INTRODUCTION

INTERNATIONAL HUMANITARIAN LAW AND
INTERNATIONAL HUMAN RIGHTS LAW:
EXPLORING PARALLEL APPLICATION

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The parallel applicability of international humanitarian law (IHL) and international human rights law (IHR law) has become in recent years part of the legal orthodoxy in international law. The International Court of Justice (ICJ) has affirmed co-application in three separate instances; additionally a number of human rights courts have asserted jurisdiction over armed conflicts, and while state practice on the matter is still not uniform, co-application appears to be the dominant position in the legal literature.

However, the full implications of the co-application of IHL and IHR law are less than clear. Although the ICJ has recognized the *lex specialis* nature of IHL in armed conflicts, complex questions pertaining to the applicability of the *lex specialis* rule

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remain. For example, should a IHL norm, such as the norm that permits shooting enemy combatants—even when they do not present an immediate risk to the adversary military force—be viewed as lex specialis that overrides IHR law which allows use of lethal force only in face of an imminent danger or as a dispositive “negative arrangement” that ought to be overridden by mandatory IHR requirements? Should IHR norms apply to matters only broadly or sparsely regulated by IHL (e.g., procedures for reviewing POW status)? Can IHR enforcement mechanisms, such as the European Court of Human Rights, apply their powers of judicial or quasi-judicial oversight in order to uphold specific IHL norms?

In addition, difficult questions arise as to the territorial and material scope of co-application: The extraterritorial reach of IHR treaties is controversial and—as demonstrated by the Court of Appeals decision in Al Skeini⁵—may deviate from the traditional scope of application of IHL, leading to more limited scope for parallel application of the two bodies of law. In addition, some areas of law traditionally unaffected by IHL—most notably jus ad bellum—may be and increasingly are affected by IHR law analysis. This development challenges, in turn, some of the fundamental assumptions on which IHL has traditionally rested.

The conference on International Humanitarian Law and International Human Rights Law: Exploring Parallel Application, which took place in Jerusalem on May 21-22, 2006, sought to examine the problems and challenges generated by the increased acceptance of the doctrine of parallel application. The conference co-organized by the Bruce W. Wayne Chair of International Law and the Minerva Center for Human Rights—both located at the Law Faculty of the Hebrew University, and the International Committee of the Red Cross (Israel, the Occupied and Autonomous Territories Delegation, based in Tel Aviv), enjoyed the support of the Konrad Adenauer Foundation and was attended by an impressive array of legal experts in the field, coming from different countries, and offering a gamut of perspectives. In this Israel Law Review Symposium the written contributions of most participants in the conference are presented.

Cordula Droege introduces the framework for discussing parallel application and surveys the main legal developments in the field that increasingly point toward co-

application of the two branches of law. Nancie Prud'homme then exposes the limits of the *lex specialis* rule of harmonization between IHL and IHR law. She argues for a “pragmatic” model of normative harmonization; one that identifies a variety of criteria for applying IHL and IHR law and refrains from ascribing a *priori* precedence to one particular branch of law.

John Cerone discusses the operation of the parallel application doctrine in situations qualifying as non-international armed conflicts. According to Cerone, co-application is feasible both in internal armed conflicts and cross-border conflicts involving a state and a non-state actor, although he concedes that the scope of extraterritorial IHR obligations is still unclear. This last point is developed further by Michael J. Dennis who argues that IHR treaties were never designed to be extraterritorial in nature. On the other hand, Ralph Wilde and Dominic McGoldrick suggest that case law—especially in the UK—is leaning towards extraterritorial application (at least with regard to “negative” IHR obligations that entail a duty not to harm protected individuals).

Fionnuala Ni-Aolain explains the utility of parallel application as a gap-filler designed to ensure the application of minimal standards of protection under all circumstances—including the war on terror—that has been beset by legal gaps and “black holes.” William A. Schabas raises the possibility that parallel application challenges the traditional dichotomy between *jus ad bellum* and *jus in bello*, e.g., if IHR enforcement procedures are utilized to challenge the very decision to use force in a conflict. René Provost identifies another potential problem of parallel application: the possible introduction into IHL of “cultural relativity” problems that have long plagued IHR law discourse. The symposium concludes with an overview of the different contributions presented by the Conference’s rapporteur, Noam Lubell. In his contribution, Lubell offers different models for co-application ranging from integration of IHL and IHR law to complementarity.

While the Symposium does not aspire to exhaust the topic, we hope and expect that it makes a significant contribution to the growing literature on parallel application of IHL and IHR law. The papers presented at the Symposium and published herein generally provide strong support for the co-application theory, while revealing the difficulties involved in co-applying these two bodies of law. The papers also highlight legal controversies (e.g., extraterritorial application of IHR) and expose some interesting side effects of co-application that have not been completely thought through by co-application supporters (e.g., application to *jus ad bellum*, cultural relativity).
locating areas of agreement and disagreement the Symposium might help, we hope to focus future work on the topic and provide academics with a convenient starting point for further research efforts. We believe such future work is needed so that we can move from the present stage of research—the consolidation of the parallel application doctrine—to the next stage, implementation of the doctrine in specific contexts.