NON-INTERNATIONAL ARMED CONFLICT IN A NEW ERA OF HUMANITARIAN LAW: GLOBAL AND ASIA-PACIFIC PERSPECTIVE

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ABSTRACT

In an era of unrelenting violence, conflict and hostilities resulting in large scale human suffering around the globe, a much talked about issue of contemporary importance relates to complex academic and political debates on the application of international humanitarian laws (IHL) in non-international armed conflicts (NIAC). The essay purports to portray as to how the post-WWII normative re-innovations in this arena of international law consolidate a broader juristic approach to IHL. With a specific focus on the distinct roles and contributions of the Asia-Pacific region in the development of IHL, the paper argues that the recent jurisprudential spin-off in the doctrine of universality renders atrocious acts and conduct violating fundamental norms of international human rights and humanitarian law in all situations of armed hostilities- irrespective of their territorial or national jurisdictional characterisation- as international crime accountable with criminal culpability of the perpetrators involved.

Keywords: International Humanitarian Law; Non-International Armed Conflict; Principle of Universality; IHL in the Asia-Pacific; International Crime; Common Article 3 and Marten's Clause

INTRODUCTION

A contemporary issue of growing concern in both analytical and normative jurisprudence of international law that continues to raise complex academic and political debates is the application of the laws of armed conflict, also known as international humanitarian law (IHL) in its modern usage, in situations of non-international or internal armed conflicts (NIAC). This issue was particularly evoked in the recent decades, notably in the post WWII period, in the context of a global proliferation of armed hostilities within national territories - including liberation movements, coups d'état, rebellions and civil wars.

Since the end of the last World War, the term international armed conflict (IAC) - 'war' to be precise – at least in its formal attribution, is no longer used by states involved in transborder hostilities. Also, it is often difficult to distinguish a NIAC from that of an international character as the increasingly complex global geo-politics tend to render such identification highly improbable. In fact, most internal armed conflicts involve some forms of trans-border linkages, whether by legitimate defence agreements between states, direct or indirect participation of foreign powers in internal hostilities, supply of weaponry and military resources, or other forms of support based on ideological, territorial, or other common interest factors. On the other hand, armed conflicts anywhere in the world – internal or international - implies issues of common concerns for the international community, including those relating to global peace, security, stability and human development.[i]

In the stated backdrop, this article critically reviews the evolving approaches in the interpretation and understanding of the interceding factors – both in subjective and objective analysis - underlying the ongoing debates on the application of IHL in NIAC. The paper begins with a brief reference to the historical antecedents as to how in the early development of the rules of armed conflict–based on the sovereign's military commands and principles of reciprocity–eventually progressed through inevitable adaptation to emerging realities of regulated warfare. This transition is particularly marked by the changing contexts of the modern and postmodern global governance and international relations based on broader humanistic approaches to armed hostilities.

The analysis then focuses on the paradigm shift in IHL in the recent decades from its traditional primary attention on the customary principles of proportionality, military necessities, distinctiveness, good faith and humane treatment of combatants to greater emphasis on collective peace, security and human rights – a beaconing feature of the second half of the last century that placed the individual at the centre stage of global policy and regulatory concerns. In this flow, reference is made to what has been known as the 'Marten's Cause' from the end of the twentieth century, later found broader comprehensive recognition in the Common Article 3 and the 1977 Additional Protocol II to the Geneva Conventions, collectively regarded as the catalytic stimulants in the recognition of *rights-and-protection*[ii] focused rules of modern international humanitarian law.

The next part of the paper delves into the roles and contributions of the legal and philosophical approaches emerging from the Asia Pacific region in the development of the modern notions of universality applicable to international humanitarian law, the non-international armed conflicts in particular. The essay concludes with a note as to how the post-WWII normative re-innovation– despite implacable inclination by many national regimes to their relentless claims of 'internal affairs' camouflage to palliate recalcitrant acts and conduct in NIAC – coalesces a broader interpretation to the juristic approaches to IHL.

HISTORICAL ANTECEDENTS: THE NORMATIVE TRANSITION

At its inception, and in the early years of its development, international humanitarian law (both customary norms as well as treaty rules) preponderantly focused on the protection and humane treatment of the wounded and sick combatants in the battle field.[iii] These eventually expanded to other groups such as Prisoners of War (POWs) and to some extent civilians who are either not involved, or no longer involved, in the hostilities. The legal framework of IHL draws a distinction between two types of conflict situations, namely- (a) "international armed conflicts, opposing two or more States", and (b) "non-international armed conflicts, between governmental forces and nongovernmental armed groups, or between such groups only".[iv]

However, along with other controversies, a key debate and disagreement continued on the question of treatment and protection of persons, combatants or not, in situations of non-

international armed conflict. For obvious reasons, states were reluctant to consider belligerents, insurgents or other rival groups engaged in armed conflict against government soldiers as 'combatants', or the acts of violence as 'armed conflict' (in order for such groups to qualify for the protection of IHL) – these being considered to be domestic or internal affairs of the state termed frequently as riots, political unrest, terrorism or sporadic criminal acts.

Thus, as the legal ambit of IHL gradually expanded to situations of organised collective violence of (at least apparently) non-international character, the next difficult question was as to when and on what bases such conflicts can be treated as NIAC. This became particularly intricate as in a NIAC at least one of the parties involved is a non-state organised armed group and, naturally, states continue to raise the question of their status of being 'organised' or 'armed group', or whether they are legitimately (from the perspectives of the state concerned) involved in such hostilities. Of course, there are also other complicated questions when the violence erupted doesn't directly involve the state forces but rather one between rival groups within a state. This last mentioned question was clearly answered in the evolving jurisprudence of international criminal law. For instance, the International Criminal Tribunal for Former Yugoslavia (ICTY) defined NIAC as one that occurs "whenever there is […] protracted armed violence between governmental authorities and organised armed groups or between such groups within a State".[v]

However, while interpreting and elaborating upon the definition given by the ICTY or elsewhere, one should remain mindful that while IHL does not as such confer any legal status, or legitimacy, to such combatting groups, it is still incumbent on the opposing parties involved to abide by the established norms of IHL.[vi] As noted by the International Committee of the Red Cross: "[A]mong the rules that the parties to an armed conflict must respect when conducting hostilities, there is the prohibition of direct attacks against civilians and of indiscriminate attacks; the obligation to respect the principle of proportionality in attacks; and the obligation to take all feasible precautions so as to avoid as far as possible civilian casualties."[vii] These fundamental principles lie at the core of IHL normative framework and are equally applicable in both categories of armed conflicts- international and non-international.

There is thus a landslide departure from the thumb rules of reciprocity practiced in the early development of laws of armed conflict (discussed below) as the modern concept of IHL is founded on the basic notions of unilateralism implying that obligations imposed by fundamental principles of IHL must be observed by each party involved in hostilities, including government authorities concerned, irrespective of observance of the same by the opposing fractions.

While the customary norms of IHL already recognised the protection and humane treatment of non-combatants equally and without distinctions of any kind by all involved parties, history of the development of treaty rules with regard to the recognition and acceptance of such protection by states in situations of NIAC was not so smooth, nor did such development proceed with the same pace, scope or outreach as those encompassing IACs.

FROM CUSTOMARY NORMS TO MODERN IHL TREATIES

Prior to 1860, rules of warfare remained predominantly comprised in mutual agreements based on principles of reciprocity between the parties involved focusing primarily on principles of military necessities and protection of non-combatant civilians or preservation of basic livelihood supplies, arts and cultural heritage. Among the early instances, references have been made to the commands and codification of military discipline and principles of humanity by Richard II of England at Durham (1385), by Henry V of England at Mantes (1419), and by Charles VII of France at Orleans (1439), and in Scotland's *Articles and Ordinances of War for the Present* Expedition of the Army of the Kingdom of Scotland (1643), among others.[viii] The Lieber Code of 1863 made the first attempt to codify these customary norms and practices in relation to the Union soldiers fighting in the American Civil War (hence not a treaty as such). This was soon followed by the adoption of the first international treaty in 1864 - the ICRC's first Geneva Convention that accorded protection to wounded soldiers on the battlefield and medical personnel and facilities.

By the end of the nineteenth century, states started to adopt more liberal approaches in accepting broader standards regulating warfare as reflected in the Hague Conventions on Land Warfare of 1899 and later in 1907 (with expanded coverage of naval warfare). The Hague rules

were based on the International Declaration Concerning the Laws and Customs of War agreed upon at the Brussels Conference in 1874 that in turn was heavily influenced by the American Lieber Code, mentioned above. Collectively, these codifications focused on the protection of civilian population and property, punishment of egregious transgressors, deserters, prisoners of war, hostages, prisoner exchange, parole and armistice, respect for human life, treatment of soldiers or citizens in hostile territory, and the status of individuals engaged in a state of civil war against the government.[ix]

However, states participating in these first international treaties (Hague and Brussels in particular) were still not prepared to accept regulatory standards applicable to armed conflicts that are not of an international character. Instead, the focus remained on updating existing rules of warfare in the light of emerging realities and lessons learnt in the aftermath of hostilities, particularly the First World War. In this process, at the instigation of the ICRC, use of chemical weapons in warfare was outlawed by the Geneva Protocol of 1925 (Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, 1925, entered into force in 1928). In 1929, one year after the Geneva Protocol entered into force, another Convention was adopted for the protection and treatment of Prisoners of War (Convention relative to the Treatment of Prisoners of War, Geneva July 27, 1929, into force 19 June 1931).

THE 1949 GENEVA BREAKTHROUGH: A RENOVATED APPROACH

The milestone breakthrough in the development of rules of armed conflict came immediately after the Second World War in 1949 with the adoption of the four Geneva Conventions that in reality revised the existing Conventions with the addition of a new, fourth treaty for the protection of civilians who found themselves under enemy control. Apart from the customary and treaty rules of humanitarian law, various other norms and standards complement the protection and safeguards accorded to persons falling victims of situations of armed conflict – international or non-international. Besides, many national laws of states concerned often provide additional protections and limits on the conduct of parties engaged in hostilities.

But even with the specific breakthrough of Geneva agreements, and generally the post WWII worldwide consensus on the maintenance of international peace and security, prohibition (or at least restrictions) on the use of force, and the promotion and protection of human dignity and worth as reflected in the 1945 UN Charter, states members of the international community still could not reach an agreement on the application of humanitarian norms and standards in NIAC. However, one particular achievement at this stage was the incorporation of Article 3, sometimes referred to as a treaty in miniature, common to all the four Geneva Conventions enumerating certain minimum standards of protection in armed conflicts not of an international character. The collective effect of common Article 3 along with the established customary rules of IHL guarantee humane treatment to all persons in enemy hands without any adverse distinction.

As noted by the ICRC: "Common Article 3, which is said to reflect elementary considerations of humanity, has since been supplemented by a number of other treaty provisions, and by customary humanitarian law governing the conduct of parties to non-international armed conflicts".[x] The most significant among these is the 1977 Additional Protocol II to the Geneva Convention of 1949[xi] that further develops and supplements common Article 3. It is to be noted that Additional Protocol II applies only when one of the parties to the armed conflict is the government armed force of the state concerned. Hence, contrary to common Article 3, Additional Protocol II does not apply to armed conflicts taking place only between non-State rival groups.[xii]

The four Geneva Conventions, termed by ICRC as "one of humanity's most important accomplishments of the last century,"[xiii] are ratified by all recognised state members of the international community (196 states to-date). The Additional Protocol II, which is also broadly ratified by a significant majority of states (169 countries as of July 2020), is also considered to be a part of customary international law. As affirmed by the International Court of Justice in 1986, the provisions of common Article 3 reflect customary international law and represent a minimum standard from which the parties to any type of armed conflict must not depart.[xiv] Accordingly, as regards any gross violation of the rules of IHL including those in NIACs – also known as war crimes – States must criminally prosecute persons suspected of committing such

violations.[xv] In an appropriate case, alleged war criminals may also be referred to the International Criminal Court.

IHL IN NIAC: THE ASIA-PACIFIC PERSPECTIVE

The Asia-Pacific region occupies a complex landscape of the globe in terms of recognition and application of IHL- particularly in the present context of non-international armed conflicts. The underlying norms and ideals of IHL are deeply rooted in the cultural and geopolitical history of the Asia-Pacific region. The following two sections of the article look into the roles and contributions of the legal and philosophical approaches emerging from the Asia Pacific in the development of the modern norms of IHL and the doctrinal notions of universality applicable to international humanitarian law, the non-international armed conflicts in particular.

In a changing geo-political scenario of the world where a blend of multipolarity replaces the increasingly fading away bipolar power blocs leading to a complex, irresolute global governance, the role of the Asia-Pacific region in the development of IHL in both international inasmuch as in non-international armed conflicts continues to gain importance. This is particularly evident from the emerging dimensions of US-China relations, or the nature of transborder as well as internal armed conflicts demonstrating a transformation in the outlook and involvement of the nations in the region in accepting and applying IHL norms and standards.

Historically, only reinforced in the recent decades, the region bears the burden of balancing issues of national security and interests as against protection of victims of armed conflicts, influx of refugees, internally displaced persons and irregular migrants and asylum-seekers. Asia-Pacific nations host a large majority of the word's nearly 80 million displaced people who have been forced to flee their homes amidst conflict situations, and the 26 million refugees- Afghanistan, Syria and Myanmar being among the five top countries sourcing the highest numbers in the recent global refugee index (the other two being South Sudan and Venezuela).[xvi] From Turkey in the Western Asia to Jordan and Iran in the Middle East to Pakistan and Bangladesh in the South- countries in the region have been shouldering the responsibility of an increasing influx of refugees and conflict-torn population from neighbouring nations.

The unique geopolitical features of the Asia-Pacific region is distinctively marked by its cultural diversity, complex governance institutions, and an increasing trend of multiplexed polarisation - a legacy of postcolonial socio-economic and political frameworks that continued to influence the region's states of collective peace, security and transborder interactions. As noted by Suzannah Linton on the 70th anniversary of the adoption of the Geneva Conventions, 1949: "The region's plurality leads to a complex and diverse landscape where there is no single 'Asia-Pacific perspective on IHL' but there are instead many approaches and trajectories".[xvii] As it is evident from several recent works in this area, Linton, Kittichaisaree and Adachi amongst them (referenced below), these approaches are clarified by the contrasting demonstration of divergence between norm internationalization of IHL vis-a-vi internalization and compliance with such standards and normative framework. However, despite this varying interpretation of the distinctively unique but parallel development, IHL in the region- especially in terms of its application in NIAC- has undeniably printed its footsteps in what may be termed as the 'Asian way',[xviii] or an 'Asia-Pacific way', of perceiving this complex and often controversial international legal regime.[xix]

Generally speaking, as noted, there is an overarching paradox with regard to the concerns and development of IHL and its application to NIAC in the region. On the one hand, counties in the region share a common positive outlook towards norms and standard of IHL perceiving the fundamental notions of human rights in close relation to the application of IHL rules in armed conflicts. On the other hand, the region has, in the postcolonial struggle for recognition, reorganization and survival, witnessed large numbers of armed conflicts that in many instances demonstrated flagrant disregard to humanitarian norms and standards. Being the first Asian country to participate in the International Conference of the Red Cross and Red Crescent, Japan's adherence to IHL's early normative development as well as its role as a strong proponent of IHL norms and standards (including the Additional Protocols) as against its much-criticised treatment of Prisoners of War (PoWs) during the WWII depicts this mysterious dichotomy embedded in the thoughts and practices in armed conflicts by many Asia-Pacific nations.

While the modern development of IHL is marked by a broadened perception of its early notions of rules of regulated warfare and conduct, the dichotomous feature of the region represents a

unique blend of humanism that underpins the core bases of IHL. However, this picture is theoretically notional considering the plurality of adherence to IHL norms by member states of the Asia-Pacific- all being signatories of the Geneva Conventions- as we consider the divergence of application of these standards in a conflict situation or in reflecting the principles in the domestic legal frameworks of the member countries.

Along with its historical, political, religious, cultural, economic and other diversities, various research on IHL in the Asia-Pacific also pin-point to the internal divisions of the region that has been a major factor in failing to establish an integrated organisational approach for the Asia-Pacific countries. This is another ground for a disintegrated approach to IHL among the nations of the region. As noted by Suzannah Linton: 'IHL in the Asia-Pacific region is very much contextualized, depending on factors such as country, local and international politics, culture, religion, time frame, political doctrine, actors and situation of violence'.[xx]

As noted, there is a vivid historical legacy of humanitarianism deep-rooted in the Asia-Pacific culture and socio-political mind-set. This has been reflected in the participation of several nations from the outset of the development of IHL, starting with the 1899 Hague Convention II on the Laws and Customs of War on Land to the recent 2017 Treaty on the Prohibition of Nuclear Weapons (TPNW).[xxi] A clear illustration of this natural inclination to humanitarianism in armed conflicts may be found from Yeophantong's proposition with regard to the historically bonded cultural and political legacy in the Southeast Asian region, particularly in the Indian Sub-Continent, as he points out three distinct but interconnected influences in the development of the underlying principles of IHL, namely: communitarianism (shared social and community values and obligations); religion and faith-orientation; and political ideologies regarding "just war".[xxii] Hinduism, Sikhism, Buddhism and Islam- all the four dominating religions of the region demonstrated strong obligations and ethical standards in warfare and treatment of warriors and non-combatants.[xxiii] Across the region, the overlapping influence of 'morality tales' deep-rooted in the dominant religious norms and customs shaped both the political thoughts and military conducts reflecting philosophical ideologies of justice, humanitarianism and good faith principles.[xxiv]

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Principles of humane treatment in warfare are also found in the ancient China, even almost three thousand years back, that resemble many rules and practices relating to the wounded and sick, or the treatment of PoWs.[xxv] Modern writers on IHL, Yeophantong included amongst them, thus tend to claim that the spirits and ideological roots of regulated warfare and its underlying humanitarianism demonstrated in the politico-cultural heritage of the region predate even the positivist legal framework of IHL that developed in the 19th century Europe.[xxvi]

Again, in so far as the development of normative framework relating to non-international armed conflict is concerned, following the negotiating trajectory leading to the adoption of the Additional Protocol I, countries from the Asia Pacific played a vital role. This is particularly with regard to the incorporation of protections extended to individuals and groups involved in armed conflicts in the exercise of the right to self-determination and national liberation movements. Similarly, Kittichaisaree noted the proactive roles played by North Korea, North Vietnam and Pakistan in this regard.[xxvii] By contrast, in terms of ratifying the Additional Protocol, interestingly, a considerable number of countries from the region either didn't become party to the Protocol, or annexed reservations, declarations, understanding or interpretative clauses to their accession.[xxviii]

In terms of developing a common and coherent platform for the development and application of IHL in armed conflicts, whether international, non-international or (debatably) of a blended nature, ASEAN in the South-East Asia promises great potentials for a sub-regional (and eventually regional) enforcement framework in the Asia-Pacific. The same applies to the role of the ASEAN Regional Forum, or the ASEAN Intergovernmental Commission on Human Rights, that has been seen by many as an embryonic prospect for establishing a common consensus on the basic tenets of IHL and NIAC.[xxix] These institutions stand as the platforms for building trust and collaboration serving as important entry points for promoting common understanding and manifestoes on security, cooperation, human rights and humanitarian protection in the region.

Finally, with its historic background of external invasions and occupations, colonial interventionism, post-colonial struggles for political and economic rebuilding, the Asia-Pacific region is a traditional stronghold of the fundamental principles of independence, national

sovereignty, territorial integrity and non-intervention. These doctrinal notions often come in conflict with the underlying principles of IHL. Strategies to address such doctrinal conflicts thus necessitate adopting individual national experience, security and collective interest concerns and collaborative platforms building upon the common political and cultural heritage that exist in the region.

ASIA-PACIFIC EXPERIENCE OF THE PRINCIPLE OF UNIVERSALITY, IHL AND NIAC

The underlying principle of universal jurisdiction- that States can prosecute perpetrators of crimes against humanity and other international crimes regardless of their nationality or the territory where the crime was committed- is gaining increasing acceptance and recognition in the Asia-Pacific region. Universal jurisdiction has been increasingly accepted by the region as a significant tool against impunity for gross violence and atrocities committed by state actors- from Syria to Iraq, Nepal, Myanmar, Kashmir, or the decades long unresolved Israel-Palestine crises.[xxx]

An early example of the application of universality principle in the Asia-Pacific is the trial of Japanese army in what is known as the 'Comfort Women Case' in December 2000 (Final Judgement in December 2001), an 'allegedly state-sanctioned' systematic sexual slavery of thousands of women and girls in the occupied territories.[xxxi] Even though the stated Tribunal is not an international tribunal like the International Criminal Tribunals for Rwanda- ICTR and the former Yugoslavia-ICTY (created under a UN Security Council mandate), or the ICC (created under the multilateral Rome Treaty), the Tribunal's authority was based on an overarching moral ground unique to the Asia-Pacific region (discussed above). This shared philosophy is premised on the understanding that "'law is an instrument of civil society' that does not belong exclusively to governments whether acting alone or in conjunction with the states. Accordingly, where states fail to exercise their obligations to ensure justice, civil society can and should step in."[xxxii] The stated Tribunal found all ten accused, then-Emperor Hirohito and nine high-ranking military commanders and Ministers (all deceased at the time the judgement was issued), guilty of the alleged crimes.

Later, in 2009, the International Crimes Tribunal (ICT of Bangladesh) - a domestic war crimes tribunal- was set up to investigate and prosecute suspects for the genocide committed in 1971 in Bangladesh by the Pakistan Army and their local collaborators. The ICT-Bangladesh, along with other similar international Tribunals, Commission, Special Courts, Panels and Chambers,[xxxiii] reflected the growing global consensus to establish a permanent international criminal court based on a set of common standards and principles to try individuals responsible for committing international crimes, crimes against humanity and war crimes. The ICT-Bangladesh indicted eleven persons on charges ranging from abduction to arson, rape, mass murder, war crimes, crimes against humanity and genocide.[xxxiv]

Another development in the expansion and recognition of the principle of universal jurisdiction is the 2019 cases and investigation against the Myanmar authorities for atrocities committed against its Rohingya population in the Northern Rakhine State of Arakan. The Myanmar instances represent yet another example of domestic and extraterritorial sanctions for gross violation of human rights and humanitarian norms that once again relied on the new, still expanding legal philosophy of 'universality' in international criminal justice. Three simultaneous proceedings begun in this regard: one at a domestic court in Argentina brought by the Burmese Rohingya Organisation UK; a case brought by The Gambia to the International Criminal Court (ICC) in The Hague for violation of the Genocide Convention; and an investigation regarding crimes against humanity against the Rohingya people initiated by the International Court of Justice (ICJ). Collectively, these proceedings and investigation brought the Myanmar military and civilian leadership under universal jurisdiction for criminal responsibilities, including Commander-in-Chief Senior General Min Aung Hlaing; State Counsellor Aung San Suu Kyi; former Presidents Htin Kyaw and Thein Sein; and numerous other political, business and religious leaders who took part in fuelling hatred against the Rohingyas.[xxxv]

Globally, as noted by the Trial International in 2019, 'the use of universal jurisdiction has grown exponentially' demonstrated in an unprecedented number of cases based on the universality principle.[xxxvi] The Asia-Pacific countries are also occupying a significant place in this process. In terms of application and jurisdictional confusions about universal criminal

liabilities, the long-held debate of 'whether' with regard to this doctrine has now taken a paradigm shift to questions of 'how'.

However, despite the positive and progressive development emerging from the Asia-Pacific with regard to IHL, NIAC and the universality principle, a multiplicity of unresolved questions still exist around the issue of its application, both in the region inasmuch as globally- and an illustration of these confusions is evident from the ICC investigation on the conduct of British troops in Iraq;[xxxvii] the findings from the Brereton Inquiry into crimes alleged to have been committed by Australian special forces operating in Afghanistan between 2005 and 2016;[xxxviii] or the legality and consequences of India's non-compliance over the last few years with the MoU signed with the ICRC to be allowed to have access to detained persons in connection with the prevailing conflict situation in Jammu and Kashmir.[xxxix]

Questions and confusions have been also evident from the failure of the international community for nearly a decade to take any effective measure for bombing civilians, using chemical weapons or inflicting torture- the atrocities in Syria committed by the Government forces (and the role of Russia in these events) that shocked the conscience of the people and states in the region along with the rest of the global community. However, it may be noted that on 23 April 2020, the first criminal trial worldwide on state torture in Syria started in Germany.[xl]

CONCLUSION

Even before the Geneva Conventions, the underlying principle of Common Article 3 was already incorporated in what is popularly referred to as the 'Marten's Clause', a provision that first appeared in the preamble to the 1899 Hague Convention (II) with respect to the laws and customs of war on land. The Marten's Clause, frequently cited as "one of the quintessential demonstrations of the humanitarian character of the law of armed conflict",[xli] states that '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.' (Preamble to the 1899 Convention). In other words, the principle is founded on the basic notion that in cases not

covered by international humanitarian law conventions, neither combatants nor civilians find themselves completely deprived of protection. However, despite continued prevalence of differing opinions and approaches in the interpretation and application of the clause in the academic and jurisprudential jargons of international law,[xlii] the doctrinal norms embedded in the Marten's Clause still served as the precursor to the modern-day interpretation of universality in the application of human rights and humanitarian laws within the framework of international criminal justice.

Finally, as noted above, while the Geneva Conventions cover humanitarian norms and standards applicable in international armed conflicts, comparatively, the legal framework for NIACs still remains sparse with ambiguities and frequent disagreements in the interpretation of the protective provisions applicable to NIACs. These global trends and challenges with regard to IHL rules and standards largely apply to the Asia-Pacific as well. As noted in the context of IHL and NIAC in the region's unique contexts, it is evident that a regional framework is inevitable for provide for a mechanism that would facilitate humanitarian access to victims of armed conflict, NIAC in particular. Such a mechanism is also important for institutionalizing IHL in its Asia-Pacific regional perspectives, strategies and approaches.

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