



CIHOL

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# Jurisprudence of the ICC and the Development of IHL



## CIHOL

- 2019, framework for cooperation with the Czech Army
- practice: [Camp Peira](#)
- theory – teaching and research
  - conference on the [use of force](#)
  - conference on the [ICC and IHL](#)



## ICC and IHL

- two presumptions:
  - a) IHL forms part of ICL and the ICL of war crimes in turn forms part of IHL
  - b) system of ICL - interdependency of substance and procedure



## ICC and IHL

### - three areas:

law-finding, methodological part: identification of applicable rules in proceedings before the ICC, importance of Art 21 of the Rome Statute, analysis of relationship between IHL and ICL (law of the ICC) at the level of sources of international law

substantive ICL: contextual element (definition of armed conflict), discrete categories of war crimes, forms of responsibility, and circumstances precluding wrongfulness

procedural ICL: jurisdiction, immunity, complementarity, cooperation, trial (law of evidence)



## Ad procedure – immunity – ICC (to be published)

### *Bashir*, ACH judgment, 2019

- § 113: there is neither State practice nor opinio juris that would support the existence of Head of State immunity under customary international law vis-à-vis an international court
- § 115: international courts act on behalf of the international community as a whole. Accordingly, the principle *parem non habet imperium*, which is based on the sovereign equality of States finds no application in relation to an international court such as the International Criminal Court



# Ad methodology and substance

## T. Hoffmann:

tests the assumption that exhaustive definitions of war crimes in Art 8 of the Rome Statute and the emphasis put of the principle of legality can eventually freeze the further evolution and development of customary IHL by the ICC

existing practice of the ICC already reveals that the ICC is free to develop new judicial interpretations that significantly expand the scope of application of war crimes



## Ad methodology and substance

### D. Loizou:

the principle of *nullum crimen sine lege* does not bar progressive development of the law through interpretation

### G. Waschefort:

argues that both Art 77 AP I and Art 4 AP II affords special protection to children such that they are protected against sexual violence, this protection continues to apply after a child is enlisted, conscripted or used in hostilities, and is not subject to any additional status requirements



# Ad methodology and substance

## M. Bradley:

reflects ongoing debate whether definition of NIAC under Art 8(2)(f) of the Rome Statute introducing additional notion of “protracted armed conflict” creates a new category of NIAC

mentions that the debate is inconclusive because scholars do present strong opinions both in favor or against the discrete character of Art 8(2)(f)

ICC’s practice produces only mixed results and therefore does not contribute to satisfactory conclusion of this debate





# Ad methodology and substance

## S. Masol:

analysis of Art 21(3) RS – human rights clause

confirms its interpretative character and super-legality

## R. Provost:

interpretation of the crime under 8(2)(c)(iv) RS – once the wording of this crime has its origin in IHL (CA 3), its meaning (the requirement of regularly constituted court) must be pre-dominantly derived from IHL, IHRL and case law of IHR courts have only secondary importance (requirement that a State court is established by law) and if it is used (at all) it must be adapted to different environment, reality of NSAG