

# The Belgian Martens Clause: Qualitative, Quantitative, and Statistical Reanalyses of the Records of the 1899 Hague Peace Conference

BY: KEISUKE MINAI \*

## *Abstract*

*This study conducts reanalyses of the preparatory work for the Martens Clause that emerged from the 1899 Hague Peace Conference to provide grounds for a consideration of the legal significance of the Clause, using qualitative text analysis, quantitative text analysis, multiple linear regression analysis, and correlation analysis of descriptive statistics. This work makes it clear that the accepted notion found in most preceding studies, according to which no humanitarian objective but only breaking a diplomatic deadlock was the preparatory goal of drafting the clause, should be acutely challenged. Accordingly, this study considers the legal status of the Clause in terms of its birthplace outside the Peace Conference. For this reason, this paper asserts that the 1899 Belgian Martens Clause, which is a material source of international law and proves the presence of customary international law granting the *facultas bellandi* to resisting populations in occupied territory, should be clearly differentiated from the modern Martens Clause, which was codified in 1949. This conclusion is consonant with the interpretation of certain important judicial precedents before 1949.*

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\* Associate Professor of International Law, Department of Economics, Meisei University, Japan; J.D., Keio University Law School, Japan.

## I. INTRODUCTION

A. *Previous Studies of the Martens Clause*

What is the legal significance of the Martens Clause?<sup>1</sup> This question, a central one in the law of armed conflict and international humanitarian law, has not ultimately been resolved. The state of prior research on this subject can be roughly characterized as follows.

Initially, roughly put, there were two antagonistic theories on the legal significance of the Martens Clause. The first position considers that the Martens Clause merely indicates that customary international law should be applied in spite of the presence or absence of specific treaty provisions that are considered applicable in armed conflict (Reminder Theory). For instance, Greenwood maintains that the Martens Clause evades equating the absence of relevant treaty provisions with silence of international law and simply reminds the parties that customary international law continues to be applied after the adoption of relative treaties.<sup>2</sup> Abi-Saab states that the Martens Clause explicitly contradicts skepticism toward the effectiveness of uncodified customary international law and resists the burial of pre-existing customary international law.<sup>3</sup> Thus, the Reminder Theory takes the Martens Clause to promote awareness of the constant combined application of treaties and customary international law as formal sources of the law of armed conflict.

The second view contends that the Martens Clause takes the principles of international law derived from the principles of humanity and from the dictates of public conscience as formal sources of the law of armed conflict that are furthermore independent from treaties or customary international law (Formal Sources Theory). Shahabuddeen finds that the Martens Clause itself provides a rationale for treating the principles of humanity and the dictates of public conscience as principles of interna-

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1. A. PEARCE HIGGINS, *THE HAGUE PEACE CONFERENCES AND OTHER INTERNATIONAL CONFERENCES CONCERNING THE LAWS AND USAGES OF WAR: TEXTS OF CONVENTIONS WITH COMMENTARIES* 209, 211 (1909) (The 1899 Martens Clause provides that “Until a more complete code of the laws of war can be issued, the High Contracting Parties think it expedient to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and the rule of the principles of law of nations, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience”).

2. Christopher Greenwood, *Historical Development and Legal Basis*, in *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS*, 28 ¶129 (Dieter Fleck ed., 1995).

3. Georges Abi-Saab, *The Specificities of Humanitarian Law*, in *ETUDES ET ESSAIS SUR LE DROIT INTERNATIONAL HUMANITAIRE ET SUR LES PRINCIPES DE LA CROIX-ROUGE* 265, 274 (Christophe Swinarski ed., 1984).

tional law separate from treaties and customary international law.<sup>4</sup> Strebhel notes that while the Martens Clause refers to the principles of international law as being based on three sources, namely, established custom or usage, the laws of humanity, and the dictates of public conscience, it also takes itself into account in the doctrine with regard to a source of international law.<sup>5</sup> Furthermore, Miyazaki and Pustogarov clearly indicate that the principles of international law derived from established custom, the principles of humanity, and the dictates of public conscience in the Martens Clause are sources of the law of armed conflict as well as being peremptory norms (*jus cogens*).<sup>6</sup> The Formal Sources Theory follows this by asserting that, in the Martens Clause, the principles of international law derived from the principles of humanity and from the dictates of public conscience are also the formal sources of the law of armed conflict, in addition to treaties and customary international law.

It is also observed that the Martens Clause takes account of the existence of moral codes<sup>7</sup> and that the facets of the above-mentioned perspectives complement each other.<sup>8</sup>

Cassese provides a strong refutation of the Formal Sources Theory. According to Cassese, to substantiate that perspective, it is necessary (1) to ascertain whether Martens himself intended to lay out the sources of law at the 1899 Hague Peace Conference, and the other delegates were not opposed to it, and (2) to validate that practices such as judicial precedents have consistently presented the signification of the Martens Clause as the construction of the sources of law.<sup>9</sup>

With respect to (1), Cassese stresses that the Martens Clause was not proposed to have a humanitarian goal, but instead as “an expedient way out of a diplomatic deadlock” that resulted from a dispute between the lesser and major powers.<sup>10</sup> Therefore, he concludes that the Martens Clause, which satisfied the demands from the great powers and suppressed dissidence among the conference participants, was a diplomatic

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4. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 375, 406, 408 (Opinion of July 8) (dissenting opinion of Judge Shahabuddeen) [hereinafter Legality of Nuclear Weapons].

5. HELMUT STREBEL, *Martens' Clause*, in 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 252, 252-53 (Rudolf Bernhardt ed., 1982).

6. SHIGEKI MIYAZAKI, *The Martens Clause and international humanitarian law*, in ETUDES ET ESSAIS SUR LE DROIT INTERNATIONAL HUMANITAIRE ET SUR LES PRINCIPES DE LA CROIX-ROUGE 433, 436-39 (Christophe Swenarski ed., 1984); V.V. Pustogarov, *The Martens Clause in International Law*, 1 J. HIST. INT'L L. 125, 131, 134 (1999).

7. Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, in A MANUAL OF INTERNATIONAL HUMANITARIAN LAWS 312, 319 (Naorem Sanajaoba ed., 2004).

8. Dieter Fleck, *Friedrich von Martens: A Great International Lawyer from Pärnu*, 2 BALTIC DEF. REV. 19, 24 (2003).

9. Antonio Cassese, *The Martens Clause: Half a Loaf or Simply Pie in the Sky?*, 11 EUR. J. INT'L L. 187, 193 (2000).

10. *Id.*

ploy, only giving the small powers “pie in the sky” or at best “half a loaf.”<sup>11</sup> Cassese moreover concludes that Martens himself, not taking his Clause seriously, had no intention of regarding the principles of international law derived from the laws of humanity and the requirements of the public conscience as distinct sources of the law of armed conflict.<sup>12</sup> Note that Giladi, who produced a detailed analysis of colloquies on the 1899 Hague Peace Conference and reached the same conclusion, namely, that the Martens Clause was a diplomatic expedient to break a deadlock, says that the Clause enacted ironies.<sup>13</sup>

As for (2), Cassese analyzes legal precedents,<sup>14</sup> such as the Klinge case,<sup>15</sup> the Krupp case,<sup>16</sup> the Rauter case,<sup>17</sup> the Matric case,<sup>18</sup> and the Nuclear Weapons case.<sup>19</sup> He notes that that these precedents cite the Martens Clause as general instructions for construing the international rules of humanitarian law in existence, a pointer suggesting the development of existing rules based on the principles of humanity, or as a displacer excluding *argumentum e contrario* of related treaty rules.<sup>20</sup>

Thus, Cassese presents his pet theory (Interpretative Criteria & Relaxation of Customary Law Requirements Theory) as below. First, the Martens Clause contains criteria for the exegeses of existing customary international law or treaty provisions; therefore, legal norms regarding the genus of international humanitarian law should be interpreted in such a way as to correspond to the principles of humanity and the dictates of the public conscience.<sup>21</sup> Second, the Martens Clause, which relaxes traditional requirements for customary international law, which consist of state practices (*usus*) and *opinio juris sive necessitatis*, increases the influence of the latter.<sup>22</sup>

Meron, recognizing that the Martens Clause is affiliated with natural law or with medieval ordinances of war, falls in with the Cassese’s conclusions.<sup>23</sup>

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11. *Id.* at 197–98.

12. *Id.* at 199, 201–2.

13. Rotem Giladi, *The Enactment of Irony: Reflections on the Origins of the Martens Clause*, 25 EUR. J. INT’L L. 847, 850, 859–66 (2014).

14. Cassese, *supra* note 9, at 202–8.

15. Prosecutor v. Klinge, 13 Ann. Dig. 262 (Sup. Ct. 1946) (Nor.).

16. In re Krupp and Others, 15 Ann. Dig. 620 (U.S. Mil. Trib. 1948).

17. In re Rauter, 16 Ann. Dig. 526 (Spec. Crim. Ct. 1949).

18. Prosecutor v. Milan Martić, Case No. IT-95-11-R61, Decision (Int’l Crim. Trib. for the Former Yugoslavia Mar. 8 1996).

19. Legality of Nuclear Weapons, *supra* note 4, at 226.

20. Cassese, *supra* note 9, at 202, 208.

21. *Id.* at 212.

22. *Id.* at 213–14.

23. Theodor Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, 94 AM. J. INT’L L. 78, 79, 87–8 (2000) [Hereinafter *The Martens Clause*]; Theodor Meron, *On Custom and the Antecedents of the Martens Clause in Medieval and Re-*

However, the Interpretative Criteria & Relaxation of Customary Law Requirements Theory is oppugned by Salter, who advocates the Formal Sources Theory. Specifically, regarding the birth of the Martens Clause, Salter holds that the breakthrough of the diplomatic stalemate between the great and small powers at the 1899 Hague Peace Conference can only be explicated if it is understood that the Martens Clause did not introduce simple criteria for construal but instead substantive principles of international law.<sup>24</sup> Even if the Clause did merely introduce interpretative criteria, these would be meaningless in the absence of relevant existing international legal norms that can be the objects of construal.<sup>25</sup> Further, the court precedents that Cassese mentions countenance the Formal Sources Theory.<sup>26</sup>

Salter contends that, due to the unanimous adoption of the Martens Clause at the 1899 Hague Peace Conference, the principles of humanity that pre-existed out of the range of treaty provisions were explicitly accepted by the participating states.<sup>27</sup> Moreover, he understands that the principles of international law stipulated in the Martens Clause as peremptory norms (*jus cogens*) that are ingenerate and applicable.<sup>28</sup>

### B. Point at Issue and Research Subject

Among the main points of controversy in earlier studies on the legal significance of the Martens Clause is the background to its birth at the 1899 Hague Peace Conference as well as the manner in which it was invoked in judicial precedent. That use, however, occurs in relation to the accumulation of doctrines that accreted onto the Martens Clause owing to the subjective views of judges regarding these doctrines; therefore, it is not easy to develop an analysis that altogether evades subjectivity.<sup>29</sup> In the Kupreškić case, Cassese, the president of the International Tribunal for the Former Yugoslavia, taking up his own Interpretative Criteria & Relaxation of Customary Law Requirements Theory, held that the Martens

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*naissance Ordinances of War*, in RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG 173, 175 (Rudolf Bernhardt ed., 1995).

24. Michael Salter, *Reinterpreting Competing Interpretations of the Scope and Potential of the Martens Clause*, 17 J. CONFLICT & SEC. L. 403, 421, 428–29 (2012).

25. *Id.* at 419.

26. *Id.* at 423–28.

27. *Id.* at 404.

28. *Id.* at 421.

29. Notice that Hayashi advances a threefold classification of the precedents based on each theory. See Mika Nishimura Hayashi, *The Martens Clause and Military Necessity*, in THE LEGITIMATE USE OF MILITARY FORCE 135, 146–48 (Howard M. Hensel ed., 2008). Given that such classification is possible, it should be difficult to underpin a specific doctrine by way of an essay of cases in the first place.

Clause had two functions.<sup>30</sup> The arbitrariness of judges is thus reflected in the related arrests. Hence, it is difficult to inductively and objectively verify the Martens Clause by means of observing trends of its use in judicial precedents.

However, the birth of the Martens Clause at the 1899 Hague Peace Conference is certainly an agreed-upon historical fact that is before all preceding studies. Accordingly, attention to this point can help remove the influence of subjective evaluations or arbitrariness with respect to scholarship on the Clause as far as possible and therefore may be the best subject for empirical analysis. Thus, this paper examines the birth of the Martens Clause at the 1899 Hague Peace Conference and considers the legal significance of the Clause in those terms, using analytical methods that have never been employed to this end hitherto.

Cassese maintains that the Clause was not proposed for any humanitarian purpose but was a diplomatic tool to break a deadlock. Although he approves of Cassese's analysis of the history, Salter draws the opposite conclusion. Thus, the original purpose of the Martens Clause appears not to be in doubt.<sup>31</sup>

However, by tracing the thread of discussion that runs through all of the meetings of the second subcommission of the second commission, the panel in charge of laying down the Hague Convention respecting the Laws and Customs of War on Land and its annexed Regulations, a humanitarian goal seems to arise. Can it be said, therefore, with absolute certainty, that the Martens Clause did not have a humanitarian objective?

Certainly, it is clear that a conflict between Belgium-Switzerland on the one hand and Russia-Germany on the other did arise during discussions of the Martens Clause. However, the United Kingdom, undoubtedly a great power, supported Belgium, a small state, and the other great powers the United States and France remained on the sidelines. This raises the question of the usefulness of a framing that concentrates on the diplomatic deadlock between the great and small powers.

This study reanalyzes the above two questions using novel research methods. Qualitative and quantitative text analyses are used to address the question of the humanitarian objective of the Clause. Statistical analyses are then conducted to resolve the question of the role of the diplomatic deadlock. Then, the legal significance of the Martens Clause, which has never been elucidated in the previous studies, is examined.

## II. QUESTION ON HUMANITARIAN OBJECTIVE

### A. *Qualitative Text Analysis*

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30. Prosecutor v. Zoran Kupreškić et al., Case No. IT-95-16-T, Judgement, ¶1525, 527 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14 2000).

31. Ticehurst reaches a similar conclusion. See Ticehurst, *supra* note 7, at 312.

To address the question of whether the Martens Clause was indubitable and not presented in a spirit of humanity, the acknowledgment or disregard of humanitarianism among the delegates to the second sub-commission, including the Russian delegates, in the diplomatic process can be examined. For this, it is necessary to theoretically grasp the structure of the transmutative phenomenon of the recorded discussion.

Qualitative text analysis is a hermeneutic approach in which a systematic analysis of texts is performed as research data by sorting out categories and aims to illuminate the phenomenal structure of a set of data as a whole by cognizing interactions, especially in the creation of the data.<sup>32</sup> Qualitative text analysis is among the best methodologies to use in elucidating the shifting phenomenon of the formation of the objective as a result of interactive discussions among delegates at the second sub-commission.

In this paper, the qualitative text analysis is conducted as follows. The data for analysis are the formal minutes<sup>33</sup> of all meetings (from the first session, on May 25, 1889, to the twelfth, on July 1, 1889) at the second subcommission of the second commission of the 1899 Hague Peace Conference, which formulated the Hague Convention respecting the Laws and Customs of War on Land and its annexed Regulations, including the Martens Clause. In these data, thematic qualitative text analysis is applied focusing on theses<sup>34</sup> relating to the phenomenological structure of the discussions among the states; by this mean, the structural categories are drawn *a posteriori* from oral statements in the meeting minutes.<sup>35</sup> In constructing categories, the grounded theory<sup>36</sup> is employed to minimize the analyst's own subjective view. More concretely, breaking down oral text data into segments on the basis of semantic content, this study creates codes (labels) that incorporate an awareness of properties (characteristics or features of conceptions) and dimensions (changing ranges of properties) that therefore derives and sorts out categories (concepts with high level of abstraction).<sup>37</sup> As part of the above qualitative text analysis, MAXQDA Analytics Pro 2020, which is a qualitative data analysis software package developed by Kuckartz, is used for efficiency.<sup>38</sup>

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32. UDO KUCKARTZ, *QUALITATIVE TEXT ANALYSIS: A GUIDE TO METHODS, PRACTICE & USING SOFTWARE*, 36, 40, 47–49 (2014).

33. *THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: THE CONFERENCE OF 1899* 474–559 (James Brown Scott ed., 1920) [hereinafter *PROCEEDINGS*].

34. KUCKARTZ, *supra* note 32, at 69–88.

35. *Id.* at 58–60.

36. BARNEY G. GLASER & ANSELM L. STRAUSS, *THE DISCOVERY OF GROUNDED THEORY: STRATEGIES FOR QUALITATIVE RESEARCH* 168–169 (3rd ed. 2008); JULIET CORBIN & ANSELM STRAUSS, *BASICS OF QUALITATIVE RESEARCH: TECHNIQUES AND PROCEDURES FOR DEVELOPING GROUNDED THEORY* 81 (4th ed. 2015).

37. Regarding the definition of property, see CORBIN & STRAUSS, *supra* note 36, at 57, 220. For the definition of dimension, see *id.* For the definition of category, see *id.* at 220.

38. Regarding qualitative text analysis with such software, see KUCKARTZ, *supra* note 32, at 131–143.

As a consequence of qualitative text analysis, 1721 parts of the data can be allocated to 387 codes (labels), and 41 categories can be extracted from these codes, as shown in Table 1.



Category Name	No. of Parts	Category Name	No. of Parts
consideration of provisions about rights and obligations of occupying state in occupied territory	186	pros and cons of specific amendment of provision	25
consideration and pros and cons of opinions	167	consideration of provisions about definition of combatants	23
opinion about specific amendment of provision	147	opinion about vote	22
consideration and analysis of the 1874 Brussels Conference and Declaration	110	attention to intents and purposes of peace conference	17
pros and cons of codification	105	cooperation with the drafting committee	15
pronouncement of view about interpretation of provision	87	reliance on law of nations (customary international law)	14
adjustment for the progress of discussion	84	attention to or affirmation of patriotism	14
consideration of provisions about neutral states	72	consideration of provisions about spies	13
pronouncement of view about the language of provision	66	respect for private property	11
attention to the characteristics, interests or standpoints of the states concerned	54	reference to or coordination with other treaties and international legal documents	10
consideration of new construction, preservation or deletion of provision	49	consideration of provisions about submarine cables	10
perspective of compromise and reconciliation	47	consideration of provisions about armistice	9
consideration of rules about the legal position of resisting populations in occupied territory	47	consideration of provisions about parlementaires	9
consideration of issues concerning job scope of the second subcommission	46	consideration of regulating methods of warfare	8
consideration of provisions about prisoners of war	45	attention to relativity or dissimilarity between land warfare and naval warfare	7
conservation as official record	36	standpoint of equity	5
comparison examination of provisions	34	pronouncement of view about form of provision	4
pros and cons of the perspective of military necessity	31	consideration of preamble of the Hague Convention	2
realistic and practical consideration	31	consideration of provisions about treacherous actions	1
attention to or emphasis on humanity	30	consideration of regulating means of warfare	1
pursuit or ascertainment of common ground	27		

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Table 1

As can be seen in clear from Table 1, as many as 30 parts fall under the category <attention to or emphasis on humanity>. Undoubtedly, this is a smaller category than those regarding certain provisions on certain specific topics, or amendment or interpretation of provisions. However, the category <attention to or emphasis on humanity> appears with almost same frequency as the category <pros and cons of the perspective of military necessity>, an indispensable perspective for states that are considering provisions about armed conflicts. Therefore, to identify that the hu-

manitarian goal was shared among the delegates, it is worthwhile to analyze the constitution of the parts in the category <attention to or emphasis on humanity>.

To analyze the organization of the portions in the category <attention to or emphasis on humanity>, this study examines the comparative distribution of the emergence over time of categories in all the meetings of the second subcommission. The data are displayed in Table 2.

	1st mtg.	2nd mtg.	3rd mtg.	4th mtg.	5th mtg.	6th mtg.	7th mtg.	8th mtg.	9th mtg.	10th mtg.	11th mtg.	12th mtg.
consideration of provisions about rights and obligations of occupying state in occupied territory				8		30	32	26	56	29	1	4
consideration and pros and cons of opinions			3	5	12	12	37	23	28	25	18	4
opinion about specific amendment of provision		14	15	17	6	11	11	19	11	32	1	10
consideration and analysis of the 1874 Brussels Conference and Declaration	1	3	8		5	20	27	12	17	4	13	
pros and cons of codification		6	1			48	7	15	9	3	15	1
pronouncement of view about interpretation of provision			1	9	6	7	19	10	10	3	7	15
adjustment for the progress of discussion	1		1	4	5	6	17	6	16	12	15	1
consideration of provisions about neutral states					11	37	5			12	2	5
pronouncement of view about the language of provision			2	7	6	3	15	6	12	5	2	8
attention to the characteristics, interests or standpoints of the states concerned		1	1		1	25	6	10		4	6	
consideration of new construction, preservation or deletion of provision		1	2	3	3	4	9	9	7	4	6	1
perspective of compromise and reconciliation		1	1	2	1	2	7	9	7	8	8	1
consideration of rules about the legal position of resisting populations in occupied territory				1		5	4	6	5	4	21	1
consideration of issues concerning job scope of the second subcommission	1			2	19	3		4	5	12		
consideration of provisions about prisoners of war	1	16	26								1	1
conservation as official record				3	5	5	5	2	1	5	9	1
comparison examination of provisions			2	6	3		7	6	6		2	2
pros and cons of the perspective of military necessity		1		3		1	11	3	4	1	6	1
realistic and practical consideration			1	1		9		2	3	7	8	
attention to or emphasis on humanity			2	1		14	3	2	4		4	
pursuit or ascertainment of common ground						1	3	5	6	5	4	3
pros and cons of specific amendment of provision				3		2	2		2	7	8	1
consideration of provisions about definition of combatants						3			1		19	
opinion about vote							5	7	3	3	4	
attention to intents and purposes of peace conference					1	8		1			7	
cooperation with the drafting committee									5	5	3	2
reliance on law of nations (customary international law)	1	1				5					7	
attention to or affirmation of patriotism						3		1		1	9	
consideration of provisions about spies				13								
respect for private property				4	3					3		1
reference to or coordination with other treaties and international legal documents	1			3		3	3					
consideration of provisions about submarine cables										10		
consideration of provisions about armistice			9									
consideration of provisions about parlementaires			9									
consideration of regulating methods of warfare					7	1						
attention to relativity or dissimilarity between land warfare and naval warfare					7							
standpoint of equity						1	1			3		
pronouncement of view about form of provision					1				2		1	
consideration of preamble of the Hague Convention				1								1
consideration of provisions about treacherous actions				1								
consideration of regulating means of warfare				1								

Table 2

As apparent in Table 2, although the parts assigned to the category <attention to or emphasis on humanity> appear concentrated during the sixth meeting, where <consideration of provisions about rights and obligations of occupying state in occupied territory> and <consideration of provisions about neutral states> are at the nucleus of discussion, they are also present with a relatively stable frequency in the other meetings. Moreover, the pattern that emerges resembles that which emerges for the categories <attention to the characteristics, interests or standpoints of the states concerned>, <pros and cons of the perspective of military necessity>, and <realistic and practical consideration>, which are perspectives that are clearly taken into account in the drafting of provisions. Note that the appearance pattern of <attention to or emphasis on humanity> is analogous to that of <consideration of rules about the legal position of resisting populations in occupied territory>, the proximate cause of the creation of the Martens Clause.

Additionally, as almost all statements by the delegates of the leading states including that of Martens, who was president of the second sub-commission and represented Russia, included a part placed in the category <attention to or emphasis on humanity>, there is little imbalance among the appearance of this category across participants. The Belgian delegate, in particular, as for his propositions, referred to “the humanitarian and charitable aim” at the third meeting,<sup>39</sup> and asserted his “opinion that the article [Article 55]<sup>40</sup> was inspired solely by humanitarian interest”<sup>41</sup> at the sixth meeting. The Russian delegate, at the sixth meeting, asserted that “[o]ur mission has been well defined from the very beginning of our common labors: we wish to elaborate, in a spirit of concord, humanity, and justice, the uniform bases for the instructions which the Governments will pledge themselves to give to their armed land forces”;<sup>42</sup> “[i]t is our unanimous desire that the armies of the civilized nations be not simply provided with the most murderous and perfected weapons, but that they shall also be imbued with a notion of right, justice, and humanity, binding even in invaded territory and even in regard to the enemy”;<sup>43</sup> and “[t]o leave uncertainty hovering over these questions would necessarily be to allow the interests of force to triumph over those of humanity.”<sup>44</sup> Regarding Article 55, the Austria-Hungarian delegate proposed a compromise formula providing that “[i]f the interests of humanity require, the neutral shall authorize the passage”<sup>45</sup> at the sixth meeting. At the sev-

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39. The statement by Beernaert. See *PROCEEDINGS*, *supra* note 33, at 482.

40. Article 55 is about the passage of the wounded or sick belonging to the belligerent armies through a neutral territory.

41. The statement by Beernaert. See *PROCEEDINGS*, *supra* note 33, at 500.

42. The statement by Martens. See *id.* at 506–507.

43. The statement by Martens. See *id.* at 507.

44. The statement by Martens. See *id.*

45. The statement by Lammasch. See *id.* at 502.

enth meeting, the Swedish delegate said regarding Article 3<sup>46</sup> that “it is necessary to adopt the principle of avoiding as far as possible any modifications of the text adopted at Brussels” and “[t]he article is humanitarian and there is no reason for abolishing it.”<sup>47</sup> The Swiss delegate cited “the humane principle which influenced the drafting of these articles [Article 3, 4, and 5]”<sup>48</sup> at the seventh meeting. The German delegate state that “there are cases in which the laws of humanity ought to be more respected than those of war”<sup>49</sup> at the sixth meeting. He also explained that the ways used to requisition indemnity for populations in occupied territories that “[t]his measure is more humane, because the poor receive immediately the price of their goods, while at the same time being more effective, because the inhabitants accede to it willingly,”<sup>50</sup> understanding “very well that there are interests, humanitarian or economic, urging the reduction of the consequences of invasion as much as possible”<sup>51</sup> at the ninth meeting. He summed up the task of the subcommission with respect to the definition of combatants by saying that “[t]he many decisions which it has adopted have been drawn up in a spirit of humanity and for the purpose of mitigating the evils of invasion for the inhabitants”<sup>52</sup> and stated that “since we are speaking of humanity, it is time to remember that soldiers also are men, and have a right to be treated with humanity”<sup>53</sup> at the eleventh meeting.

Thus, the qualitative text analysis shows that the language classified as <attention to or emphasis on humanity> appears ubiquitously and without being eccentrically located in specific sessions or in the speech of specific speakers. There is a chance that a humanitarian goal, which is intimately connected to this category, was shared among the delegates, including the Russian delegation. Thus, it cannot be said with absolute certainty that the Martens Clause did not have a link to a spirit of humanity.

### B. Quantitative Text Analysis

To strengthen the objectivity and cogency of the results of the qualitative text analysis in the previous section, this study revisits the data using quantitative methods. For this purpose, quantitative text analysis is adopted, a method used to derive reproducible ratiocinations in the form

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46. Article 3 is about the maintenance of domestic laws of occupied states.

47. The statement by Bildt. PROCEEDINGS, *supra* note 33, at 513.

48. The statement by Odier. *See id.*

49. The statement by Gross von Schwarzhoff. *See id.* at 501.

50. The statement by Gross von Schwarzhoff. *See id.* at 528-29.

51. The statement by Gross von Schwarzhoff. *See id.* at 529.

52. The statement by Gross von Schwarzhoff. *See id.* at 552.

53. The statement by Gross von Schwarzhoff. *See id.* at 552-53.

of objective, systematic, and quantitative descriptions of the message content in a set of verbal data.<sup>54</sup> Concretely, taking account of the properties and dimensions that emerged from the above qualitative text analysis, all nouns and adjectives in the same data as the foregoing section (the formal minutes of the meetings at the second subcommission of the second commission of the 1899 Hague Peace Conference) are taken as the object of analysis to ensure the data were not excessively complex.<sup>55</sup> Then, the degree of co-occurrence (relativeness) between frequently appearing nouns and adjectives is worked out using a computer software,<sup>56</sup> with no manual or subjective coding being performed by the analyst.

The Jaccard similarity coefficient, a numerical value representing the degree of co-occurrence (relativeness) between words, is frequently used to perform cluster analyses in numerical taxonomy to measure similarity between sets,<sup>57</sup> and it is employed here as well. We define the set of occurrences of the word *a* as *A*, the number of elements *A* as  $|A|$ , the set of another word *b* as *B*, the number of elements *B* as  $|B|$ , and the Jaccard similarity coefficient between *A* and *B* as  $J_{A,B}$  ( $0 \leq J_{A,B} \leq 1$ );  $J_{A,B}$  is calculated as follows.

$$J_{A,B} = \frac{|A \cap B|}{|A \cup B|}$$

$$= \frac{|A \cap B|}{|A| + |B| - |A \cap B|}$$

For a visual understanding of the result of the quantitative text analysis, this paper constructs a word network diagram<sup>58</sup> that joins highly rele-

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54. See e.g., DANIEL RIFFE, STEPHEN LACY, BRENDAN R. WATSON, & FREDERICK FICO, *ANALYZING MEDIA MESSAGES: USING QUANTITATIVE CONTENT ANALYSIS IN RESEARCH* 23 (4th ed. 2019); KLAUS KRIPPENDORFF, *CONTENT ANALYSIS: AN INTRODUCTION TO ITS METHODOLOGY* 24 (4th ed. 2019); PHILIP J. STONE ET AL., *THE GENERAL INQUIRER: A COMPUTER APPROACH TO CONTENT ANALYSIS* 5 (1966); BERNARD BERELSON, *CONTENT ANALYSIS IN COMMUNICATION RESEARCH* 18 (1952).

55. If all words in the dataset (35,984 words) are subjected to the analysis, there is a possibility of embranglement in an analytical finding; therefore, this can prevent the analyst from producing adequate findings from the data.

56. This study adopts the computer software KH Coder for the quantitative text analysis. About KH Coder, see Koichi Higuchi, *A Two-Step Approach to Quantitative Content Analysis: KH Coder Tutorial using Anne of Green Gables (Part I)*, 52 *RITSUMEIKAN SOC. SCI. REV.* 77, 77–8 (2016). For more details about the quantitative text analysis using a computer software, see Howard P. Iker & Norman I. Harway, *A Computer Systems Approach toward the Recognition and Analysis of Content*, in *THE ANALYSIS OF COMMUNICATION CONTENT: DEVELOPMENTS IN SCIENTIFIC THEORIES AND COMPUTER TECHNIQUES* 381, 381–82, 384–86 (George Gerbner et al. eds., 1969).

57. See H. CHARLES ROMESBURG, *CLUSTER ANALYSIS FOR RESEARCHERS* 2, 8, 142–44 (Lulu Press, 2004).

58. About the characteristics, intended end-usage, and build process of a word network diagram, see James A. Danowski, *Network Analysis of Message Content*, in 12

vant words on the basis of the degree of co-occurrence (relativeness) between frequently appearing nouns or adjectives using the Jaccard similarity coefficient as a benchmark. This procedure produces the word network diagram seen in Figure 3. In this image, words with a high degree of co-occurrence (relativeness) are joined by solid lines and are automatically sorted as clusters. The numbers shown on the solid lines joining circles represent the Jaccard similarity coefficients, and word frequencies are indicated by the circles' sizes.

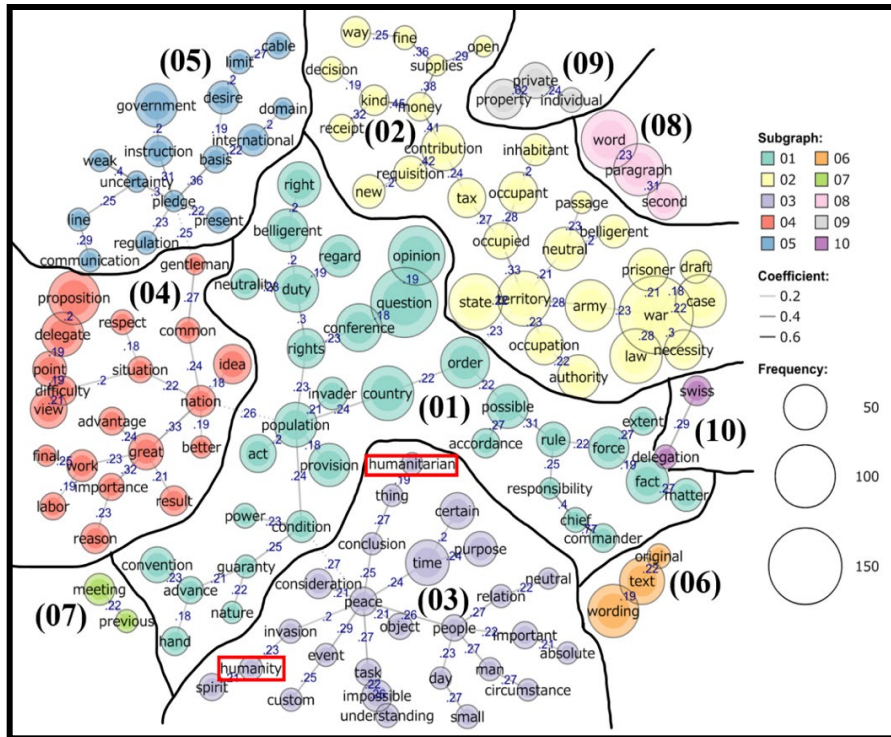


Figure 3

Cluster (01), which contains such words as “belligerent,” “right,” “rights,” “duty,” “provision,” “convention,” “rule,” and “advance,” concerns the advance of the codification of the rights and obligations of belligerents (occupying states), which is one of the major areas of contention in the second subcommission. Cluster (02) demonstrates the presence of colloquies regarding tangible stipulations about levy, impressment, and fine in occupied territories, about passage of belligerent troops through neutral territories, as well as about prisoners of war, having “occupation,” “occupied,” “territory,” “tax,” “requisition,” “contribution,” “receipt,” “fine,” “neutral,” “passage,” “prisoner,” and “war.” Cluster (03) possesses

“peace,” “time,” “task,” “purpose,” “object,” “people,” “important,” “humanitarian,” “humanity,” “consideration,” and “spirit,” so the intent and purpose of codification in time of peace, where peaceful populations should be protected based on humanitarian considerations and in a human spirit, can be observed. Cluster (04) represents propositions concerning the amendment of provisions with “proposition,” “delegate,” “view,” “idea,” “reason.” Being comprised of words such as “communication,” “line,” “cable,” “instruction,” “regulation,” “domain,” and “uncertainty,” while Cluster (05) describes arguments as to the pros and cons of codifying some rules (or whether the rules should belong to the domain of law of nations (customary international law)) concerning problems centering on submarine cables, as well as on the *facultas bellandi* of resisting populations in occupied territory, disputed from the standpoint of protecting lines of communication. Cluster (06) exhibits the analyses of the 1874 Brussels Declaration by “original,” “text,” “wording.” Cluster (07) suggests adjusting continuance or review of discussion with the words “previous” and “meeting.” Including “word” and “paragraph,” Cluster (08) signifies the amendment of the wording in provisions. Cluster (09) discusses respect for private property by means of “private,” “individual,” and “property.” In Cluster (10), an account of the opinions of delegations can be read from “swiss” and “delegation.”

In Cluster (03), the two words relating to humanity are found in this cluster regarding the intent and purpose of codification. Because this intent and purpose can be seen as the common goal among the delegates in the second subcommission, the above quantitative text analysis corroborates the conclusion of the qualitative text analysis that there is a potential for maintaining that the humanitarian goal is shared among the delegates.

Because it cannot be said with absolute certainty that the Martens Clause is not presented in a spirit of humanity, Cassese’s logic, which interprets the Martens Clause on the grounds of a complete absence of any humanitarian goal is not tenable.

### III. QUESTION ON DIPLOMATIC DEADLOCK

#### A. *Multiple Linear Regression Analysis*

It is possible to answer the question of a diplomatic deadlock based on controversy between the smaller and greater powers at the second subcommission of the second commission of the 1899 Hague Peace Conference by investigating whether the magnitude relationship of national capabilities affects the debate over the *facultas bellandi* of resisting populations in occupied territory, the immediate cause of the adoption of the Martens Clause. The great powers Russia and Germany were in fact negatively disposed to the *facultas bellandi* of resisting populations in occupied



territory, and the small states Belgium and Switzerland were affirmatively disposed on this point. Hence, if, in the overall 25 states participating in the second subcommission, it can be shown that the larger the capability a state had, the more negative about the *facultas bellandi* it was, and vice versa, then the usual understanding of a deadlock on this point can be established.

Multiple linear regression analysis was conducted to evaluate the influence rate of multiple explanatory (independent) variables on a certain objective (dependent) variable. Let  $Y_i$  be the stance on the *facultas bellandi* of resisting populations in occupied territory (the objective variable), where  $Y_i$  consists of three continuous variables (trivalent: negative about the *facultas bellandi*= 1, hands-off or benign neglect= 0, affirmative about the *facultas bellandi*= -1). Multiple explanatory variables need to be established to determine the size of national strength. Given that national capabilities are often identified from measures of military capacity, economic vigor, and population, the explanatory variables ( $X_{2i}, X_{3i}, X_{4i}, X_{5i}, X_{6i}$ , respectively) are defined by five numerical data, i.e., military expenditures (milex), military personnel (milper), iron and steel production (irst), primary energy consumption (pec), and total population (tpop) in 1899.<sup>59</sup> Conducting multiple linear regression analysis after standardization<sup>60</sup> of each explanatory variable, the present study measures the influence rate of each explanatory variable on the objective variable by comparing the magnitude of standardized partial regression coefficients.

Table 4 presents numerical data including the stance of the participants of the second subcommission on the *facultas bellandi* (the objective variable) and data on national capabilities (the explanatory variables; raw data before standardization).

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59. This study adhibits the data set in National Material Capabilities (v6.0) of The Correlates of War Project. See J. David Singer, Stuart Bremer & John Stuckey, *Capability Distribution, Uncertainty, and Major Power War, 1820-1965*, in PEACE, WAR, AND NUMBERS 19 (Bruce Russett ed., 1972); J. David Singer, *Reconstructing the Correlates of War Dataset on Material Capabilities of States, 1816-1985*, 14 INT'L INTERACTIONS 115 (1987).

60. Standardization is carried out by using the following mathematical expression. For example, regarding the explanatory variable  $X_{2i}$ , define  $\bar{X}_2$  as its sample mean,  $\sigma X_2$  as its standard deviation, and  $x_{2i}$  as its standardized explanatory variable,

$$x_{2i} = \frac{X_{2i} - \bar{X}_2}{\sigma X_2}$$

No.	State Name	Stance ( $Y_i$ )	Military Ex- penditures (milex) (thousands of current year British Pounds) ( $X_{2i}$ )	Military Per- sonnel (milper) (thousands) ( $X_{3i}$ )	Iron and Steel Pro- duction (irst) (thousands of tons) ( $X_{4i}$ )	Primary Energy Consumption (pec) (thousands of coal-ton equiva- lents) ( $X_{5i}$ )	Total Popu- lation (tpop) (thousands) ( $X_{6i}$ )
1	Austria-Hungary	0	16462	308	1467	19009	46298
2	Belgium	-1	2272	49	1025	19148	6745
3	Bulgaria	0	1203	59	0	220	4184
4	China	0	11967	1000	20	798	424811
5	Denmark	0	937	12	0	2042	2400
6	France	0	38813	654	2578	45244	38890
7	Germany	1	37508	619	7160	114456	55248
8	Italy	0	12506	264	19	5114	32140
9	Japan	0	11421	147	20	7118	43404
10	Luxembourg	0	125	0	585	789	261
11	Mexico	0	1140	33	10	409	13406
12	Montenegro	0	720	23	0	58	2455
13	Netherlands	1	3117	29	0	5036	5110
14	Persia	0	5040	25	0	3	9761
15	Portugal	0	1595	36	0	785	5370
16	Romania	-1	1821	67	0	594	5910
17	Russia	1	43240	938	2713	29782	130300
18	Serbia	0	720	23	0	58	2455
19	Siam	0	238	6	0	0	7227
20	Spain	0	5869	132	296	4467	18480
21	Sweden	-1	2401	63	498	3441	7285
22	Switzerland	-1	1090	0	10	1950	3263
23	Turkey	0	7497	235	10	218	27910
24	United Kingdom	-1	63547	331	9572	183524	40774
25	United States of America	0	38588	100	13839	236406	74799

Table 4

Source: National Material Capabilities (v6.0)

\* About Bulgaria, data in 1908 when it attained independence from the Ottoman Empire is used.

\* About Luxembourg, data in 1920 when records were first kept is used.

\* About the military expenditures of Persia, because of unavailability of data in 1899, data in 1908 acquirable and proximate to 1899 is used.

Let  $Y_i$  ( $i = 1, 2, 3 \dots 25$ ) be the objective (dependent) variable, let  $x_{2i}, x_{3i}, x_{4i}, x_{5i}, x_{6i}$  ( $i = 1, 2, 3 \dots 25$ ) be the five standardized explanatory (independent) variables, let  $x_{1i} = 1$  (constant), let  $\beta_1, \beta_2, \beta_3, \beta_4, \beta_5, \beta_6$  be the standardized partial regression coefficients that correspond to the constant and each standardized explanatory variable, let  $\hat{Y}_i$  be the prediction value of the objective variable, and let  $\varepsilon_i$  be the residual ( $Y_i - \hat{Y}_i$ ). The multiple regression equation is reckoned as follows.

$$Y_i = \beta_1 x_{1i} + \beta_2 x_{2i} + \beta_3 x_{3i} + \beta_4 x_{4i} + \beta_5 x_{5i} + \beta_6 x_{6i} + \varepsilon_i \quad (i = 1, 2, 3 \dots 25)$$

In this equation, the influence rate of each standardized explanatory variable on the objective variable is considered proportionate to the magnitude of the standardized partial regression coefficients. This paper adopts the method of least squares, evaluating the standardized partial regression coefficients, in which  $S$  (the residual sum of squares) is minimal.  $S$  can be computed by the following equation.

$$S = \sum_{i=1}^{25} \varepsilon_i^2$$

$$= \sum_{i=1}^{25} \{Y_i - (\beta_1 x_{1i} + \beta_2 x_{2i} + \beta_3 x_{3i} + \beta_4 x_{4i} + \beta_5 x_{5i} + \beta_6 x_{6i})\}^2 \quad (i = 1, 2, 3 \dots 25)$$

To calculate the standardized partial regression coefficients in making  $S$  be minimal in the above equation, this study solves the system of equations seen below, where the residual sum of squares  $S$  is differentiated with respect to each standardized partial regression coefficient.

$$\left\{ \begin{array}{l} \frac{\partial S}{\partial \beta_1} = 0 \\ \frac{\partial S}{\partial \beta_2} = 0 \\ \frac{\partial S}{\partial \beta_3} = 0 \\ \frac{\partial S}{\partial \beta_4} = 0 \\ \frac{\partial S}{\partial \beta_5} = 0 \\ \frac{\partial S}{\partial \beta_6} = 0 \end{array} \right.$$

To test the goodness of fit of the multiple regression equation as a model based on the obtained standardized partial regression coefficients, the coefficient of determination ( $\eta^2$ ) and adjusted coefficient of determination ( $\eta'^2$ ) are used. Let  $\bar{Y}$  be the mean value of  $Y_i$ ,  $\eta^2$  ( $0 \leq \eta^2 \leq 1$ ) and  $\eta'^2$  ( $0 \leq \eta'^2 \leq 1$ ) can be calculated as follows.

$$\eta^2 = 1 - \frac{\sum_{i=1}^{25} \varepsilon_i^2}{\sum_{i=1}^{25} (Y_i - \bar{Y})^2}$$

$$\eta'^2 = 1 - \frac{\sum_{i=1}^{25} \varepsilon_i^2 / 19}{\sum_{i=1}^{25} (Y_i - \bar{Y})^2 / 24}$$

Moreover, it is also necessary to identify the presence or absence of multicollinearity between the five standardized explanatory variables. This is because standardized partial regression coefficients with strong multicollinearity have tend to inaccurately influence the objective variable. The presence of multicollinearity can be ascertained by determining the variance inflation factor (*VIF*). Here, we use explanatory variable  $x_{ki}$  as the objective variable and let  $\eta_{x_{ki}}^2$  be the coefficient of determination obtained from the multiple linear regression analysis by virtue of the other explanatory variables. *VIF* is mathematized as follows.

$$VIF_{xki} = \frac{1}{1 - \eta_{xki}^2}$$

From this formula, a set of *VIF* of all standardized explanatory variables is worked out.

Table 5 presents the standardized partial regression coefficients and the *VIF* obtained from the statistical analysis.<sup>61</sup>

	Standardized partial regression coefficient ( $\beta_k$ )		Variance inflation factor
intercept	$\beta_1$	0.0800000	-
milex ( $x_{2i}$ )	$\beta_2$	0.3192551	27.102985
milper ( $x_{3i}$ )	$\beta_3$	0.5369705	26.555089
irst ( $x_{4i}$ )	$\beta_4$	1.2682474	184.443592
pec ( $x_{5i}$ )	$\beta_5$	1.0913356	253.209414
tpop ( $x_{6i}$ )	$\beta_6$	0.2634400	9.305485

Table 5

The coefficient of determination ( $\eta^2$ ) is 0.2842, and the adjusted coefficient of determination ( $\eta'^2$ ) is 0.09583.

The standardized partial regression coefficients in Table 5, at first blush, it appears that the coefficient of iron and steel production (irst) is relatively large, so that this explanatory variable influences the stance on the *facultas bellandi* of resisting populations in occupied territory (the objective variable). However, the coefficient for military personnel (milper) is small, and the coefficients of the other explanatory variables, including military expenditures (milex), indicate negative values, so it cannot be concluded that the size of national capabilities impacts the objective variable.

More to the point, the value of each *VIF* is greater than 5, and that for iron and steel production (irst), which has the upper standardized partial regression coefficient, is greater than 184. Hence, a strong multicollinearity is obvious such that the rate of influence on the objective variable on the basis of the above standardized partial regression coefficients is considered statistically insignificant.

Furthermore, the coefficient of determination ( $\eta^2$ ) and the adjusted coefficient of determination ( $\eta'^2$ ) are minuscule, such that the multiple regression equation is evidently devoid of accuracy.

The findings of the multiple linear regression analysis in this section have lower reliability from a statistical viewpoint; therefore, this analysis cannot clarify the present study.

61. All statistical analyses in this paper are performed using R 4.1.2.

### B. Correlation Analysis

The question of whether the measure of national strength involves the polemics with respect to the *facultas bellandi* of resisting populations in occupied territory cannot be validated by multiple linear regression analysis. Thus, calculating the coefficients of correlation between an objective variable and each explanatory variable, this study individually examines the presence of a correlative relationship. We define  $Y_i$  (stance on the *facultas bellandi* of resisting populations in occupied territory) as the objective variable, and we set  $X_{2i}, X_{3i}, X_{4i}, X_{5i}, X_{6i}$  (mileyx, milper, irst, pec, tpop, respectively) as the explanatory variables. The present article uses Pearson's product-moment correlation coefficient and Spearman's rank correlation coefficient.

Pearson's product-moment correlation coefficient can be derived by dividing the mean value of the deviation product of the objective variable and certain explanatory variable (covariance) by the product of standard deviation of the objective variable and that of the explanatory variable. More specifically, let  $\bar{X}_k$  be a mean of  $X_{ki}$ ,  $\bar{Y}$  be a mean of  $Y_i$ , and  $n (= 25)$  be the number of all data. Pearson's product-moment correlation coefficient between  $X_{ki}$  and  $Y_i$  ( $r_{Xk,Y}$  ( $-1 \leq r_{Xk,Y} \leq 1$ )) is as shown in the following equation.

$$\begin{aligned} r_{Xk,Y} &= \frac{\sum_{i=1}^{25} (X_{ki} - \bar{X}_k)(Y_i - \bar{Y})/n}{\sqrt{\sum_{i=1}^{25} (X_{ki} - \bar{X}_k)^2/n} \sqrt{\sum_{i=1}^{25} (Y_i - \bar{Y})^2/n}} \quad (i = 1, 2, 3 \dots 25) \\ &= \frac{\sum_{i=1}^{25} (X_{ki} - \bar{X}_k)(Y_i - \bar{Y})}{\sqrt{\sum_{i=1}^{25} (X_{ki} - \bar{X}_k)^2} \sqrt{\sum_{i=1}^{25} (Y_i - \bar{Y})^2}} \quad (i = 1, 2, 3 \dots 25) \end{aligned}$$

Spearman's rank correlation coefficient can be derived by applying the above mathematical formula for Pearson's product-moment correlation coefficient to qualitative standards according to which the actual measured values of variables are transformed to ranked data. To make this more concrete, let  $R_{Xki}$  be the ranking of  $X_{ki}$ ,  $R_{Yi}$  be the ranking of  $Y_i$ , which corresponds to  $R_{Xki}$ , Spearman's rank correlation coefficient between  $X_{ki}$  and  $Y_i$  ( $r_{sXk,Y}$  ( $-1 \leq r_{sXk,Y} \leq 1$ )) is as shown in the following equation.

$$r_{sXk,Y} = 1 - \frac{6}{n(n^2 - 1)} \sum_{i=1}^n (R_{Xki} - R_{Yi})^2 \quad (i = 1, 2, 3 \dots 25)$$

Table 6 shows two correlation coefficients between  $Y_i$  (the objective variable) and  $X_{ki}$  (each explanatory variable).

	milex ( $X_{2i}$ )	milper ( $X_{3i}$ )	irst ( $X_{4i}$ )	pec ( $X_{5i}$ )	tpop ( $X_{6i}$ )
Pearson's product-moment correlation coefficient ( $r_{XkY}$ )	0.157	0.373	0.0411	-0.00594	0.177
Spearman's rank correlation coefficient ( $r_{sXkY}$ )	0.188	0.187	-0.0105	0.0627	0.234

Table 6

Table 6 indicates that all the coefficients of correlation for the stance on the *facultas bellandi* of resisting populations in occupied territory ( $Y_i$ : the objective variable) and military expenditures (milex), military personnel (milper), iron and steel production (irst), primary energy consumption (pec), total population (tpop) ( $X_{ki}$ : each explanatory variable) is much smaller than 0.5 or much larger than  $-0.5$ . Thus, the correlation between the objective variable and these explanatory variables is almost imperceptible.

It is possible to conclude that the position a state took regarding the *facultas bellandi* of resisting populations in occupied territory had little connection with the scale of its power. Thus, there could have been no diplomatic deadlock based on contestation between the small and great powers on this topic in the second subcommission. Thus, the reasoning that affirms or negates the formal source nature of each particular within the Martens Clause based on the hypothesis of a deadlock and its resolution by the Clause is without basis.

#### IV. DISCUSSION: WHAT IS THE LEGAL SIGNIFICANCE OF THE MARTENS CLAUSE?

The analyses thus far can be summarized as follows. First, qualitative and quantitative analyses indicate the possibility of a humanitarian objective among the delegates in the course of consultations at the second subcommission; therefore, it cannot be stated with absolute certainty that the Martens Clause was not advanced based on the humanitarian objective. Thus, it is difficult to conclude that the Martens Clause is an interpretative criterion in the light of potential humanitarian goals. Second, statistical analyses (multiple linear regression analysis and correlation analysis) make it obvious that no diplomatic deadlock rests upon a dispute between the lesser and major powers that came into being at the second subcommission. Hence, it is pointless to determine the nature of the formal source of the contents within the Martens Clause due to its ability to move beyond this impasse. Thus, the Martens Clause cannot be under-

stood as the interpretive criterion for international humanitarian law and remains undefined whether it has formal sources of international law.

What, then, is the legal significance of the Martens Clause? If we cannot find its grounding in the colloquies at the second subcommission of the 1899 Hague Peace Conference, attention must be paid to written material that is discovered outside of the meetings of the subcommission. According to Nabulsi, a document archived in the Belgian Ministry of Foreign Affairs proves that the declaration by Martens,<sup>62</sup> the Russian delegate, which eventually became the Martens Clause, relied absolutely on the draft preamble of the Hague Convention respecting the Laws and Customs of War on Land prepared by a Belgian diplomat.<sup>63</sup> Pustogarov asserts that Martens redacted a Belgian document with the approval of a Belgian delegate and proposed that it be adopted as the preamble of the Hague Convention.<sup>64</sup> Best stresses that the Martens Clause was based on the ideas in this Belgian text.<sup>65</sup>

Given that the legal signification of the Martens Clause cannot be understood from by the arguments given at the second subcommission, this question is inevitably considered by using the above-noted birthplace of the Clause. The Martens Clause certainly reflects the Belgian view that the *facultas bellandi* of resisting populations in occupied territory is granted by customary international law.

Beernaert, the Belgian delegate, said the following regarding the *facultas bellandi*:

In my opinion there are certain points which cannot be the subject of a convention and which it would be better to leave, as at present, under the governance of that tacit and common law which arises from the principles of the law of nations. ... Who are the belligerents? What part

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62. PROCEEDINGS, *supra* note 33, at 547-48 (The declaration provided that "The Conference is unanimous in thinking that it is extremely desirable that the usages of war should be defined and regulated. In this spirit it has adopted a great number of provisions which have for their object the determination of the rights and of the duties of belligerents and populations and for their end a softening of the evils of war so far as military necessities permit. It has not, however, been possible to agree forthwith on provisions embracing all the cases which occur in practice. On the other hand, it could not be intended by the Conference that the cases not provided for should, for want of a written provision, be left to the arbitrary judgment of the military commanders. Until a perfectly complete code of the laws of war is issued, the Conference thinks it right to declare that in cases not included in the present arrangement, populations and belligerents remain under the protection 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. It is in this sense especially that Articles 9 and 10 adopted by the Conference must be understood.").

63. KARMA NABULSI, TRADITIONS OF WAR: OCCUPATION, RESISTANCE, AND THE LAW 161 (1999).

64. V. V. PUSTOGAROV, OUR MARTENS: F. F. MARTENS: INTERNATIONAL LAWYER AND ARCHITECT OF PEACE 176 (W. E. Butler trans., Kluwer Law International, 2000).

65. Geoffrey Best, *Peace conferences and the century of total war: The 1899 Hague Conference and What Came After*, 75 INT'L AFF. 619, 627 (1999).



may populations take in the war, either before or after occupation? ... But by undertaking to restrict war to States only, the citizens remaining to a certain extent only mere spectators, would not the risk be run of reducing the factors of resistance by weakening the powerful main-spring of patriotism? Is it not the first duty of a citizen to defend his country, and is it not the fulfillment of this duty that we all owe the most beautiful pages of our national history? On the other hand, would not telling the citizens not to mingle in the struggles in which the fate of their country is at stake be further encouraging that baneful indifference which is perhaps one of the gravest evils from which our times suffer? Small countries especially need to fill out their factors of defense by availing themselves of all their resources, ... would it not be better, in the interests of all, not to attempt the regulation by convention of interests which lend themselves only with difficulty to regulation by convention, but rather to leave the matter to the law of nations and to that incessant progress of ideas which the present Conference and the high initiative from which it emanates will so powerfully encourage!<sup>66</sup>

After the announcement of the Martens declaration, he responded with the following:

no one thought of disregarding the fact that the right of a country to defend itself is absolute, and that it is not only a right but a duty, and an imperious one at that. ... the only point settled is that armies, militia, organized bodies, and also the population which, even though unorganized, spontaneously takes up arms in unoccupied territory, must be regarded as belligerents. All other cases and situations are regulated by the law of nations according to the terms of the declaration just read by the President.<sup>67</sup>

Accordingly, the significance of the Martens Clause is that it explicitly acknowledges the existence of a legal norm (formal source of international law) by which the *facultas bellandi* is granted to resisting populations in occupied territory in customary international law. That is, the Martens Clause serves the function of being a material source of international law by proving the presence of customary international law that supports the *facultas bellandi* of resisting populations in occupied territory.<sup>68</sup> Hence, the range of the Martens Clause is perforce confined to the issue of the *facultas bellandi* of resisting populations in occupied territory.

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66. PROCEEDINGS, *supra* note 33, at 502, 504, 505.

67. *Id.* at 548–49.

68. Along the same lines, Eyffinger says that the Martens Clause offers nothing new, but identifies established principles of international law. Arthur Eyffinger, *Friedrich Martens: A Founding Father of the Hague Tradition*, 15 ENDC Proc. 13, 28 (2012).

It would appear that, at first sight, the consideration that the Martens Clause is a material source of international law runs counter to the existence of the Martens Clause itself as treaty stipulations (i.e., the formal source of international law) provided in denunciation provisions of the 1949 Geneva Conventions<sup>69</sup> and Article 1(2) of the 1977 Additional Protocol I to the Geneva Conventions.<sup>70</sup> Therefore, the Martens Clause as it was in 1899 must be discriminated from the Martens Clause as it has been 1949. The 1899 Martens Clause should be referred to as the Belgian Martens Clause, as it was created to support a Belgian point of view. Furthermore, this paper titles the Martens Clause, which became a formal source of law in 1949, as the modern Martens Clause for convenience.

The Belgian Martens Clause in 1899 is the material source of international law that bears on the limited sphere of the question of the *facultas bellandi* of resisting populations in occupied territory. Regarding the range of application radius of the Belgian Martens Clause, many scholars agree despite differences in their theoretical perspectives.<sup>71</sup> Meanwhile, the modern Martens Clause ranges over the entirety of international humanitarian law and is the formal source of international law in the sense of *lex scripta* as stipulated in the body texts of the treaties.<sup>72</sup> The time series variation context regarding the scope of the two versions of the Martens Clause is consonant with the historical fact that the adoption of the Martens Clause, whose compass extends over international criminal law or in-

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69. Article 63 of the First Convention, Article 62 of the Second Convention, Article 142 of the Third Convention, and Article 158 of the Fourth Convention provide that "The denunciation shall have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience." See Geneva Convention for the amelioration of the condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.

70. Article 1(2) of the Protocol provides that "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." 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) Geneva, June 8, 1977, art. 1.

71. Greenwood, *supra* note 2, at 28 ¶129; Strebel, *supra* note 5, at 252; Meron, The Martens Clause, *supra* note 23, at 79; Ticehurst, *supra* note 7, at 312; Hayashi, *supra* note 29, at 136.

72. However, the question of whether the principles of international law derived from the principles of humanity or the dictates of public conscience provided in the modern Martens Clause are the formal sources independent from the 1949 Geneva Conventions or the 1977 Additional Protocol I to the Geneva Conventions is beyond the scope of the present study. An opinion answering the question in the affirmative can be found in exponents of the Formal Sources Theory mentioned *supra* in the Introduction.

ternational law as a whole, was discussed and ended up with being denied in arguments about types of trial norm (*Entscheidungsnorm*) at the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties<sup>73</sup> or the Advisory Committee of Jurists for the purpose of preparing plans for the establishment of the Permanent Court of International Justice<sup>74</sup> after the First World War.

Furthermore, it is possible to deductively account for the judgments of leading cases before 1949 that made positive use of the Belgian Martens Clause and went beyond its function to interpret specific treaty provisions. In the Klinge case, war crimes against “the laws and customs of war” were found for the reason that committed acts were contrary to “the laws of humanity” and “the dictates of the public conscience” provided in the Belgian Martens Clause (the 1907 Hague Convention IV respecting the Laws and Customs of War on Land).<sup>75</sup> Because “the laws of humanity” and “the dictates of the public conscience” in the Belgian Martens Clause are the material sources that prove the existence of “the laws and customs of war” as the formal sources, the logical structure whereby violation of the former relates to war crimes with respect the latter can be analyzed. If this were not the case, the Court should directly proclaim that the malefactions were infringements of the Belgian Martens Clause. In the Krupp case, confirming that the Belgian Martens Clause referred specifically to belligerency in occupied territory, the Tribunal held the following with respect to the Clause:

It is a general clause, making the usages established among civilized nations, the laws of humanity and the dictates of public conscience into the legal yardstick to be applied if and when the specific provisions of the Convention and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare.<sup>76</sup>

First, from this ruling, it is clear that the scope of the Belgian Martens Clause is confined to the subject of the *facultas bellandi* of resisting populations in occupied territory. Second, the Belgian Martens Clause is the material source that “mak[es]” specific contents listed in itself “into the legal yardstick to be applied” (i.e., the formal source). This is because, if the Belgian Martens Clause provides the formal sources and so is already the legal yardstick, there would be no need for the Tribunal to stress the idiom: “mak[e] ... into.”

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73. See e.g., M. Adatci, *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, 14 AM. J. INT'L L. 95, 122 (1920).

74. See e.g., Permanent Court of International Justice, Advisory Committee of Jurists, in Procès-Verbaux of the Proceedings of the Committee, June 16th – July 24th 1920, With Annexes 323–24 (1920).

75. Prosecutor v. Klinge, 13 Ann. Dig. 262, 263 (Sup. Ct. 1946) (Nor.).

76. In re Krupp and Others, 15 Ann. Dig. 620, 622 (U.S. Mil. Trib. 1948).

Based on these considerations, the Belgian Martens Clause has the legal signification that it is the material source to evince customary international law with regard to the *facultas bellandi* of resisting populations in occupied territory. Thus, the Belgian Martens Clause, which has this feature, should be differentiated from and not be confused with the modern Martens Clause as the formal source in the sense of treaty provisions. This distinction has hitherto largely been ignored.

## V. CONCLUSION

This study reanalyzes conceptions of the *travaux préparatoires* of the Martens Clause that support the Formal Sources Theory and the Interpretive Criteria & Relaxation of Customary Law Requirements Theory regarding the legal significance of the Martens Clause. Reconsideration of the Clause by means of novel essay methods is performed to challenge the universalist view that the Martens Clause was proposed with no humanitarian objective but instead to break a diplomatic deadlock based on a controversy between the small and great powers regarding the *facultas bellandi* of resisting populations in occupied territory at the second sub-commission of the second commission of the 1899 Hague Peace Conference.

The question of the humanitarian objective is investigated with regard to all of the meetings at the second subcommission. The qualitative text analysis based on the grounded theory indicates that parts of the oral text data classified in the category <attention to or emphasis on humanity> emerge ubiquitously in the main discussions conducted in the second subcommission; therefore, the humanitarian objective associated with this category could have been shared among the delegates. As a consequence of the quantitative text analysis, the findings of the qualitative text analysis can be corroborated by extracting a cluster including words regarding humanity in the colloquies at the second subcommission. These text analyses show that the argument that the Martens Clause was written with regard for the humanitarian objective cannot be excluded.

Descriptive statistical analyses are performed to existence of a diplomatic deadlock regarding. First, defining the stances on the *facultas bellandi* of resisting populations in occupied territory as the objective variable and the indicators of national capability as the explanatory variables, multiple linear regression analysis is used to calculate the standardized partial regression coefficients and articulate the power of influence of each explanatory variable. However, as strong multicollinearity identified among explanatory variables, so calculating the coefficients of correlation between the above objective variable and each explanatory variable, a correlation analysis is conducted to verify the presence and extent of the correlative relationships. The coefficients of correlation on this showing show very little correlation. Accordingly, it can be concluded that there

was no diplomatic deadlock depending on an alignment opposing small and great powers.

Hence, the only remaining material relevant to the Martens Clause is the corroborated source for the Clause in a redacted version of a document prepared by a Belgian diplomat that was proposed at the conference. Thus, the Martens Clause reflects the Belgian view that the *facultas bellandi* of resisting populations in occupied territory is granted by customary international law; therefore, the Clause should be considered to be capable of serving the function of the material source to prove the existence of this customary international law (the formal source). The Martens Clause that appeared in 1899 should be referred to as the Belgian Martens Clause and should be sharply distinguished from the modern Martens Clause, which is the formal source as treaty provisions codified since 1949. This demarcation corresponds to the historical context of the range extension of the Martens Clause. Moreover, the legal signification of the Belgian Martens Clause is attuned to the interpretations in judicial precedents before 1949.

The present study yields a definitive disjuncture and disconnection between the Belgian Martens Clause in 1899 and the current modern Martens Clause. Thus, the legal significance of the modern Martens Clause cannot be derived immediately from that of the Belgian Martens Clause, as evident from the reasoning in this paper. Thus, this study makes it even more difficult to answer the question: what is the legal significance of the Martens Clause? If the signification of the modern Martens Clause cannot be considered based on *travaux préparatoires* in 1899, further research must be undertaken to return to the starting point.