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MARTENS CLAUSE

ABILA STUDY GROUP

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MARTENS CLAUSE

Proposed Addition to the Preamble of the Prevention and Punishment of Crimes against Humanity [ILC Draft]

Preamble

[...]

***Declaring* that in cases not covered by the present Convention or by other international agreements, the human person remains under the protection and authority of principles of international law derived from established customs, from the laws of humanity, and from the dictates of the public conscience, and continues to enjoy the fundamental rights that are recognized by international law;**

[...]

Explanatory Notes

The inclusion of a Martens clause in the Draft Articles is recommended to strengthen the Convention’s moral and legal foundation and ensure that courts and other interpreters apply it consistently with humanitarian principles.

The proposed text – modeled on provisions in the Hague Conventions, Geneva Conventions, and other international instruments – acknowledges that individuals remain under the protection of “international law derived from established customs, from the laws of humanity, and from the dictates of public conscience” in cases not explicitly covered by the Convention. Its inclusion would situate the Convention within established legal precedent, preserve space for the development of customary international law, and reinforce the Convention’s commitment to humanitarian values.

1. The preamble is a critical element of any treaty. It guides government officials, courts, and academics regarding the instrument’s “object and purpose”, which will be the basis of interpreting any ambiguous language.¹ The Convention’s preamble must set forth the reasons for the Convention’s adoption and situate it as part of a system of international

¹ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31(1). This provision reflects customary international law. See e.g. ICJ, *Obligations of States in respect of Climate Change* (Advisory Opinion) (23 July 2025) paras 176-177.

criminal justice. The preamble also serves an expressive function, allowing the reader to understand the important social values the treaty enshrines and protects.

2. The Preamble in the Draft Articles sets forth some general principles governing the proposed Convention's relationship to the International Criminal Court and references the *jus cogens* nature of crimes against humanity.² It does not, however, include a Martens clause.
3. What we now know as the Martens clause was introduced at the 1899 Hague Peace Conference by Russian jurist F.F. de Martens to provide supplementary protections, grounded in morality and law, in particular for populations in occupied territories, including armed resisters.³ Martens proposed the clause as a compromise during the negotiations,⁴ suggesting that even where specific treaty rules were absent, the parties to a conflict remained bound by fundamental principles of humanity and the public conscience, thereby limiting States' freedom to act without restraint against civilian populations.⁵ Since its first appearance in 1899, this principle has been reinforced with the emergence of binding *jus cogens* norms that protect individuals regardless of State consent.⁶
4. Most commentators tie the emergence of crimes against humanity as an offense at Nuremberg to the Martens clauses of the 1899 and 1907 Hague Conventions. Justice Robert H. Jackson invoked Martens clause language in shaping Article 6(c) of the London Charter (defining crimes against humanity), observing that such atrocities had "been assimilated as a part of International Law at least since 1907", when the Fourth Hague Convention provided that inhabitants and belligerents remain under the protection of the law of nations which, in turn, arise from "the laws of humanity and the dictates of the public conscience".⁷ The International Military Tribunal's Judgment at Nuremberg

² UNGA, 'Report of the International Law Commission (71st Session), Text of the Draft Articles on Prevention and Punishment of Crimes Against Humanity and Commentaries Thereto' (20 August 2019) UN Doc A/74/10, preamble, paras 4, 7.

³ Theodor Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience' (2000) 94 American Journal of International Law 78, 79.

⁴ See Jeffrey Kahn, "'Protection and Empire": The Martens Clause, State Sovereignty, and Individual Rights' (2016) 56 Virginia Journal of International Law 1, 24.

⁵ Ibid, 5 ("[H]istory reminds us that the purpose of the clause was not to end debate, but to forestall the worst consequences for civilian populations and belligerents that would result if the parties assumed that a lack of tight-fitting treaty law meant *carte blanche* freedom to act [...]").

⁶ Ibid, 5-6.

⁷ Justice Robert H. Jackson, *Report to the President on Atrocities and War Crimes* (7 June 1945) <https://avalon.law.yale.edu/imt/imt_jack01.asp>. See also Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) <<https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-iv-1907>> (Fourth Hague Convention), preamble para 8; Egon Schwelb, 'Crimes Against Humanity' (1946) 23 British Yearbook of International Law 178, 187.

echoed Jackson's reference, condemning the Nazis' crimes as committed "in complete disregard of the elementary dictates of humanity" and affirming that "[t]he prohibition of aggressive war [was] demanded by the conscience of the world".⁸

5. Martens clauses continue to be included in recent treaties, sometimes as preambular provisions,⁹ or sometimes in the denunciation clause of a particular treaty.¹⁰ A Martens

⁸ *Trial of the Major War Criminals before the International Military Tribunal* (Judgment) (30 September-1 October 1946) XXII Blue Series 411, 465, 470.

⁹ Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 September 1900) <<https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-ii-1899>> preamble para 9 ("Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection 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"); Fourth Hague Convention (n 7) preamble para 8 ("Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule 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"); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609, preamble para 4 ("Recalling that, in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience"); Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (adopted 10 October 1980, entered into force 2 December 1983) 1342 UNTS 137, preamble para 5 ("*Confirming their determination* that in cases not covered by this Convention and its annexed Protocols or by other international agreements, the civilian population and the combatants shall at all times 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"); Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (adopted 18 September 1997, entered into force 1 March 1999) 2056 UNTS 211 preamble paras 8, 11 ("*Stressing* the role of public conscience in furthering the principles of humanity as evidenced by the call for a total ban of anti-personnel mines and recognizing the efforts to that end [...] *Basing* themselves on the principle of international humanitarian law that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited [...]"); Convention of Cluster Munitions (adopted 30 May 2008, entered into force 1 August 2010) 2688 UNTS 39, preamble paras 11, 17 ("*Reaffirming* that in cases not covered by this Convention 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 [...] *Stressing* the role of public conscience in furthering the principles of humanity as evidenced by the global call for an end to civilian suffering caused by cluster munitions"); Treaty on the Prohibition of Nuclear Weapons (adopted 7 July 2017, entered into force 22 January 2021) <https://treaties.un.org/doc/Treaties/2017/07/20170707%2003-42%20PM/Ch_XXVI_9.pdf> preamble paras 11, 24 ("*Reaffirming* that any use of nuclear weapons would also be abhorrent to the principles of humanity and the dictates of public conscience [...] *Stressing* the role of public conscience in the furthering of the principles of humanity as evidenced by the call for the total elimination of nuclear weapons").

¹⁰ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31, art 63 ("The denunciation shall

clause was included in 1977 as a stand-alone provision of Protocol I to the Geneva Conventions,¹¹ and in a General Assembly resolution on the protection of the environment, adopted only a few years ago.¹² Finally, an analogous provision was included in the preamble of the 2013 Arms Trade Treaty.¹³

6. Scholars have noted the “enduring legacy” and “continuing currency” of the Martens clause.¹⁴ In addition to a number of treaties, it is also included in military manuals,¹⁵ and has been relied upon by the International Law Commission.¹⁶ Its inclusion in diverse legal instruments demonstrates how the clause has evolved from its original role as a diplomatic compromise in a particular treaty to a core principle of international law. The International Court of Justice has noted that the clause is an expression of customary international law in the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion, affirming that its “continuing existence and applicability is not to be doubted”.¹⁷

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.”); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85, art 62 (same); Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135, art 142 (same); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, art 158 (same).

¹¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, art 1(2) (“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.”).

¹² UNGA Res 77/104 (7 December 2022) UN Doc A/RES/77/104, annex, principle 12 (titled “Martens Clause with respect to the protection of the environment in relation to armed conflicts”, and providing that: “In cases not covered by international agreements, the environment remains 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”). The General Assembly adopted this resolution without a vote.

¹³ Arms Trade Treaty (adopted 2 April 2013, entered into force 24 December 2014) 3013 UNTS 269, preamble paras 6, 18 (“*Acknowledging* that peace and security, development and human rights are pillars of the United Nations system and foundations for collective security and recognizing that development, peace and security and human rights are interlinked and mutually reinforcing [...] *Determined* to act in accordance with the following principles [...] Respecting and ensuring respect for international humanitarian law in accordance with, inter alia, the Geneva Conventions of 1949, and respecting and ensuring respect for human rights in accordance with, inter alia, the Charter of the United Nations and the Universal Declaration of Human Rights”).

¹⁴ See e.g. Meron (n 3) 78-79.

¹⁵ Ibid 78.

¹⁶ UNGA, ‘Report of the International Law Commission (73rd Session), Text of the Draft Principles on Protection of the Environment in Relation to Armed Conflict’ (5 August 2022) UN Doc A/77/10, principle 12, commentary paras 1-9.

¹⁷ See *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (8 July 1996) 1996 ICJ Rep 226, paras 84, 87.

7. The clause also functions as a crucial interpretive principle, entailing that the treaties in which it is included be construed “in case of doubt, consistently with the principles of humanity and the dictates of public conscience”.¹⁸ In the words of the International Criminal Tribunal for the former Yugoslavia, this “celebrated” clause “enjoins, as a minimum, reference to those principles and dictates any time a rule of international humanitarian law is not sufficiently rigorous or precise”, and forms part of customary international law.¹⁹ Thus, the provision operates not merely as historical language but as an active legal tool that shapes judicial decision-making when treaty provisions or customary rules provide insufficient guidance. Inclusion of a Martens clause in the new treaty would thus enhance the protection it offers the civilian population, particularly when faced with “ingenious cruelty that occurs in armed conflicts” and attacks directed against the civilian population.²⁰
8. During the discussions that took place in Geneva as the ILC completed its work, and during the debates in the Sixth Committee over the past six years in New York, many experts and State delegates have warned of the need not to prejudice the continuing development of customary international law as a result of treaty codification.
9. Including a Martens clause in the preamble could respond to this concern and reinforce Draft Article 2(3) by affirming that humanitarian principles remain operative even where treaty text is silent.

¹⁸ Meron (n 3) 88.

¹⁹ *Prosecutor v Kupreškić et al.* (Judgement) IT-95-16-T (14 January 2000) para 525 (citing the “authoritative view of the International Court of Justice”).

²⁰ See Kahn (n 4) 44 (“[The Martens clause] reminds us that an exhaustive accounting of inhumanity is impossible, and therefore a general rule must apply to limit the ingenious human cruelty that occurs in armed conflicts.”).