

# Upsides and Downsides of the Expansion of NIAC Law: Is the Equivalence Between IHL of IAC and NIAC a Desirable Outcome?

Outline of a presentation by Marco Sassòli, director of the Geneva Academy of International Humanitarian law and Human Rights and professor of international law at the University of Geneva, at the 12th Seminar for Legal Advisors of the Armed Forces, Geneva, 19 June 2019

# Overview

- IHL of IACs and IHL of NIACs
  - Why are they different?
  - Contemporary tendency to bring them closer to each other
- Advantages of a convergence
- The dark sides of a good idea

# Why are IHL of IACs and of NIACs different

- IHL has developed as IHL of IACs
- State sovereignty
- No State accepts combatant status in NIACs
- Conceptual impossibility to define occupied territories in NIACs
- Most non-State armed groups would be unable to respect most detailed rules of IHL of IACs

ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Prosecutor v. Tadić, 2 October 1995, para. 97.

“[T]he distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals [...], as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted ‘only’ within the territory of a sovereign State? If international law [...] must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.”

# Factors contributing to the convergence of IHL of IACs and of NIACs

- The prevalence of NIACs
- ICTY jurisprudence
- The ICC Statute
- Some domestic war crime legislation is the same
- The ICRC Customary IHL Study
- Recent treaty law
- States want to take advantage of «rights» conferred by IHL of IACs

# Advantages of a convergence between IHL of IACs and IHL of NIACs

- Same humanitarian needs
- IHL of IACs provides more detailed rules
- IHL of NIACs has inherent gaps
- Difficulties to distinguish IACs and NIACs
  - Conceptual difficulties
  - Political difficulties
  - The law applicable to mixed conflicts

# The dark sides of a good idea

- IHL of NIACs is better adapted to the realities of NIACs
- Realism for non-State armed groups
- Crowding out of Human Rights Law
- «Authorization» to kill and detain in NIACs