens to become the head of something like a real diplomatic academy. During his 25 years in Göttingen, Martens did to international law much what Moser had done to German public law, compiling over the course of the years the basic legal sources that other lawyers could use to pursue their interpretative and

²⁴ Johann Jakob Moser, *Versuch des neuesten europäischen Völkerrecht in Friedens- und Kriegszeiten* (10 vols., 1777-1780); *Beiträge zu dem neuesten europäischen Völkerrecht in Friedenszeiten* (5 vols., 1778-1780); *Beiträge zu dem neuesten europäischen Völkerrecht in Kriegszeiten* (3 vols., 1779-1780). To these must be added several introductory and expository works on European international law from 1732 to 1770.

systematic studies on a practical basis, and thus contribute to the sense among the bureaucratic class in Germany of the presence of an understanding of treaties as forming or at least manifesting the operation of something like a legal system. His most significant work, without a doubt, is the *Recueil de Traités*²⁶ - the single most important collection of treaties, declarations and other international acts until the League of Nations Treaty Series. The first three volumes came out in 1791 and covered the years 1761 to the date of publication. In 1801 the *Recueil* was extended to seven volumes with another four to follow the following year. In 1817 Martens began his *Nouveau Recueil* with yet another four volumes. After his death, the *Recueil* was edited by several eminent German lawyers so that the third series covered the years 1908-1944 and consisted of 41 volumes. The total number of volumes in five series rose up to 126.²⁷

All other works by Martens are explorations of European diplomacy in terms of international law being applied in practice. These include the *Erzählungen merkwürdiger Fälle des neueren europäischen Volkerrechts*, 2 volumes of over 1300 pages (Göttingen, 1800-1802) that was intended as a case-book for the use of students and diplomats. The *Cours diplomatique ou tableau des relations des puissances de l'Europe* came out in 3 volumes (Berlin, Mylius 1801) and was meant for assisting the teaching of "particular international law" - that is to say, the law concerning the relations between particular States - on which Martens concentrated his practical exercises. The *Grundriss einer diplomatischen Gesch. der europ, Staatshndel u. Friedensschlüsse*

²⁵ See Stolleis, *Geschichte*, supra note 9, p. 258-267.

²⁶ *Recueil des principaux traités d'Alliance, de Paix, de Trêve, de neutralité, de commerce, de limites, d'échange etc. conclus par les puissances de l'Europe tant entre elles qu'avec les Puissances et États dans d'autres parties du monde depuis 1761 jusqu'à présent. Tiré des copies publiées par autorité, des meilleures collections particulières de traités, et des auteurs les plus estimés* (Göttingue 1791). The title is very informative of the contents of the collection and shows nicely the "inductive" method at work.

²⁷ Habenicht, supra note 14, p. 62-66. See also Martiz, 'Der Recueil Martens', 40 Arch öff. R (1921), p. 22-72.

seit dem Ende des 15. Jahrhunderts (Berlin, Mylius 1807) made the point that whoever aspired to read international law also needed to know European history.²⁸

Now the point of all this was to imagine and present the interaction of European Princes and States, and in particular the practices of European diplomacy, as aspects of an actually operating legal system. If it was true that the reality of the Empire lay largely on the shoulders of the historically oriented jurists who were able to see a system in a fragmented set of institutional traditions and practices, it was even more so in regard to Europe at large. Without the materials produced by Martens, later historically-oriented lawyers would have had little on which to ground their claims about a distinct European tradition of public law from Westphalia to modern times.²⁹

It may be hard to say what a legal system is. But at least it is something imagined and operated by lawyers. After Martens, it was possible for legal minds to point to treaties and de facto practices of European diplomacy as evidence of the workings of a legal system. True, there was no single treaty that would work as a European constitution - and as Martens presciently noted, there will probably never be one.³⁰ But the practices of European nations still converged so that it was possible to speak of what he called a practical and a positive European international law.³¹ It was this law he taught in his lectures and his practical exercises during his quarter-century in Göttingen.

II THE WORK

²⁸ Only one volume was published

²⁹ For this claim, see my *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2001), p. 70-88.

³⁰ Martens, *Précis* 1801, p. 9, 42.

³¹ Martens, *Précis* 1801, p. 9.

Although Martens admired Moser's approach and his industry, he also criticised this "en la séparant totalement du droit des gens universel, qui cependant doit en faire la base".³² If Martens was a "positivist", this did not mean he did not see beyond treaties and State practices. In the absence of a positive European constitution, natural law provided the basis of the European political system. Its derivation in Martens reads as if it had been taken from Pufendorf. The State is established as a "moral person" by individuals escaping the precariousness of human life in the state of nature. This leaves natural law to govern the relations of the moral persons thus established.

"...le peuple a donc les mêmes droits à réclamer et les mêmes devoirs à observer qui ont lieu dans l'état naturel des individus".³³

The domestic analogy is not complete, however, as the regulation must take account of the difference in the nature of its various objects. Yet the greatest part of the nation's external public law (*droit public externe*) is natural law, either as such, or as modified so as to take into account the nature of its various objects moral persons as "States".³⁴ The naturalist derivation of the law did not remain a mere decoration but surfaced constantly here and there either expressly or implicitly in the substantive law that Martens put forward. For example, in case a dispute arose over an alleged violation of the law, the matter should be settled by sufficient proof. But it followed from the natural independence and equality of European States that each was entitled to form its own view on this. And though seeking justice by force was lawful only to redress a wrong suffered (and not for example to counter mere immorality), the state of nature between European nations

³² Martens, *Précis* 1801, p. 23.

³³ Martens, *Précis* 1801, p. 3.

³⁴ Martens, *Précis* 1801, p. 5.

meant that each was free to decide whether such wrong was present.³⁵

There is no manifesto in favour of positivism anywhere. The discussion by Martens of natural law and natural lawyers is respectful and frequent. But there is a down-to-earth character in his writing that gives it a more contemporary or "modern" feel than the works of Pufendorf, Thomasius, or even Vattel. The matter is more one of style or choice of subject than philosophical argument. It is in the vivid connection to practice, accompanied by a strong faith in the natural justifiability of that practice, where the key to the Martens' modernity lies. This may be illustrated by reference to three aspects of his *Précis*.

First, it is a work of empirical, historical jurisprudence. It opens with a discussion and even an enumeration of European States. This is the transcendental condition, the *a priori* from which the rest of the chapters emerge, justified by nothing else than a passage in the Preface according to which it had "appeared natural to examine more closely what are the proper...and the common relations under which the powers of Europe may be considered as a whole".³⁶ The law is an effect of European statehood, the will, nature or interest of the European states:

"C'est en rassemblant les principes ... surtout par les Grandes Puissances de l'Europe, soit en vertu des conventions particulières, expresses ou tacites, uniformes ou ressemblantes, soit en vertu des usages du même genre qu'on forme par abstraction une théorie du droit des gens de l'Europe général, positif, modern et pratique".³⁷

³⁵ Martens, *Précis* 1801, p. 374, 387. The principle that the two sides should be considered both as legitimate in regard to treatment of prisoners, conduct of hostilities and making the peace, was extended also to the Barbary States, p. 388n.

³⁶ Martens, *Précis* 1801, p. VIII

³⁷ Martens, *Précis* 1801, p. 12.

And if such an inductive method does not allow fully certain conclusions in view of all cases (for example concerning relations between Turkey and Europe), Martens notes, this is true of all induction and the limit of all science. The results of induction are only probable, not certain. Outside the sphere of inductive reference – that is, outside Europe – the principles can no longer be applied as positive law. In this regard, Martens concludes, Kant's *Weltbürgerrecht* belongs to philosophy and not to positive law.³⁸

The second noteworthy aspect of the book has to do with the discussion of the law's substance that proceeds by an endless series of classifications, divisions and subdivisions of each subject-matter to its component parts. The law is divided into natural and positive, public and civil law. Public law, again, is subdivided into universal and particular, necessary and voluntary. With these, a series of combinations can be attained whereby the whole of European legal landscape may be grasped: States with full and States with less than full sovereignty; unitary and composed States; maritime powers and continental powers; States classified by reference to geographical location, size and rank and differing by way of three types of constitution: monarchy, aristocracy and democracy, each subdivided further into species.³⁹ The relations between the States of the Empire, too, are included as a special case of international legal relations.⁴⁰ This same technique is followed throughout. Negotiations are classified by method, official envoys by rank and function. The law of territory is discussed by classifying the rules on land and sea, rivers and lakes. Types of diplomatic correspondence classified by addressee, treaties divided into private and public; conditional and

³⁸ Martens, *Précis* 1801, p. 14.

³⁹ Martens, *Précis* 1801, p. 52-59.

⁴⁰ Such speciality relating e.g. to the jurisdiction of imperial courts, See e.g. Martens, *Précis* 1801, p. 374-5, 378.

unconditional, and then into a long list of their objects, effects and conditions of validity.⁴¹

This style reproduces the eighteenth-century notion of science: knowledge without superstition, knowing for oneself, as things appear to the senses. This excluded Aristotelian teleology as well as derivations from abstract principle. What was left was a kind of "natural history [as] nothing more than nomination of the visible" - i.e. description through classification of things in relation to one another. To proceed in a scientific way meant the compilation of taxonomies of immediately observable similarities and differences in one's object: this was the "system".⁴² By this means, truth in natural as in human sciences - including international law - was reached by classing the object by reference to properties given by the object itself: this insect has eight legs - that political community is ruled by aristocracy; the leaves of this flower are round - the competence of that envoy ranks him as a Minister of the third class. The world became a language that opened its secrets by the synchronic arrangements of its basic elements - not from any intrinsic (moral, political etc.) value that its elements would enjoy outside their position in the system.⁴³

Debates about the just war, for example, were unfruitful and unnecessary, Martens held. War had no intrinsic normative status. It was simply a fact and a process, one of the "voyes de fait" (in addition to retorsions and reprisals)⁴⁴ on a par with - though

⁴¹ Martens, *Précis* 1801, p. 81-91.

⁴² Michel Foucault, *The Order of Things. An Archaeology of the Human Sciences* (transl. London, Tavistoc, 1970) especially p. 132-162, 355-387.

⁴³ Hence the stress on protocol and ceremonial in Martens' practical exercises and the *Précis* more generally. These were not incidental or marginal aspects of more "serious" political or social substance. In a representative culture such as 18th century court culture, the representation of power was a tangible aspect of that power itself. See T.C.W. Blanning, *The Culture of Power and the Power of Culture. Old Regime Europe 1660-1789* (Oxford University Press, 2003).

⁴⁴ Martens, *Précis* 1801, p. 373 et seq,

defined by its opposition to - peace.⁴⁵ Again what matters is the synchronic relationship between the two: each receives meaning from its negation of the other, not from any moral or psychological meaning "peace" or "war" might possess. The task of the law was to describe and systematise - and thus order - the relationships that the categories described. The natural history paradigm compelled empiricism. One had first to collect the raw data - the flower from the forest, the native from the Orient, the treaty from that conference. And one had to publish this. This is why the compilations by Leibnitz and Moser had taken "le vrai chemin".⁴⁶ *Öffentlichkeit*, after all, was a condition for further civilisation and enlightenment to which the Martens *Recueil* would in due course give its contribution.

Third, why would this be binding as law? Because of a natural teleology underwriting Martens' text. The practices reflect what Martens calls "the progress of the human spirit". Expressions such as "modernity" and "progress" run throughout. They describe the move - completed in Europe only after Westphalia - away from the dangerous state of nature into positive law, a scientific application of the requirements of civilised behaviour into the relationships between national societies. Of course, in many regards the state of nature still pertained - enlightenment was not complete. In the conclusion of peace, for example, natural law prescribed satisfaction corresponding to the injury suffered. But as long as there was no positive law on the matter, Martens admits that one "feels" ["on sent"] that "it is less principles of abstract theory than circumstances of the moment that determine how the hazards of the war are terminated".⁴⁷ To decide wisely, one

⁴⁵ Although war was endemic in the post-Utrecht (1713) period, it was low in destructiveness and normally did not involve civilians. It "was not considered a serious problem requiring systematic diagnosis or prescription... in most spheres of life commercial and other contacts between societies continued much as in peacetime". Kalevi J. Holsti, *Peace and War: Armed Conflicts and International Order 1648-1989* (Cambridge University Press, 1991), 102, 103.

⁴⁶ Martens, *Précis* 1801 p. 22.

⁴⁷ Martens, *Précis* 1801 p. 484.

had to orient oneself pragmatically. When peace should be made, and on which conditions, was "à la sagesse des puissances de juger".⁴⁸ In this way, international law became associated with enlightened decision-making by statesmen, guided by the well-educated lawyer in possession of a scientific method.

The apparent fragility of such a system vanishes when it is examined against the optimistic historical frame in which it was produced. The 'Introduction' to the Second French edition of 1801 makes abundantly clear that European States participate in what may since Vattel (1758) be properly labelled "modern history" coalescing with enlightenment and civilization - principles all the more strikingly valuable for Martens as he contrasts them with brief interlude of the revolutionary wars. Reflecting back on the Napoleonic episode in 1820 he comments:

"Il est donc fort heureux de voir que l'Europe, après avoir secoué le joug que l'opprimait, soit retournée aux principes antérieures de cette époque, sans se refuser à des modifications que les progrès des lumières ont pu faire paraître désirable".⁴⁹

The teaching by Martens in Göttingen was geared to educating his students in such good, practical sense. The students were expected to discuss the materials distributed in class and to learn the right formulas to compose the acts that would carry forward the project of the *Droit public de l'Europe*. Progress and modernity were the preserve of an internationally-oriented legal class, conversing with the Princes. At least until something happened in Paris.

III THE REVOLUTION

⁴⁸ Martens, *Précis* 1801 p. 485.

In April 1795 the Abbé Grégoire - the defender of the Jews, the initiator of the abolition of slavery in the French colonies - submitted to the French *National Convention* a proposal for the adoption of a *déclaration du droit des gens*. In 21 Articles, the declaration sought to do to the world what the *déclaration des droits de l'homme et du citoyen* had done to the *ancien régime* at home. The basis of the new order would be the right of "independence and sovereignty" of every European nation (Article 2). Every nation was to treat every other nation as it would wish itself to be treated (Article 3). It would have an obligation to peace, and if at war, it was to harm its adversary as little as possible (Article 4). There would be no distinction between representatives of nations and ambassadors would enjoy immunity only inasmuch as that would be necessary for the accomplishment of their mission (Articles 19 and 20).⁵⁰

Despite the Assembly's failure to adopt the declaration, its submission gave reason for Martens to write a new Foreword to the 1796 German edition of *Précis* - later repeated in the 1820 and 1864 French editions. There is no lack of aspects of international law, he wrote, where agreement between European powers would be desirable. But to believe that they would suddenly adopt a general codex of positive international law was devoid of any likelihood. The proposal was only a warmed-up version of projects for eternal peace that must, as long as men remain men, holding their fate in their own hands and seeking their own good, remain a pure chimera ("eine blosse Chimäre blieben wird").⁵¹ To declare principles of morality is pointless: they can be realised only under conditions

⁴⁹ Martens, *Précis* 1820, p. 15 (§10).

⁵⁰ For the proposal, see Boris Mirkine-Guetzewitch, 'L'influence de la révolution française sur le développement du droit international dans l'Europe orientale', 22 RDC (1928-II), p. 309-316; Wilhelm Grewe, *The Epochs of International Law* (Berlin, de Gruyter 2000), p. 416,

⁵¹ Martens, *Einleitung*, 1796 p. vii.

which, if they were present, would make their declaration unnecessary.⁵²

Martens went through most of the 21 principles, showing how they were self-evident as principles, but empty as practical directives. Some of them were undoubtedly part of "pure natural law" - such as the equality of State representatives - that, however, would not stand a chance of being actually adopted. Remember, Martens says, the ridiculous but often violent disputes in the past over ambassadorial precedence. When will the representative of San Marino be equal to the Ambassador of France? Yet there is a regretful tone in Martens' analysis. There may be agreement that the particular interest of a nation must yield to the general interest of the human family (Article 5) - but which nation would be ready to apply such a principle to its own disadvantage?

But above all, many such provisions were dangerous. The provision according to which only constitutions founded on equality and liberty conform with the rights of peoples (Article 8) or the prohibition of alliances that may violate the interest of a nation and thereby constitute aggressions on the human family (Article 16) only open the door for endless intervention in the affairs of weaker nations in the interests of the intervening State.⁵³ Where now is, Martens asks, the freedom of Nations? Even "old diplomacy" could not dream of a wider right of intervention.

In the Foreword of 1796 Martens expressed anxiety about a proposal for a declaration whose grand ideas seemed to open the door for practices he had reason to fear. The argument is familiar from much of political realist writing ever since. So is Martens' recourse to history to counter the rationalist abstractions of the

⁵² *Id.* p. viii-ix.

⁵³ *Id.* p. xiv-xv.

Abbé's proposal. For anyone with some experience in recent diplomatic history, the danger in the proposals seemed evident. It did not take long for Martens' doubts to receive confirmation.

IV APPLICATIONS

In the year following the publication of the foreword, Martens was appointed as counsel for the German imperial delegation at the Ambassadorial Conference of Rastatt (1797-99) that ended up allotting the left bank of the Rhine to Napoleon. Returning from Rastatt, he was appointed twice Dean of the Law Faculty (1799-1800 and 1803-1804) as well as Prorector of the University (1803-1805). In these years he could follow closely, and participate in, the diplomacy of a violent period. In May 1803 the war broke out anew. The Electorate of Hanover was in personal union with England and thus Napoleon's enemy. Resistance was pointless. As Prorector, Martens wrote to Napoleon ("Citoyen, Premier Consul et Président") to spare the University from the requisitionings and quartering of French soldiers. Though Hanover was occupied, Göttingen was first spared and the University was accorded protection. However, as war fortunes changed not only the University but even the professors were finally required to quarter French officers. A Prussian occupation in 1806 almost did away with the autonomy of the University. After the battles of Jena and Auerstädt the French returned and Göttingen was made part of the newly established Kingdom of Westphalia with Napoleon's brother Jérôme as its head. In September 1807 Martens was granted audience by Napoleon in Paris, only to learn that the ties to England had been permanently broken. The University would henceforth be French.⁵⁴

The University and other public institutions suffered from the need to direct public funds to the new Court. Opportunities for research and publication were scarce and the number of students

⁵⁴ For these events, see Habenicht, *supra* note 14, p. 35-42.

fell. Martens, too, resigned from the University and took up a position in Kassel as a member of the Council (*Staatsrat*) of the Kingdom dealing with questions of financial legislation.⁵⁵ As the Kingdom fell in 1813, Martens rapidly re-integrated himself in the administration of Hanover. He assisted Count Münster, representing Hanover at the Congress of Vienna 1814-1815 after which he was assigned the task of representing Hanover in the Frankfurt parliament in which he was one of its most active members until his death in 1821. After 1808, however, he no longer taught at the University.

These events - the changing occupations, both French and Prussian, the restorationist diplomacy of the Congress and the re-arrangement of the German territories by Diktat - seemed to confirm the political realism Martens used to criticise the draft *déclaration* by the Abbé. As long as men remain men, and seek to hold their fate in their own hands, it would be a mistake to expect them to act out of altruism, or to choose the alternative that is less advantageous to them simply because in the eyes of someone, this would be in the interests of humanity.

The second French edition of 1801, published in the short period of peace before Napoleon's push into Russia, observed the betrayal by the Revolution of its own principles. Though the balance of power had been breached, it would be a mistake to read the Napoleonic moment as a victory for revolutionary ideas. It was Realpolitik in the shadow of high-sounding phrases.

"...ce n'est plus au moins pour planter des arbres de la liberté qu'on a continué à faire des conquêtes... ce n'est pas de nos jours que le droit du plus fort a commencé à l'emporter sur d'autres considérations".⁵⁶

⁵⁵ His activities in the Council concerned the preparation and survey as well as the negotiation with the Estates over new forms of financial legislation. See Habenicht, *supra* note 14, p. 44-47.

V LEGACY

So what is the legacy of the "positivism" of Georg Friedrich von Martens? To dismiss him as an apologist of the restoration would be crude and simplistic.⁵⁷ No doubt he is part of the tradition of realism and prudence, suspicion against abstract principles and large theories, a fixation on the evil of human nature rather than the occasional pursuit of the good. The positivism of Martens is a positivism of fear, to paraphrase an expression from Judith Shklar, an inclination towards avoidance of harm more than attaining the good.⁵⁸ It is a conservative disposition, but a conservatism that - like that of Edmund Burke - also may show itself surprisingly respectful of cultural difference. Natural law, wrote Martens, does not entitle Christian princes to take territory occupied by savages - "even if practice - he wrote - offers only too many examples of such usurpations".⁵⁹

There are many reasons to admire the revolution of 1789, its enthusiasm for human freedom and enlightenment. But it says something of the nature of such words that they can also be accommodated in a realist, even conservative discourse such as that of Martens. Where the 1789 edition began with a careful

⁵⁶ Martens, *Précis* 1801, p. xvi

⁵⁷ This is the basis on which Martens' French commentator de Lapradelle condemns his "dryness", his scepticism and what he calls the latter's lack of imagination. De Lapradelle credits Martens' "modernity" to the demise of the influence of humanism in post-revolution Europe and ends his review by a cryptic sentence - "Le droit des gens est en danger". Albert de Lapradelle, *Maitres et doctrines du droit des gens* (2e édition, Paris, Editions Internationales, 1950), p. 181. I find this completely unjust. A much better appreciation is in Arthur Nussbaum, *A Concise History of the Law of Nations* (Rev. edn, New York, Macmillan 1954), p. 179-185. Yet Martens surely did not represent any "humanistic tradition", either, as suggested by Ingo Hueck, 'Peace, Security and International Organisation. The German International Lawyers and the Hague Conference', in Lesaffer, *Peace Treaties*, supra note 2, p. 260.

⁵⁸ Judith Shklar, 'The Liberalism of Fear', in Shklar, *Political Thought and Political Thinkers* (ed. by S. Hoffmann, The University of Chicago Press, 1998), p. 3-20.

⁵⁹ Martens, *Précis* 1801, p. 66.

typology of laws and rights, the 1801 edition begins, astonishingly, with these sentences:

"L'homme considéré dans le rapport avec son semblable est né libre. Cette liberté, apanage égal de tous, offre à la fois et le *principe* et les *bornes* de la légitimité externe et naturelle de ses actions, indépendamment de leurs motifs; ou le principe et les bornes du droit naturel absolu et proprement dit."⁶⁰

This sentence is followed by a discussion of the inconveniences that follow from life in a purely natural state that will persist even between individual commonwealths until the establishment of positive laws. Unlike morality, such *external public law* provides for enforceable duties of the holders of public power. This understanding of the relationship between morality and law, internal and external, and of the imperative need for nations to move to positive law to remedy the inconveniences of the state of nature, and to realise freedom, is, as Martens expressly writes, based on the new route opened up by Immanuel Kant.⁶¹

I would like to end by suggesting that the significance of Martens lies in the way he reads international law from within the German public law tradition. That tradition was divided between the two poles of the sociologically oriented natural law of the Pufendorffian type and the moral principles of Kantian *Rechtslehre*.⁶² On the one hand, Martens is undoubtedly closer to the former. Like this, he understands international rules as the effect of prudential calculations on the basis of the self-interest not only of nations but in particular of their rulers. Where the revolution sought to "free the nation" as the legal subject, Martens continues to speak of states and to mean kings and diplomats. Martens does not object to war and receives his law

⁶⁰ *Id.* p. 1.

⁶¹ *Id.* p. 18.

⁶² For an extensive discussion of these two traditions, see Hunter, *Rival Enlightenments supra* note 22.

from a description and classification of something he thinks is an empirical reality. On the other hand, however, Martens agrees with the way Kant made the distinction between morality and law, one internal and subjective, the other a matter of external constraint and as such an indispensable condition for freedom within a society of rational egoists. Hence both Kant and Martens repudiate the right of revolution - apart from cases of extreme oppression - as well as the importation of constitutional change from the outside. What also follows is the critique of the "miserable comforters" - Grotius, Pufendorf, Vattel - whose natural law appears, as Kant noted, and Martens seems to agree, "deprived of the slightest legal force".⁶³ But where Martens most decisively seems Kantian, instead of part of the natural law tradition, is his optimism about increasing civilization to peace and prosperity in the future.

Many people forget that Kant's legal theory has a teleological frame: law is part of universal history with a cosmopolitan purpose, as the famous essay from 1784 puts it.⁶⁴ Though that essay is not mentioned in the *Précis*, the book is still written within the same frame. The starting point of human society lies in the brute freedom of the state of nature, precarious and uncertain. Therefore reason commands to leave it. If the state of nature still reigns within primitive peoples and among commonwealths, positive law is slowly taking its place. Even the revolutionary wars could not do away with the positive laws "que des progrès des lumières ont pu faire paraître desirable".⁶⁵ This is positivism triumphant: the present is worth being imagined as law because, whatever its problems, it also represents the best promise of the future. This was the special sin of the French revolutionaries, in the eyes of Kant as in those of Martens: by ignoring the

⁶³ Kant, 'Perpetual Peace. A Philosophical Sketch', in Kant, *Political Writings* (Hans Reiss ed. Cambridge University Press 1991) p. 103.

⁶⁴ Kant, 'The Idea for a Universal History with a Cosmopolitan Purpose', in *Political Writings*, supra note 63, p.41-53.

constraints of history and morality, they ended up in worse violations than those from which they provided escape.

With all its limits and weaknesses, positivism is a project for the rule of law in international affairs, as poised against the rule of a moral universalism on the one hand, a pure *Realpolitik* on the other. This is German public law, too, in its formalistic and its sociological mode; the awareness of the gulf between what is and what ought to be and the feel of an imperative sense that to get to the latter one must first know, and master, the former. And yet it is a bureaucratic mode, too, the willingness to sacrifice today for a better, eternally postponed tomorrow. Kant dealt with this by insisting that among the principles of rational political community there would be a public space, an *Öffentlichkeit*, in which political debate among enlightened citizens would take place and the work of *Bildung* would prepare for that better tomorrow. Perhaps it is possible to understand the training and publishing activities of Martens as a preparation for such an international public realm. That his work was hijacked by a reactionary Concert of Europe shows the need for political awareness to accompany the legalist spirit. Perhaps, to take another invidious parallel, the French and Dutch votes in 2005 against the European constitution may have opened - or at least demand - something like a Martens' moment in Europe.

⁶⁵ Martens, *Précis* 1820 § 10 *in fine*.