

REVIEW

International Humanitarian Law in the Universal Periodic Review of the UN Human Rights Council: An Empirical Survey

By Lijiang Zhu

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Dr. Zhu's article purports to address the controversy over the inclusion of International Humanitarian Law ("IHL") as a basis of review in the Human Rights Council ("HRC")'s Universal Periodic Review ("UPR") mechanism.¹ Concerning the controversy, the author raises two questions: First, whether IHL is now established as the basis of review despite strong oppositions in that the HRC lacks both the mandate and expertise to address IHL. Second, if the first is true what obligations of IHL are 'applicable' when a State is under review.

The author conducts a detailed and extensive literature research of the HRC documents throughout, devoting a substantial part of its pages to explaining how IHL was introduced to the UPR mechanism in spite of strong opposition in both Working Group and Council President stage. *E.g.*, after a shrill ping pong debate on the issue of whether to include IHL in the UPR mechanism, the HRC finally adopted its Institution-building package that enumerated the basis of review as the UN Charter, the Universal Declaration of Human Rights, Human rights instruments to which a State is a party, and Voluntary pledges and commitments made by States. The package then adds in a separate subsection "in addition to the above and given

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the complementary and mutually interrelated nature of international human rights law and international humanitarian law the review shall take into account applicable international humanitarian law.”² Furthermore, States like the UK, Norway and Australia that initially opposed the inclusion of IHL not only stopped opposing, but are actively making recommendations to other States under review on how to comply with or enhance IHL, as well.

The author explains that conducting an empirical survey on actual State practices concerning IHL in the review cycles is relevant to finding answers to his questions as they constitute ‘subsequent practices’ which, according to the Advisory Opinion of International Court of Justice (“ICJ”) on Kosovo “may provide guidance” on interpreting the UN Security Council resolutions. The ICJ in that opinion referred to Article 31(3)(b)³ of the 1969 Vienna Convention on the Law of Treaties (“VCLT”)⁴ that requires to take “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” into account when interpreting a treaty. However, the author seems to have overlooked that unlike most of the Security Council resolutions, the HRC resolutions are not legally binding.⁵ Therefore, whereas the Security Council resolutions in general are equivalent to a treaty by definition (i.e. binding instruments concluded between international entities)⁶ under international law, the HRC resolutions are not.

Moreover, the author’s conclusions that IHL has been well-established as the basis of the review through subsequent practice based on changes in the position of States and that more thorough and professional review of IHL is expected in the future seem to fall short of answering the questions he raised in the beginning. Well, he may have succeeded if his intention was to simply demonstrate that States are now peer-reviewing other States during the UPR cycles in accordance with the relevant provision that requires the consideration of ‘applicable’ IHL as the basis of review. His article seems to be more of a detailed observation of current State practices in the UPR rather than a well-founded argument. It would have been more compelling if his empirical survey gave weight on explaining what it means to “take into account” of ‘applicable’ IHL. The controversy as to whether IHL is indeed

² HRC Res, 5/1, June 18, 2007, at 4-5.

³ The author refers to Article 31(1) & (3) of VCLT in his paper, but the exact subsection mentioning ‘subsequent practice’ is Article 31(3)(b).

⁴ Signed on May 23, 1969, 1155 U.N.T.S. 331.

⁵ The Human Rights Council: A Practical Guide 18 (Permanent Mission of Switzerland to the United Nations Office ed., 2014).

⁶ See Definition of key terms used in the UN Treaty Collection, available at https://treaties.un.org/Pages/overview.aspx?path=overview/definition/page1_en.xml#treaties (last visited on Nov. 5, 2015).