The Human Rights Council and the Convergence of Humanitarian Law and Human Rights Law

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Dr. Daphné Richemond-Barak

Abstract

This Article examines and challenges the assumption that the Human Rights Council can and ought to address violations of international humanitarian law. Though envisaged as the main guardian of human rights within the United Nations system, the Human Rights Council views its mandate as encompassing both human rights and international humanitarian law. This extension of its mandate to humanitarian law is not entirely surprising, given the close relationship between IHL and human rights law. Yet, a comparison with other human rights bodies shows that the Council has gone further and with less caution than any other human right body called upon to interpret or apply IHL. I argue that the Human Rights Council has neither the expertise nor the mandate to address IHL matters – and that the experience of other human rights bodies demonstrates that such a level of encroachment upon IHL is not inevitable. I address the implications of having the Human Rights Council develop, interpret and apply IHL, and advocate that limits be placed on the convergence of human rights law and humanitarian law.
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Introduction

In the final stages of the Sri Lankan Civil War in 2009, Human Rights Watch publicly criticized the Human Rights Council ("the Council") for failing “to address serious allegations of violations of human rights and humanitarian law by government forces, focusing only on the abuses committed by the LTTE".¹ Underlying this criticism was the assumption that the Council can and ought to address violations of international humanitarian law (IHL) – in addition to violations of human rights.

Viewed within the context of the Council’s creation in 2006, this criticism comes as somewhat of a surprise. The Human Rights Council was founded as a replacement body to the much-discredited UN Commission on Human Rights, which had become, in the Secretary General’s words, selective and politicized.² As the first UN body to have undergone a full-fledged reform, the newly created Human Rights Council was granted a new mandate, a new membership, and renewed legitimacy to address issues of human rights. It was well known at the time of the Council’s creation that its predecessor, the Commission on Human Rights, had addressed issues of international humanitarian law. And yet, no mention of either IHL or armed conflict appears in UN General Assembly resolution 60/251 establishing the new Council.

² See, for example, Secretary General’s Address to the Commission on Human Rights, Geneva (April 7, 2005).
The absence of any reference to IHL in the resolution establishing the Council – coupled with the widely held assumption that the Council should address such matters (as in the case of Sri Lanka) – raises important questions about the Council’s mandate, the line separating human rights and IHL, and the role of human rights bodies in the context of armed conflict.

Both the treatment of IHL by human rights bodies and the flaws of the Human Rights Council have been debated at some length. This paper’s contribution lies in its analysis of the Human Rights Council’s involvement in IHL as a manifestation of the convergence of human rights law and IHL. Moreover, this paper is the first academic piece which questions the mandate and expertise of the Council to deal with IHL while building on state practice.

The paper begins by examining the circumstances of the Human Rights Council's creation (Part I) and its recent forays into international humanitarian law (Part II). I then compare the treatment of IHL by the Council and by other human rights bodies. Unlike the Human Rights Council, other human rights bodies facing similar challenges have not encroached so directly on the territory of IHL: they have generally been reluctant to address humanitarian law head-on, and have felt compelled to justify any interpretation or application of IHL (Part III). While I am mindful of the growing convergence of IHL and human rights law, I argue in Part IV that the Human Rights Council has neither the mandate nor the expertise necessary to act as enforcer of IHL. Finally, I envisage the
consequences of the blurring of the IHL/human rights divide by the Human Rights Council (Part V).

VI. From the Commission on Human Rights to the Human Rights Council

The Commission on Human Rights was established on 16 February, 1946 by Resolution E/20 at the first meeting of the UN’s Economic and Social Council (ECOSOC). It was created pursuant to Article 68 of the U.N Charter, which provides that “[t]he Economic and Social Council shall set up the commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions”. Under the terms of Resolution E/20, the Commission on Human Rights was to submit proposals, recommendations and reports to ECOSOC regarding inter alia the status of women, freedom of information, the protection of minorities, and the prevention of discrimination on grounds of race, sex, language or religion.3 The Commission’s mandate was thus decidedly focused on states’ compliance with human rights norms.

In its lifespan, the Commission was continuously discredited. It was accused of being bureaucratic, excessively political and ineffectual, especially due to the participation of states with problematic human rights records who exploited the organization as a shield against scrutiny and condemnation. The 2005 In Larger Freedom report of the UN Secretary General condemned the Commission’s lack of credibility and professionalism:

3 ECOSOC Res. 5(I), at 5, U.N. Doc E/20 (February 16, 1946).
“In particular States have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or criticize others. As a result, a credibility deficit has developed, which casts a shadow on the reputation of the United Nations system as a whole.”

The Commission was also criticized for its partial and subjective treatment of human rights issues and for resorting to double standards – focusing on certain states while ignoring other, graver, violations of human rights in other states:

“The Commission's ability to perform its work has been overtaken by new needs and undermined by the politicization of its sessions and the selectivity of its work.”

Coming from the United Nations Secretary-General, such severe accusations carried unprecedented weight. They reflected a broad consensus among developed countries – and many of the UN’s strongest financial backers – that the Commission has become a moral and political liability. The dismantlement of the Commission on Human Rights had become necessary for the sake of the UN system as a whole, and, of course, for the sake of human rights.

Throughout this process, the composition and competence of a replacement body were discussed. The Secretary's General High Level Panel on Threats, Challenges and

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Change (known as the High Level Panel Report) noted that the new Human Rights Council would deal with human rights and economic issues – but made no mention of IHL.\(^6\) And Addendum 1 to the Secretary General’s Report In Larger Freedom, which dealt specifically with the reform of the Commission on Human Rights and devoted an entire section to the mandate of the new Council, did not even raise the possibility that IHL should be part of its mandate.\(^7\)

Similarly, the summary of the open-ended informal consultations held in Geneva ahead of the reform of the Commission on Human Rights – the main document recording discussions that took place prior to the creation of the Council – provides extensive information as to the role of the new human rights body.\(^8\) While it describes views on the Council’s function, agenda, status, and composition – it does not refer at any time to international humanitarian law. The possibility of including IHL as part of the new body’s mandate was raised only once by the Organization of Islamic States, which stressed that the new body should “deal with serious human rights violations and situations involving non-compliance with international humanitarian law. Its mandate should be to oversee the implementation of international human rights and international

\(^7\) See supra note 5.
\(^8\) U.N. Doc. A/59/847-E/2005/73, Summary of the open-ended informal consultations held by the Commission on Human Rights pursuant to Economic and Social Council decision 2005/217 (June 21, 2005), para. 68 (document summarizing elements of the reform of the Commission on Human Rights following a day of informal consultations in Geneva with member states, observer states, UN specialized agencies, intergovernmental organizations, national human rights institutions and NGOs).
humanitarian law.” This suggestion, however, failed to trigger any discussion on the matter.

The absence of any reference to international humanitarian law in the discussions leading up to the creation of the Human Rights Council is all the more surprising considering the practice of its predecessor. The past practice of the Commission on Human Rights in matters of IHL was not mentioned – let alone considered a point of reference – when delineating the mandate of the new body.

Naturally, therefore, when the General Assembly voted in favor of the creation of the Human Rights Council in March 2006, the draft resolution did not mention IHL or any related concept. While the expression “human rights” appears over 30 times in the resolution, IHL (or war, or armed conflict) is not mentioned even once. According to resolution 60/251,

“The Council shall be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms…

The Council should address situations of violations of human rights…

The Council shall make recommendations to the General Assembly for the further development of international law in the field of human rights…”

9 Id., para. 68.
10 See infra notes 85, 86, 87, and 88.
12 The resolution was adopted by 170 member states against 4 (Israel, Marshall Islands, Palau, and United States), with 3 abstentions (Belarus, Iran, and Venezuela) (see U.N. Doc. A/60/L.48).
The Council shall undertake a universal periodic review… of the fulfillment by each State of its human rights obligations and commitments…

The Council shall contribute towards the prevention of human rights violations and respond promptly to human rights emergencies…”

As can be seen, the resolution is notably silent on matters of IHL, despite explicit and repeated reference to human rights law. I argue, therefore, that IHL is outside the Council’s mandate, and that the Council should tread carefully when considering such matters.

13 See, supra note 11 (emphases added). In order to restore the body's credibility and prestige, the Council was established as a subsidiary of the General Assembly – not as a subsidiary of ECOSOC as its predecessor. In terms of membership, initially the Council was conceived as a more selective body, whose members would not include serious human rights violators. Despite concerted efforts, however, to set forth reasonable membership criteria, the Council ended up having almost as many members as the old Commission (47 for the Council instead of 53 for the Commission) (on the difficulty in establishing membership criteria, see Lawrence Moss, Will the Human Rights Council Have Better Membership than the Commission on Human Rights?, 13 HUM. RTS. BRIEF 5 (2006); and Philip Alston, Promoting the Accountability of Members of the New UN Human Rights Council, 15 J. TRANS L AND POLICY 49 (2005)). Among the new features designed to make the Council more efficient than its predecessor in ensuring respect for human rights, a new mechanism known as "universal periodic review" requires all UN member states (i.e. not just state members of the Council) to submit reports every four years on actions that have been undertaken to improve respect for human rights. The universal periodic review exists in parallel to the special procedures, which already existed under the Commission, and allows the Human Rights Council to address country-specific situations or thematic issues. For each situation or issue, an independent expert (known as rapporteur) or a specialized working group is designated. "Special procedures" usually entail monitoring, advising, and publishing a report on human rights situations in specific countries or territories, known as country mandates, or on major phenomena of human rights violations, known as thematic mandates (Office of the U.N High Commissioner for Human Rights: http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx). Country mandates have included the Cambodia and Sudan; thematic mandates have included arbitrary detention, education, drinking water and sanitation, and the right to food.
VII. **The Activity of the Human Rights Council**

In stark contrast with its constitutive document which is focused exclusively on matters of human rights, the practice of the Human Rights Council has focused heavily on matters of international humanitarian law. In this section, I address three specific instances in which the Council became involved in situations of armed conflict since its creation in 2006: the war pitting Israel against Hezbollah in the summer of 2006, the ongoing conflict unfolding in the Darfur region of Sudan, and Somalia. Illustrative in nature, these examples do not intend to provide an exhaustive picture of the IHL-related activity of the Council. Other examples abound – such as the Council's treatment of the situation in the Congo,\(^\text{14}\) in Sri Lanka (as mentioned in the introduction to this paper),\(^\text{15}\) or in Myanmar.\(^\text{16}\) The Council has also addressed alleged violations of IHL by Israel outside the context of the Second Lebanon War.\(^\text{17}\)

\(^{14}\) U.N. Doc. A/HRC/S-8/1, *Situation of human rights in the east of the Democratic Republic of the Congo* (December 1, 2008) (calling "upon all concerned parties to comply fully with their obligations under international law, including international humanitarian law, human rights law and refugee law, to ensure the protection of the civilian population and to facilitate the work of humanitarian agencies; Underlines that the Government has the primary responsibility to make every effort to strengthen the protection of the civilian population and to investigate and bring to justice perpetrators of violations of human rights and of international humanitarian law.”) (emphasis added).

\(^{15}\) U.N. Doc. A/HRC/S-11/1, *Special session resolution Assistance to Sri Lanka in the promotion and protection of human rights* (May 26, 2009) (the Human Rights Council reaffirmed "the obligations of States to respect human rights law and international humanitarian law while countering terrorism” (emphasis added)).

The Second Lebanon War provided the new Council with its first opportunity to opine on matters of international humanitarian law. In July 2006, the Human Rights Council decided to hold its first Special Session to discuss the situation then unfolding in Lebanon,

_Myanmar_ (March 18, 2011), para. 11 (“Strongly calls upon the Government of Myanmar to take urgent measures to put an end to the continuing grave violations of international human rights and humanitarian law”).

following the kidnapping and killing of Israeli soldiers.\textsuperscript{18} During this special session, the Human Rights Council adopted a resolution addressing the broad Israeli response to the Hezbollah attack.\textsuperscript{19} The subject-matter and very terms of the resolution were imbued with IHL. The Council reaffirmed “the applicability of the Geneva Conventions relative to the protection of civil persons in Time of War, of 12 August 1949, to the Occupied Palestinian territory, including East Jerusalem, and to other occupied Arab territories” and expressed “deep concern at the breaches by Israel, the occupying Power, of international humanitarian law and human rights law in the Occupied Palestinian Territory”.\textsuperscript{20} Importantly, the Council also established a Commission of Inquiry responsible for investigating alleged systematic targeting and killing of civilians by Israel in Lebanon, examining the type of weapons used by Israel and the conformity of such use with international law, and assessing the extent and deadly impact of Israeli attacks on human life, property, critical infrastructure and the environment.\textsuperscript{21} All of these questions related in large part (if not exclusively) to international humanitarian law.

\textsuperscript{18} A special session can be requested by two-thirds of the Council’s members (see A/RES/60/251, \textit{supra} note 11, para. 10). The holding of a special session in July 2006 was requested by the Representative of Tunisia to the United Nations Office at Geneva, on behalf of the Group of Arab States (see U.N. Doc. A/HRC/S-1/1, \textit{Human Rights Situation in the Occupied Palestinian Territory} (July 6, 2006)). The letter was accompanied by signatures in support of the above-mentioned request from the following 21 States members of the Council: Algeria; Azerbaijan; Bahrain; Bangladesh; Brazil; China; Cuba; Gabon; India; Indonesia; Jordan; Malaysia; Mali; Morocco; Pakistan; Russian Federation; Saudi Arabia; Senegal; South Africa; Sri Lanka; and Tunisia.

\textsuperscript{19} For more information on the first special session, see U.N. Doc. A/HRC/S1-3, \textit{Report of the First Special session of the Human Rights Council} (July 18, 2006).

\textsuperscript{20} A/HRC/S-1/1, \textit{supra} note 18.

The mandate of the Commission of Inquiry on Lebanon was discussed in greater detail at a second special session held by the Council in August 2006. The Commission declared that it would interpret such mandate “broadly” and “in the light of the principles and rules of international law, international humanitarian law and international human rights law, and having in mind the need for the respect for human life and dignity in the face of the complex challenges posed in the context of armed conflict.” In its report, the Commission characterized the conflict between Israel and Hezbollah as “an international armed conflict to which conventional and customary international humanitarian law and international human rights law are applicable.” Such determination was made based on the Commission’s finding that “[t]he fact that the Lebanese Armed Forces did not take an active part in them neither denies the character of the conflict as a legally cognizable international armed conflict, nor does it negate that Israel, Lebanon and Hezbollah were parties to it.”

Overall, the Human Rights Council conveyed a very clear message when it convened its first and second special sessions to discuss the conflict in Lebanon: the Council, like its predecessor, would continue to address situations of armed conflicts. While in line with the late Commission's practice, the Council's focus on IHL in its very first resolutions nonetheless stands in stark contrast to the lack of discussion of humanitarian law ahead of

23 Id., paras. 8 and 9.
24 Id., para. 9.
the creation of the Council and the absence of any reference to IHL in its foundation
document. Keeping in mind the short lapse of time between the adoption of that
document and the Council’s first special session (only a few months), the contrast is even
stronger.

Were one inclined to interpret the Council’s declarations on the Second Lebanon War as
inadvertent references to IHL, the Council’s subsequent treatment of Darfur suggests
otherwise. In late 2006, the Council noted “with concern the seriousness of the human
depend on humanitarian situation in Darfur” and called “on all parties to put an immediate
end to the ongoing violations of human rights and international humanitarian law, with a
special focus on vulnerable groups, including women and children, while not hindering
the return of all internally displaced persons to their homes.”25 Regularly since then, the
Council has reiterated its call to end violations of human rights and international
humanitarian law in Darfur – usually placing an emphasis on the latter. It has, for
example, expressed concerned regarding

“violations of human rights and international humanitarian law in Darfur, including
armed attacks on the civilian population and humanitarian workers, widespread
destruction of villages, and continued and widespread violence, in particular gender-
based violence against women and girls, as well as the lack of accountability of
perpetrators of such crimes.”26

26 U.N. Doc. A/HRC/DEC/S-4/10, Situation of human rights in Darfur (December 13,
2006).
As a matter of fact, most of the Council's decisions dealing with the situation in the Sudan, the Council have addressed human rights and IHL concerns on an equal footing.27

The Council’s treatment of the situation in Somalia confirms this pattern – with resolutions typically condemning violations of human rights law and IHL, and calling on all parties involved in the conflict to respect human rights and humanitarian law.28 Since 2009, the Council has referred to the situation in Somalia as an armed conflict,29 repeatedly referring to human rights law and humanitarian law as the applicable legal frameworks. There is hardly a report of the Council's Independent Expert on Somalia


29 See, for example, U.N. Doc. A/HRC/18/48, Report of the independent expert on the situation of human rights in Somalia, Shamsul Bari (August 29, 2011), Summary (“Apart from the drought and famine, the armed conflicts between Islamist insurgents and the Transitional Federal Government, supported by the troops of the African Union Mission in Somalia (AMISOM), continues to cause deaths and injury to the civilian population. Indiscriminate shelling and firing in urban areas, and suicide and improvised explosive attacks by the insurgent group Al-Shabaab, are the main causes.”)
that does not make reference to IHL. Take, for example, the Independent Expert's recommendation to establish “an Independent International Commission of Inquiry into human rights and humanitarian law violations, or similar mechanism to investigate all abuses committed by all actors involved in the Somali conflict.” Perhaps more importantly, the Council has recently addressed IHL on its own (i.e. without any accompanying reference to human rights law) when it called on parties “to adhere to the principles of international humanitarian law relating to the protection of civilians. The waging of hostilities in urban areas – as provoked by Al-Shabaab – inevitably brings with it huge risks to the civilian population, particularly if the principles of international humanitarian law of proportionality, targeting of only military objects and the requirement to take precautionary measures to avoid civilian casualties are disregarded. Both TFG and AMISOM have suffered many fatal casualties as a result of attacks by Al-Shabaab.”

The Council’s joint treatment of IHL and human rights law, accompanied by occasional but increasingly frequent references to IHL alone, demonstrate the growing involvement of this body in matters of humanitarian law. The activity of the Council in the context of the Second Lebanon War, Sudan and Somalia exemplifies a general trend in the body's

32 Id. para. 17.
treatment of IHL. Such treatment is by no means unintended or secondary to its treatment of human rights issues: the Human Rights Council addresses international humanitarian norms in almost all of its resolutions, often (but not always) in tandem with human rights law.

That IHL has become a major part of the Council's workload is not contested – not even by the Council itself. On the contrary, the Council is well aware of the scope and implications of its forays into international humanitarian law, and at least on one occasion has actively advocated for an expansive interpretation of its human rights mandate. When addressing the United States' argument that the Council's Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions lacks competence to address IHL matters, the Rapporteur noted that, if accepted, such argument “would have far-reaching consequences for the Council and for its ability to contribute in any way to many of the situations that are currently most prominent on its agenda.”

The Council thus acknowledges its growing involvement in matters of IHL.

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33 U.N. Doc. A/HRC/4/20, Civil and Political Rights, Including the Questions of Disappearances and Summary Executions, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (January 29, 2007), paras. 18-19 (emphasis added). See also, Project on Extrajudicial Executions, Center for Human Rights and Global Justice, New York University School of Law, UN Special Rapporteur on Extrajudicial Executions Handbook (2010), Chapter 1, at 7 (noting that if the US position was accepted, it “would represent a significant challenge not only to the work of this mandate but, more importantly, to a significant amount of the activities undertaken by the Human Rights Council. In brief, one of the consequences would be to disable the Council in relation to a large number of situations involving armed conflicts in which it has been actively involved over the past decade and more.”)
As a result of this involvement, the Council produces a significant body of law in IHL – an area of law not formally part of its mandate.\(^{34}\) I examine below the consequences of humanitarian law-making at the hands of a human rights body. Before I do so, however, I would like to address – only to dismiss it – the argument that the Human Rights Council must inevitably interpret and apply IHL given the close relationship between IHL and human rights law.

VIII. **Enforcement of International Humanitarian Law by Other Human Rights Bodies**

Defenders of the Council's treatment of IHL would argue that the unclear boundaries between human rights and international humanitarian law make the Council’s forays into IHL inevitable. In addressing the validity of this argument, it is instructive to examine how other human rights bodies that have contended with similar challenges. How have such bodies conceived of their role in interpreting, developing, and enforcing IHL? Have they, too, expanded their mandate to encompass IHL alongside human rights?

At times, other human rights bodies have indeed found themselves compelled to interpret or even apply norms of IHL. Most human rights bodies address matters of IHL –

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\(^{34}\) See Daniel O'Donnell, *Trends in the Application of International Humanitarian Law by United Nations Human Rights Mechanisms*, 324 INT'L REV. RED CROSS 481, 497 (1998) ("UN human rights mechanisms also contribute to the development of international law by interpreting and consolidating the law through their practice. In so far as international humanitarian law is concerned, interesting developments can be observed regarding the evolution of certain standards from treaty law to customary law.")
generally without an explicit mandate to do so. President Theodor Meron of the International Criminal Tribunal for the Former Yugoslavia explains that human rights bodies turn to IHL for primarily two reasons: either because human rights law could address the relevant issues only indirectly or because IHL seems more pertinent to the situation considered. The analysis of the practice of human rights bodies (other than the Council) reveals that human rights bodies usually address IHL reluctantly. Whenever they do so, they take careful steps to justify the treatment of such issues and assert their competence by reference to the terms of their mandate. Such justifications and references are singularly absent from the Council’s decisions and resolutions.

Among all human rights bodies, the European Court of Human Rights (ECHR) has probably demonstrated the greatest reluctance to engage in an analysis and application of IHL. Even when claims arose out of a situation of armed conflict (for example, in the context of the Turkish occupation of Cyprus in Loizidou v. Turkey36 or the conflict between Transdniestrian separatists and the Moldovan Security Forces in Ilascu and others v. Moldova and Russia37),38 the European Court of Human Rights has avoided

37 Id., at 13.
38 See also European Court of Human Rights, Issa and Others v. Turkey, Application no. 31821/96, Judgment, 6 November 2004 (in the context of the Turkish operation which took place in Northern Iraq in 1995).
making any reference to humanitarian law and has provided relief to victims on the basis of human rights law only.\(^{39}\)

By carefully confining itself to the application and interpretation of the European Convention of Human Rights and protocols, the ECHR demonstrates a real awareness of the limits of its competence. This exclusively human rights approach has given rise to some criticism. In particular in situations where victims of armed conflicts turned to the ECHR for relief or when the pleadings themselves referred to IHL (as in Banković\(^{40}\) in the context of the war in the Balkans or Isayeva in Chechnya\(^{41}\)), scholars have deplored the ECHR’s reluctance to apply IHL.\(^{42}\)

The Inter-American Commission on Human Rights has shown more willingness to consider IHL. One such example is the well-known decision of the Inter-American Commission to examine questions of IHL in *Abella v. Argentina* (better known as the *La


\(^{40}\) *Banković and others v. Belgium* 522077/99 (December 12, 2001).

\(^{41}\) European Court of Human Rights, *Isayeva v. Russia* 57950/00 (February 24, 2005).

The case considered the circumstances surrounding the attack on members of the Argentinean armed forces by over 40 armed persons, leading to a lengthy battle and many deaths among both groups. Attackers who survived filed a complaint with the Inter-American Commission on Human Rights for violations of the American Convention on Human Rights and IHL by members of the Argentinean armed forces. The Commission therefore had to determine whether it had competence to examine the IHL-related allegations. The Commission began by characterizing the violent incidents between the attackers and the Argentine armed forces as a non-international armed conflict, to which Common Article 3 of the Geneva Conventions applies. But before proceeding to analyze whether any violation of this provision had been committed by Argentina, the Inter-American Commission decided to “clarify the reasons why it has deemed it necessary at times to apply directly rules of international humanitarian law or to inform its interpretations of relevant provisions of the American Convention by reference to these rules.” Only following a lengthy analysis of its mandate and the questions arising in the specific case did the Inter-American Commission conclude that it had the competence to apply international humanitarian law.

Skeptics questioned whether the Commission was justified in extending its mandate to IHL as it did in *La Tablada*. One scholar argues that most of the arguments presented by

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44 *Id.*, at paras. 156.
45 *Id.*, at paras. 157.
the Commission do not provide compelling authority for the unqualified application of IHL and that it might “have sufficed for the Commission to apply provisions of the American Convention interpreted in light of international humanitarian law.”

The question of whether the Inter-American Commission was justified in extending its mandate falls beyond the scope of this paper. What matters for our purposes is that the Commission felt compelled to assert its competence to deal with matters of IHL prior to embarking on a direct application of this body of law.

This has consistently been the approach of the Inter-American Commission on Human Rights. Two years following La Tablada, in a discussion of the violent situation in Colombia (namely, acts of violence carried out by Colombian state agents and organs and their proxies as well as by armed dissident groups such as the FARC), the Commission noted that it “will apply international human rights norms, particularly the American Convention on Human Rights (…), and will also refer to international humanitarian law, where relevant.” Though it did apply humanitarian norms directly, the Commission acknowledged that “the American Convention and other universal and regional human rights instruments were not designed specifically to regulate in detail internal conflict

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situations and, thus, they do not contain specific rules governing the means and methods of warfare.”\textsuperscript{49} The Commission then proceeded to explain its use of IHL as \textit{lex specialis} and as a source of “authoritative guidance” in nine detailed paragraphs.\textsuperscript{50} The Inter-American Commission on Human Rights again reiterated the need to “refer to and consider pertinent provisions of international humanitarian law as the applicable \textit{lex specialis}” when applying human rights law in the context of counter-terrorism in subsequent reports and decisions.\textsuperscript{51} The possible use of IHL as a tool of interpretation of human rights instruments was perhaps best spelled out by the Commission in response to US objections that the Commission lacked competence to address legal issues relating to the detention of suspected terrorists in Guantanamo Bay:

“[T]he Commission remains of the view that it has the competence and the responsibility to monitor the human rights situation of the detainees at issue and in so doing to look to and apply definitional standards and relevant rules of the international humanitarian law in interpreting and applying the provisions of the Inter-American human rights instruments in times of armed conflict.”\textsuperscript{52}

\textsuperscript{49} \textit{Id.}, para. 10.
\textsuperscript{50} \textit{Id.}, para. 12.
\textsuperscript{51} Inter-American Commission on Human Rights, \textit{Report on Terrorism and Human Rights}, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. (October 22, 2002), para. 29. The Inter-American Commission on Human Rights has applied IHL in a number of other situations. See Meron, \textit{supra} note 35, at 269 (referring to the Dominican Republic, El Salvador, and Haiti).
\textsuperscript{52} Inter-American Commission on Human Rights (July 23, 2002) (emphasis added).
Following a similar pattern, the Inter-American Court of Human Rights refuses to apply humanitarian law directly. The landmark case in this respect is certainly *Las Palmas* – even though a number of earlier cases had already announced the Court’s position.

The case arose out events that occurred in Las Palmas, Colombia, where Colombian armed forces allegedly fired from a helicopter, injuring a child, and Colombian police detained a number of individuals, some of whom were extrajudicially executed by the Colombia police. Colombia filed a number of preliminary objections contesting the jurisdiction of the Court, including two objections arguing that neither the Court nor the Commission had the jurisdiction to apply humanitarian law. The Court admitted these two objections and held that it lacked competence to analyze whether actions committed by the Colombian police and armed forces complied with the Geneva Conventions.

Again in *Bámaca Velásquez v. Guatemala*, the Court held that IHL may be used as a tool of interpretation of human rights law – but not applied directly as such. The case related to the detention and alleged mistreatment of Bámaca Velásquez and other

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54 On the importance of cases preceding Las Palmas in understanding the Court’s position, see Buis, *supra* note 47, at 284.
55 *Las Palmas Case*, *supra* note 53, para. 2.
56 *Id.*, para. 16.
57 *Id.*, paras. 33 and 34 (concluding that the American Convention on Human Rights “has only given the Court competence to determine whether the acts or the norms of the State are compatible with the Convention itself, and not with the 1949 Geneva Conventions” and that “[t]he fact that States members of the Organization of American States must observe the Geneva Conventions in good faith and adapt their domestic legislation to comply with those instruments does not give the Commission competence to infer State responsibility based on them.”)
combatants of the Guatemalan National Revolutionary Unit at the hands of the Guatemalan armed forces. The Court first characterized the situation in Guatemala as a non-international armed conflict and held that “the relevant provisions of the Geneva Conventions may be taken into consideration as elements for the interpretation of the American Convention.” This position, maintained in following cases, suggests a conservative and careful interpretation of its competence by the Inter-American Court of Human Rights.

The case of other UN human rights bodies is also instructive. At the Human Rights Committee, which was established by the International Covenant on Civil and Political Rights of 1966, no real interpretation or application of IHL has been noticed. The Human Rights Committee has referred to IHL mostly in observations and recommendations made on states’ reports – which are not binding – and not with respect to decisions regarding individual applications. As noted above in the context of Israel's objections to the Human Rights Committee's treatment of IHL, the Committee has referred to IHL when commenting on state parties' periodical reports. Not limited to Israel, this practice has also included in the past states such as Croatia, Bosnia and Herzegovina, and Colombia.

59 Id., para. 207.
60 Id., para. 209.
62 Id., at 849.
63 See supra note 81.
64 See Byron, supra note 61, at 849.
Even the Human Rights Division of the United Nations Observer Mission in El Salvador, whose mandate includes humanitarian law, has given priority to violations of human rights law and has elaborated some operational guidelines designed to apply when investigating violations of IHL.

Unlike its counterparts, the Council does not feel the need to establish its competence when addressing substantive issues of IHL. The Council approaches questions of IHL in the same manner as it approaches human rights questions – i.e. as if they are part of its mandate. At best, the Council “acknowledges that human rights law and international humanitarian law are complementary and mutually reinforcing” – a statement that precedes, for example, a resolution on the protection of cultural rights and property in situations of armed conflict. In another resolution entitled *Protection of Human Rights of Civilians in Armed Conflict*, the Council noted that “all human rights require protection equally and that the protection provided by human rights law applies as a lex specialis”, and that “conduct that violates international humanitarian law… may also constitute a gross violation of human rights”. This is as far as the Council has gone in justifying its continual treatment of IHL.

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65 See Meron, supra note 35, at 270.
While surprising in its own right, the failure of the Council to explain its overreaching is even more puzzling when compared to the practice of other human rights bodies. No comparable encroachment upon IHL has been found on the part of other human rights bodies, which have either refrained from applying IHL altogether or taken great care to justify any such application. In contrast, the Human Rights Council not only does not limit itself to the application of IHL as *lex specialis*, but regularly applies IHL in its own right.

The comparison between the Human Rights Council and other human rights bodies reveals the weakness of the claim that the former has no choice but to apply IHL under the *lex specialis* doctrine. The experience of other human rights bodies shows that other courses of action are indeed available to the Council when contending with IHL matters.

**IX. Challenging the Council’s Mandate and Expertise to Address IHL**

The Council’s treatment of IHL raises the question of whether the Council has the mandate or the expertise to engage in the interpretation, development, and application of international humanitarian law.

**a. Challenging the Council’s Mandate**

A number of states have expressed their reluctance to have the Human Rights Council (or its predecessor, the Commission on Human Rights) involved in situations of armed conflict. Back in the days of the Commission on Human Rights, Turkey and the United
States argued that matters of international humanitarian law fell outside the body's mandate.

In the 1990s, Turkey challenged the Commission's treatment of the conflict between the Kurdish Workers Party (PKK) and the Turkish security forces. Turkey had faced criticism from a number of UN human rights bodies and experts (including the Commission's Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions) relating to the alleged killing of Turkish and Iraqi civilians of Kurdish origins following Turkey's entry into Northern Iraq in March 1995. The Permanent Mission of Turkey to the United Nations responded that the operation conducted by the Turkish armed forces in Northern Iraq did not fall within the competence of the human rights bodies and that, accordingly, special rapporteurs and working groups of the United Nations human rights system were not entitled to oversee state performance with IHL in armed conflicts. To Turkey’s argument, the UN bodies and experts replied that “they considered themselves competent to monitor the implementation of international human rights law within the framework of their respective mandates, irrespective of whether those rights were codified in international human rights law or humanitarian law.”69

A decade later, the United States challenged the treatment of IHL by the Commission on Human Rights. The US first raised the argument in 2003 in connection with the detention of suspected terrorists in Guantanamo Bay.\footnote{U.N. Doc. E/CN.4/2003/G/73, Civil and political rights, including the questions of: torture and detention Letter dated 2 April 2003 from the Permanent Mission of the United States of America to the United Nations Office at Geneva addressed to the secretariat of the Commission on Human Rights (April 7, 2003).} That same year, the US once again challenged the competence of the Commission (in particular that of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions) following the targeted killing of a terrorist in Yemen.\footnote{Commission on Human Rights, UN Doc. E/CN.4/2005/7, Civil and Political Rights, including the Questions of Disappearance and Summary Executions (December 22, 2004), para. 43.} The US claimed that the question of the legality of the strike fell outside the Commission’s mandate, as the strike was carried out as part of an armed conflict.

The United States raised similar arguments after the creation of the Council in 2006 in connection with the execution of Al Qaeda operative al Yemeni. The US argued that “inquiries related to allegations stemming from military operations conducted during the course of an armed conflict with Al Qaida do not fall within the mandate of the Special Rapporteur.”\footnote{U.N. Doc. A/HRC/4/20/Add.1, Letter of May 4, 2006 from the United States to the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, at 344.} In particular, the US dismissed the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions’ argument that “all major relevant resolutions in recent years have referred explicitly to that body of law” as imparting “upon the Special Rapporteur a mandate to consider issues arising under the law of armed conflict.”\footnote{Id., at 345.}
According to the US, the Rapporteur’s mandate did not provide it with the authority to opine on questions of IHL – and the fact the Rapporteur (both under the Commission and the Council) “may have reported on cases outside of his mandate (...) does not give the Rapporteur competence to address such issues.” 74 Past practice, according to the US, could not make up for the absence of a mandate in IHL.75

Interestingly, these objections extend beyond the Human Rights Council and its predecessor. State practice reveals a certain level of objection to the treatment of IHL by human rights bodies, generally speaking. Take, for example, the arguments raised by the United States before the Human Rights Committee.76 Or the US’ claim that the Inter-American Court of Human Rights “lacks the jurisdiction or specialized expertise to apply” international humanitarian law,77 and that the Inter-American Commission on Human Rights could not grant precautionary measures in the context of the detentions of suspected terrorists at Guantanamo Bay as such detentions took place during an armed conflict.78

74 Id., at 346.
76 See US Delegation Response to Oral Questions from the Members of the Committee (July 18, 2006) (“our view is simply that U.S. detention operations in Guantanamo, Afghanistan, and Iraq are part of ongoing armed conflicts and, accordingly, are governed by the law of armed conflict”); and US Periodic Report to the Human Rights Committee (2000), paras. 3 and 130.
78 Inter-American Commission on Human Rights, Resolution 2/06, On Guantanamo Bay Precautionary Measures (July 28, 2006), available at http://www.cidh.oas.org/resolutions/resolution2.06.htm (“The United States has stated,
In the same vein, the United Kingdom has argued that the Committee against Torture lacks jurisdiction to address humanitarian law,79 and Israel has repeatedly challenged the competence of human rights bodies to deal with situations governed by the law of armed conflict. Israel's argument has focused on the absence of mandate of UN human rights bodies to discuss the situation in the West Bank and Gaza – a situation which, Israel argues, is governed by IHL. In the context of the submission of Israel’s second periodic report to the Committee on Economic, Social and Cultural Rights, for example, it was noted that:

“Israel has consistently maintained that the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction… Accordingly, in Israel’s view, the Committee’s mandate cannot relate to events in the West Bank and the Gaza Strip, inasmuch as they are part and parcel of the context of armed conflict as distinct from a relationship of human rights.”80


under Article 16 and 17 of the Covenant, Addendum, Israel (October 16, 2001), para. 5 (the Committee added that “without prejudice to its basic position, Israel has been willing – and in fact, has done so in the context of its oral presentation of its initial report – to cooperate with the Committee and provide relevant information to the extent possible, with regard to the exercise of those powers and responsibilities, which according to the agreements reached with the Palestinians, continue to be exercised by Israel in the West Bank and the Gaza Strip.” (para. 8)). See also U.N. Doc. E/1989/5/Add. 14, Implementation of the International Covenant on Economic, Social and Cultural Rights, Additional information submitted by States parties to the Covenant following the consideration of their reports by the Committee on Economic, Social and Cultural Rights, Addendum Israel (May 14, 2001), para. 2 (“Israel has consistently maintained that the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction… Accordingly, in Israel’s view, the Committee’s mandate cannot relate to events in the West Bank and the Gaza Strip, inasmuch as they are part and parcel of the context of armed conflict as distinct from a relationship of human rights.”); U.N. Doc. E/2002/22-E/C.12/2001/17, Committee on Economic, Social and Cultural Rights, Report on the Twenty-Fifth, Twenty-Sixth and Twenty-Seventh Session (23 April-11 May 2001, 13-31 August 2001, 12-30 November 2001) (November 20, 2001), Annex VI, Statement by the Permanent Representative of Israel to the United Nations Office at Geneva addressed to the Committee on Economic, Social and Cultural Rights (August 17, 2001, Twenty-Sixth session) (“In addition to the serious procedural reservations I have emphasized, I would like to conclude by reiterating Israel’s reservation with regard to the Committee’s handling of events in the West Bank and the Gaza Strip. It has consistently been Israel’s position that consideration of questions of human rights in these territories is not within the mandate of the Committee, as such territories fall within the context of armed conflict and international humanitarian law.”); U.N. Doc. E/C.12/2/Add. 69, Consideration of reports submitted by states parties under Articles 16 and 17 of the Covenant, Concluding observations of the Committee on Economic, Social and Cultural Rights, Israel (August 31, 2001), para. 12 (“The Committee rejects the State party’s assertion regarding the distinction between human rights and humanitarian law under international law to support its argument that the Committee’s mandate ‘cannot relate to events in the Gaza Strip and West Bank.’ The Committee reminds the State party that even during armed conflict, fundamental human rights must be respected and that basic economic, social and cultural rights as part of the minimum standards of human rights are guaranteed under customary international law and are also prescribed by international humanitarian law.”); and U.N. Doc. E/C.12/1/Add.90, Consideration of reports submitted by states parties under Articles 16 and 17 of the Covenant, Concluding observations of the Committee on Economic, Social and Cultural Rights, Israel (May 23, 2003), para. 15 (“[t]he Committee is deeply concerned at the insistence of the State party that, given the circumstances in the occupied territories, the law of armed conflict and humanitarian law are considered as the only mode whereby protection may be ensured for all involved, and that this matter is considered to fall outside the sphere of the Committee’s responsibility.)
Israel has expressed this position on a number of occasions before the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, and the Committee on the Rights of the Child.

The objections of various states to the treatment of IHL by human rights bodies reveal a level of support for the view that human rights bodies lack competence to apply international humanitarian law – an element largely overlooked in contemporary analysis of the relationship between human rights law and IHL. In other words, it is not at all clear that states support the application of IHL by human rights bodies – and even in cases in which states do support such application, the mandates of the human rights bodies themselves might limit the application of IHL.

In contrast to the practice of certain states, arguments in favor of the Council’s treatment of IHL have been made. Though the Council’s mandate does not expressly cover IHL, it

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81 U.N. Doc. CCPR/C/79/Add.93, Consideration of reports submitted by States parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Israel (August 18, 1998), para. 10; U.N. Doc. CCPR/C/ISR/2001/2 Consideration of reports submitted by States parties under Article 40 of the Covenant Second Periodic Report, Addendum, Israel (December 4, 2001) (reiterating the same position); U.N. Doc. CCPR/CO/78/ISR, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Israel (August 21, 2003), para. 11 (“The Committee has noted the State’s party’s position that the Covenant does not apply beyond its own territory, notably in the West Bank and in Gaza, especially so long as there is a situation of armed conflict in these areas.”)


83 U.N. Doc. CRC/C/SR.829 (October 10, 2002), Committee on the Rights of the Child, Summary record of the 829th meeting: Israel, paras. 39-42 (“The international law on armed conflicts was the body of law best suited to regulating the situation in the West Bank and the Gaza Strip.”)
has been suggested that the competence to deal with humanitarian law could have been “inherited” by the Council from its predecessor.\footnote{Alston, infra note 90.} In the decade or so before the Commission on Human Rights was dismantled and replaced by the Council, the former dealt with IHL on a number of occasions. This treatment dates from the 1990s and includes situations of armed conflicts in Kuwait,\footnote{Commission on Human Rights, Res. 1992/60, \textit{Situation of human rights in Kuwait under \textit{Iraqi occupation}} (March 3, 1992).} Yugoslavia,\footnote{See, for example, Commission on Human Rights, Res. 1992/S-1/1, \textit{The situation of human rights in the territory of the former Yugoslavia} (August 14, 2002); Res. 1993/7, \textit{Situation in the territory of the former Yugoslavia} (February 23, 1994); and Res. 1994/72, \textit{The situation of human rights in the territory of the former Yugoslavia: Violation of human rights in Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)} (March 9, 1994).} Rwanda,\footnote{See, for example, Commission on Human Rights, A/RES/49/206, \textit{Situation of human rights in Rwanda} (December 23, 1994); and Res. 1995/91, \textit{Situation of human rights in Rwanda} (March 8, 1995).} and Israel.\footnote{Commission on Human Rights, Res. 1996/68, \textit{Human Rights Situation in southern Lebanon and West Bekaa} (April 23, 1996).} One could perhaps attribute this shift in the Commission’s practice to a change in the nature of international conflicts – involving more nonstate entities, often taking place within the territory of a single state, not always being characterized by the relevant state as an armed conflict to which IHL applies. Regardless of the reasons that led the Commission to address IHL more frequently, the Commission’s practice exists and cannot be disputed.\footnote{See Meron, \textit{supra} note 35, at 269 and n. 180 (arguing that special rapporteurs have turned to international humanitarian law – in particular to Common Article 3 of the Geneva Conventions – when alleging violations against non-states, and giving the example of the Special Rapporteur’s consideration of the Sudan People’s Liberation Army in Sudan).} The question, rather, is whether such IHL practice granted the Commission (and later, the Council) the authority to act both as guardian of human rights and enforcer of IHL.

\footnote{Alston, \textit{infra} note 90.}
The argument seems plausible. International law places much weight on the practice of states and international organizations. The behavior of essential actors in the international arena can affect the development of existing law and even contribute to the crystallization of new law. In this sense, the practice of the Commission on Human Rights can theoretically have shaped the contours of the body’s competence – to the point where, following fifteen years of practice in this sense, the Commission might eventually have been legally and legitimately entitled to opine on matters of IHL.

Even assuming that the practice of the Commission did have the effect of expanding its own mandate – a question that this article does not seek to answer – could the newly created Council have benefited from such an expansion? As noted earlier, the replacement of the Commission on Human Rights with the Human Rights Council in 2006 constituted the first (and, to date, the unique) case in which a UN body underwent full-fledged reform. Following the dismantlement of the Commission on Human Rights, a completely new body was established, with a completely new mandate. As part of the reform of the Commission on Human Rights, a serious examination of the roles and mandates of both the Commission and its successor-to-be was conducted. And yet, the discussions leading up to the creation of the Council did not include any mention of to whether the mandate of the new body should cover human rights and humanitarian law. The absence of such a discussion, together with the clear language of the resolution establishing the Council, militate against a “transfer of competence” from the
Commission to the Council – even assuming the Commission acquired such competence by its practice.

Some argue that the omission of IHL from the debates leading up to the creation of the Council shows how obvious the question was to all. Alston and others, for example, concede that “the issue was never broached” but claim that “it was simply assumed that the Council would, in this respect as in most others, maintain the practice followed by the Commission.” 90 I find this argument unconvincing. The debates show the willingness of states to deeply reform the Commission and create an entirely new and distinct body, with different features, mechanisms, mandate, and aspirations. For Alston and others to attribute the fact that IHL was never “broached” to a mere “assumption” contradicts the circumstances in which the Council was established. Drawing such wide ranging conclusions as to the Council’s competence from the absence of debates on IHL seems far-fetched by any legal standard. If anything, the absence of such debates indicate a consensus to the effect that the Council’s mandate would in fact be limited to human rights.

This conclusion is supported by the practice of a few human rights bodies whose mandate covers both human rights law and humanitarian law. Take, for example, the UN Observer Mission in El Salvador of 1991 or the UN Verification Mission in Guatemala.

Whenever human rights bodies have been expected to intervene in situations of armed conflict, their mandates have referred to humanitarian law – undermining the argument that IHL was assumed to form part of the new Council’s mandate and was thus not included expressly in its mandate.

Another argument raised in favor of the treatment of IHL by the Council emphasizes the absence of mechanisms specifically designed to enforce IHL. As noted by a group of experts consulted by the ICRC on IHL enforcement mechanisms, “[t]here is unanimous agreement that existing IHL implementation mechanisms suffer from a lack of use and from a lack of effectiveness.”

As a result, human rights bodies have increasingly been regarded as an alternative:

“The consequence of the weaknesses in the traditional enforcement mechanisms of international humanitarian law is that the victims of many conflicts have been left with no recourse other than regional or international human rights bodies. Therefore, such bodies have found themselves in the situation where they are called upon to address violations committed in armed conflicts, and so have had to decide upon the appropriate law to apply in such situations.”

91 See infra note 65.
93 Byron, supra note 61, at 847. See also Arnold and Quénéivet, supra note 39, at 9.
That victims view recourse to human rights bodies as the only means to obtain remedy for IHL violations does not imply that these bodies ought to act as enforcers of IHL. The argument that victims have a right to an effective remedy for a violation cannot provide a justification for overstepping a body’s mandate or jurisdiction. As a matter of fact, all experts taking part in the ICRC meetings on enforcing IHL “cautioned strongly against any blurring of the distinction between the two bodies of law and voiced concerns that increased consideration by regional human rights bodies in particular might lead to a fragmentation or lack of universality in the application of international humanitarian law.”

Among the issues raised against the increased consideration of IHL by human rights bodies was the “lack of express competence to examine issues of international humanitarian law, except where some fundamental human rights and protections of international humanitarian law overlap”.

I question neither the lack of IHL enforcement mechanisms nor its implications. The Council itself has noted that denying it competence on matters of IHL would have “the effect of placing all actions taken in the ‘global war on terror’ in a public accountability void, in which no public and transparent international monitoring body would exercise

\[94\] See Reidy, supra note 42, at 528.
\[95\] See ICRC Report, supra note 92, at 58-59 (also noted as an issue was the "lack of adequate knowledge of international humanitarian law by members of the human rights bodies").
The potential drawbacks this institutional gap holds for ensuring compliance with IHL, however, cannot suffice to overcome the major legal hurdles which stand in the way of using the Human Rights Council to deal with matters of IHL.

In yet another attempt at rationalizing the Council's singular treatment of IHL, it has been suggested that human rights treaty bodies might feel more reluctant to pronounce on violations of IHL than human rights bodies established through UN Charter mechanisms. Non-treaty bodies, Noam Lubell notes, “do not have the same treaty restrictions and are therefore more easily able to refer directly to violations of IHL.” The lack of deference to a treaty may – or may not – explain the greater reluctance of treaty bodies to deal with IHL. Still, it may not explain why the Human Rights Council should feel less bound by its mandate than human rights treaty bodies. It, too, was granted a mandate – and it does not matter whether such mandate was encapsulated in a treaty or, as in the present case, in a UN General Assembly resolution.

Neither can the mandate issue be solved by the appointment of rapporteurs and experts well-versed in IHL. The Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council, adopted in 2007, provides in its Article 7 that

98 See Lubell, supra note 97, at 743.
“It is incumbent on the mandate-holders to exercise their functions in strict observance of their mandate and in particular to ensure that their recommendations do not exceed their mandate or the mandate of the Council itself.”

The Council’s lack of competence, in other words, cannot be “cured” by conferring an IHL mandate to rapporteurs and experts.

Overall, the arguments raised to assert the competence of the Council to deal with IHL are unconvincing. Neither the past practice of the Commission on Human Rights nor the absence of a suitable mechanism capable of enforcing IHL, the lack of deference to a treaty, the right of victims to an effective remedy, or the appointment of IHL specialists by the Council can justify the Council’s pattern of incursion into humanitarian law. This is particularly true given the Council’s failure to provide much explanation of how it derives such authority (as shown in Part III), and the Council's apparent lack of expertise when pronouncing on matters of IHL (as I elaborate below).

b. Challenging the Council's Expertise

Beyond the jurisdictional aspects of the treatment of IHL by human rights bodies, a number of scholars have questioned the expertise of these bodies to interpret and apply international humanitarian law. Though scholars rarely mention the Human Rights

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Council in this context,¹⁰⁰ the questions that arose are similar: What are the consequences of IHL being enforced by a non-specialized body? Does a human rights body have the required expertise and resources to investigate state behavior in situations of conflict?

The Council’s membership consists of 47 member states, each of which elects a representative at the Human Rights Council.¹⁰¹ At the moment, only the President of the Council and one out of four members of the Bureau has experience in IHL.¹⁰² This is the first time the Council is headed by someone with IHL experience since the Council was created in 2006.¹⁰³ In general, it can be said that most of the Officers of the Human Rights Council are diplomats – traditionally, though not always, with experience in human rights law.¹⁰⁴ Even more rarely do the Officers of the Council have expertise in IHL.

¹⁰⁰ See, for example, Lubell, supra note 97.
¹⁰² Id. (President of the Council (Laura Dupuy Lasserre) and one of the members of the Bureau (H.E. Mr. Christian Strohal from Austria)).
¹⁰³ Id. The bios of the Council’s officers are only available for 2011-2012 and 2010-2011. As noted above, for the year 2011-2012, one member of the Council’s bureau had experience in IHL. The year before, none of the Bureau’s members had any experience in IHL.
¹⁰⁴ A/59/565, supra note 6, para. 286 (“In the first half of its history, the Commission was composed of heads of delegation who were key players in the human rights arena and who had the professional qualifications and experience necessary for human rights work. Since then this practice has lapsed. We believe it should be restored, and members of the Commission on Human Rights designate prominent and experienced human rights figures as the heads of their delegations.”)
Statistics provided in connection with other human rights bodies confirm this trend. Only about 16% of the judges have expertise in IHL at the European Court of Human Rights, 50% of the members at the Human Rights Committee, and 20% of the members of the Inter-American Court and Commission.\textsuperscript{105} The need for human rights bodies to employ more members with IHL expertise and train the members in humanitarian law has already been noted.\textsuperscript{106} In the case of the Human Rights Council, whose activity heavily focuses on IHL, this need has become an imperative.

The absence of IHL experts on the Council carries important implications. The lack of training and expertise in IHL among the Council’s officers affects their perception of issues related to armed conflict. Daniel Reisner argues that, in international law, “what you see depends on where you sit.”\textsuperscript{107} Using Reisner’s terminology – what do state representatives “see” when sitting on the Human Rights Council? They “see” the situation through the eyes of diplomats and/or human rights experts sitting on the UN’s main human rights body – not as IHL experts or military experts. Their interpretation and application of IHL necessarily reflects this viewpoint.\textsuperscript{108}

\textsuperscript{105} Byron, supra note 61, at 882.
\textsuperscript{106} See Byron, supra note 61, at 882-83 (“if human rights bodies are to continue to deal with situations involving armed conflict, and furthermore to apply humanitarian law… then it is vital that an effort is made to employ more members with humanitarian law expertise.”); and Hampson, supra note 42, at 571.
\textsuperscript{107} Daniel Reisner, What You See Depends on Where You Sit, presentation (June 2009), on file with author.
\textsuperscript{108} In this sense, see also W. Michael Reisman, The View from the New Haven School of International Law, Faculty Scholarship Series, Paper 867 (1992) (emphasizing the importance of the decision-maker’s “observational standpoint”).
Perhaps this explains why the treatment of IHL by the Council has proved inconsistent at best and counter-productive at worst. The first issue concerns the characterization of conflicts by the Council. That inconsistent findings may arise when human rights bodies determine the existence of armed conflicts should not come as a surprise.\footnote{See, for example, O'Donnell, \textit{supra} note 34, at 493 ("There appears to be a risk that UN human rights mechanisms may arrive at different conclusions regarding the question of whether an armed conflict exists in a given country.") In this sense, see also Byron, \textit{supra} note 61, at 893 (highlighting the risk that "this lack of expertise may lead a human rights body to hold that a non-international armed conflict exists when humanitarian law experts would deny that the situation was more than internal disturbances."); and Lubell, \textit{supra} note 97, at 743.}

The Council, for example, has characterized the situation in Somalia as an armed conflict\footnote{See, \textit{infra} Part II.} but it has yet to recognize that the ongoing hostilities in Syria have risen to the level of an armed conflict (as of March 2012). I find this discrepancy difficult to justify.

The second issue has to do with the interpretation and development of IHL norms by a human rights body – which has the potential of weakening the fundamentals of humanitarian law. This danger has been highlighted by Yuval Shany.\footnote{Yuval Shany, \textit{Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror}, in \textit{Human Rights and Humanitarian Law, Collected Courses of the Academy of European Law} 13 (Orna Ben-Naftali, ed.) (OUP, 2011).} According to Shany, the tendency of human rights bodies “to alter the basic attributes of the ‘armed conflict’ paradigm through the application of human rights law may result in problematic normative-overreaching” and “lead to a law-application exercise divorced from the actual conditions and the needs of warfare.”\footnote{\textit{Id.}, at 29.} For this reason, Shany concedes that “[o]ne may
regard with a certain degree of apprehension attempts by human rights bodies to assess
the lawfulness of counter-terrorist military operations *predominantly* pursuant to human
rights standards.” 113 The main reason for such apprehension is that the standards
developed by human rights bodies, imbued with human rights law, may lead to counter-
productive results in terms of compliance. States may regard these standards as out-of-
synch with the reality of the battlefield and be less inclined to comply with them. Shany
also expresses regret that Goldstone applied a “high standard of required precautions” in
its analysis of the duty of effective warning owed to civilians located in areas where
military operations take place. 114 As a result of this and other (mis)applications of IHL in
the report, Shany notes, “IHL with its greater tolerance for operational mistakes
committed during the fog of war is cast aside, and human rights law, which arguably
imposes a more exacting standard of care, is selected as the principal legal framework for
the imposition of liability.” 115

Laurie Blank echoes Shany's concerns. 116 She, too, deplores the concurrent application
of IHL and human rights law in the Goldstone Report. In particular, Blank takes issue at
the report's analysis of the attack on the al-Daya family home, which the report found did
not violate IHL but violated Article 6 of the ICCPR. 117 This type of finding, she argues,

113 *Id.*, at 29 (emphasis in original).
114 *Id.*, at 30.
115 *Id.*, at 31.
117 *Id.*, at 394.
undermines the delicate balance “between minimizing suffering in war and enabling effecting military operations” on which IHL is premised.  

These criticisms highlight the danger of having a significant bulk of IHL interpreted, developed, and applied by a human rights body like the Council. Until reforms to address the lack of expertise in IHL are implemented, the integrity of IHL will continue to be harmed. These reforms would include training and properly selecting representatives, appointing specialized rapporteurs, heads of commissions of inquiry, and other experts specialized in IHL, and establishing dialogue between various international and regional bodies on issues of common interest. But none of these steps, no matter how feasible or beneficial, would cure the Council's lack of a mandate to address questions of IHL. Fixing the Council's mandate would require approval by the General Assembly – a step unlikely to take place. As such, the Council’s lack of a mandate in IHL raises potentially insurmountable hurdles.

X. The Convergence of Human Rights Law and Humanitarian Law

The Council’s treatment of IHL illustrates the ever growing convergence between human rights law and humanitarian law. This convergence has also been referred to as fusing,  

118 Id., at 397.  
119 See supra, note 106; and Hampson, supra note 42, at 571 (suggesting to provide training in IHL in non-specialized bodies).  
120 Hampson, supra note 42, at 572. In this sense, see also O'Donnell, supra note 34, at 485 (“What does not yet exist, and would be useful, is a forum where UN human rights experts and specialists in international humanitarian law could periodically engage in an informal exchange of views on issues of common concern.”)
meshing, complementarity, or confluence. These expressions all describe a reality where peace and war have become blurred – in large part as states have had to contend with terror, non-conventional warfare, and the realities of the modern battlefield. Like the traditional paradigm between human rights law and IHL, other traditional distinctions, such as the distinction between civilians and combatants or the *suma divisio* between the *jus ad bellum* and the *jus in bello*, have also eroded as a result of these changes.

Human rights law and humanitarian law have grown closer – upholding similar values but setting forth different standards. At the same time, these bodies of law increasingly compete with each other to govern situations which do not necessarily fall clearly within one or the other’s sphere of competence. That the Human Rights Council has encountered difficulties in delineating the scope of application of human rights law in relation to humanitarian law thus appears legitimate. And yet, as I explored in Part III,

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124 O’Donnell, *supra* note 34, at 501 ("The increasing application of humanitarian law by UN human rights mechanisms is, perhaps, the inevitable consequence of years of promoting the idea that human rights law and humanitarian law are complementary and dedicated to the same ultimate objective." In addition, he notes, it is in situations of
the experience of other human rights bodies suggests that convergence is not necessarily
inevitable – at least not to the extent witnessed in the practice of the Human Rights
Council.

Convergence between human rights law and humanitarian law, including of the type
witnessed in the practice of the Human Rights Council, can be attributed to a number of
factors. The two fields share a common goal\textsuperscript{125} – the protection of individuals, especially
those most vulnerable. Human rights law was traditionally defined as the body of law
protecting the individual in time of peace; while humanitarian law protects individuals
from hostilities in time of war.\textsuperscript{126} At their core was the recognition of “one and the same
ideal.”\textsuperscript{127} The two bodies, however, are based on different assumptions: while human
rights law aims at curbing the power of the government, IHL has different sensibilities
with respect to the balance of power. IHL grew out of an arrangement between
sovereigns, not as a body of law protecting the individual against the state.

\textsuperscript{125} Cordula Droege refers to these common goals as a "common humanist ideal", supra
note 46, at 312 (though she also highlights the different theoretical foundations and
motivations at the roots of the two systems). See also Buis, supra note 47, at 269
("[b]oth branches of law share a basic hardcore of well-defined rules, which aim at the
protection of the human person and constitute a homogenous legal corpus.").

\textsuperscript{126} See, for example, Adam Roberts, Transformative Military Occupation: Applying the

\textsuperscript{127} See Orna Ben-Naftali and Yuval Shany, Living in Denial: The Application of Human
Rights in the Occupied Territories, 37 ISR. L. REV. 17, 47 (2003) (quoting the President
of the Geneva Conference during the signing ceremony “our texts are based on certain
fundamental rights… the Universal Declaration of Human Rights and the Geneva
Conventions are both derived from one and the same ideal.”)
Though each field’s sphere of application was theoretically clearly defined, the question of their interaction quickly arose.\textsuperscript{128} The International Court of Justice’s advisory opinion in \textit{The Legality of the Threat or Use of Nuclear Weapons} made clear that the relationship between the two bodies of law was far more complex than traditionally envisaged.\textsuperscript{129} It laid out, for the first time in such clear terms, the \textit{lex specialis} doctrine: “The Court observes that the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable \textit{lex specialis}, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.”

The complexity of the relationship between human rights law and IHL created some confusion at the doctrinal level. This confusion has also reached beyond the legal realm, with journalists and politicians referring to human rights and humanitarian law interchangeably. Take, for example, references to the principle of proportionality – a principle “common” to both fields, but with a different substantive content.\textsuperscript{130} While

\textsuperscript{128} See GA Res. 23 (May 12, 1968) \textit{Human Rights in Armed Conflicts} (“peace is the underlying condition for the full observance of human rights and war is their negation”; “even in periods of armed conflict, humanitarian principles must prevail.”)

\textsuperscript{129} Advisory Opinion, \textit{Legality of the Threat or Use of Nuclear Weapons}, ICJ (8 July 1996), para. 25.

\textsuperscript{130} See, generally, Criddle, \textit{supra} note 123.
scholars face challenges trying to determine which of the human rights law standard or IHL standard of proportionality apply and when,\textsuperscript{131} the wider public simply uses the term broadly to cover all situations. Human rights law and humanitarian law both enjoy mass awareness and popular appeal, and the distinction between the two often gets lost.

In this climate, the forays of the Human Rights Council into human rights law have gone largely unnoticed.\textsuperscript{132} In fact, as noted in the introduction to this paper in the context of Sri Lanka, the Council is now \textit{expected} to address violations of humanitarian law.

The absence of any effective mechanism capable of enforcing IHL has strongly contributed to this situation. The institutional vacuum pertaining to IHL is striking, especially when compared to the plethora of mechanisms existing to monitor and enforce human rights – whether charter-based or treaty-based.\textsuperscript{133} The only existing IHL-specific enforcement mechanism is the International Humanitarian Fact-Finding Commission (“the Commission”) – a permanent body established by Article 90 of Additional Protocol I. Since coming into existence in 1991, 72 states have recognized the competence of the Commission\textsuperscript{134} and endowed it with the competence to inquire into allegations of grave violations of the Geneva Conventions and accompanying Protocols, exercise good offices,

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Exceptions include Shany, \textit{supra} note 111; and Blank, \textit{supra} note 116.
\item See \url{http://www.ihffc.org/Files/en/country_list_29.11.2011.pdf} (including Canada, Germany, Australia and the United Kingdom).
\end{enumerate}
\end{footnotesize}
and make recommendations when appropriate. But the ability of the Commission to carry out its functions exists only when both the state requesting the involvement of the Commission and the state against which the allegations are made have accepted the Commission’s competence. Thus limited by its voluntary jurisdiction, the Commission has not yet been called upon to exercise its functions. The Commission has therefore failed to provide states with a mechanism capable of ensuring compliance with IHL.

The common roots and popular appeal of IHL and human rights law, combined with the failure of IHL mechanisms, has led the Council (as well as other human rights bodies) to act as enforcer of IHL. Human rights bodies are increasingly seen as an alternative, particularly by victims seeking redress for violations committed during armed conflicts. But as I explained in Part IV, the absence of any other available mechanism should not and cannot justify an extension of the mandate of the Human Rights Council to all matters of IHL. No matter how laudable the goal of enforcing IHL, the automatic application of IHL by the Council finds legal support neither in theory nor in practice.

The experience of the Council raises the question of whether certain limits should be placed on the convergence of IHL and human rights law. Certain scholars view

\footnotesize{135 See http://www.ihffc.org/Files/en/pdf/article%2090_oct2005_keith_engl.pdf
137 See http://www.ihffc.org/index.asp?Language=EN&page=aboutus_general. This is true even though the Commission has offered its services to states on a number of occasions (see Report, supra note 136, at 14).
138 See, infra Part III, discussion of the case law of the European Court of Human Rights.}
convergence as a positive development.\textsuperscript{139} Others have expressed the need for caution, noting that the “common aim” shared by IHL and human rights law “does not wipe away the fact that they are finally different legal corpora and that, as a consequence, in their articulation it is impossible to confuse or blend their rules.”\textsuperscript{140}

Convergence, I would argue, is a question of degree. While “the momentum behind the complementary application of the law of armed conflict and human rights law is too powerful a trend to reverse”,\textsuperscript{141} a clearer separation between IHL and human rights law is necessary at the enforcement level. If not at the theoretical level, the paradigm and the delicate equilibrium between human rights law and IHL should be maintained at the enforcement level.

The Human Rights Council’s lack of mandate to address matters of IHL and the resulting damage to IHL norms strongly advocate for such a solution. One could envisage the creation of a committee within the Human Rights Council expressly entrusted with the task of advising the body on humanitarian law questions. This could actually solve both the expertise and the mandate issues, if such a solution were adopted by members of the

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\textsuperscript{139} See Criddle, \textit{supra} note 123; and Katarina Mansson, \textit{Implementing the Concept of Protection of Civilians in the Light of International Humanitarian Law and Human Rights Law: the Case of MONUC} in \textit{INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW: TOWARDS A NEW MERGER IN INTERNATIONAL LAW, supra} note 39, at 563.

\textsuperscript{140} Buis, \textit{supra} note 49, at 292.

\textsuperscript{141} Geoffrey Corn, \textit{Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict}, 1 J. INT’L HUMAN. LEGAL STUDIES 52, 56 (2010) [include Cite to Bill’s introductory chapter here].
\end{flushleft}
United Nations.\textsuperscript{142} As this solution appears unlikely, the Council should exercise greater
deferece to its mandate when becoming involved in questions of IHL. And when such
involvement is inevitable, the Council should tread more cautiously when interpreting
and applying IHL. The ultimate function of the Council should remain ensuring respect
for human rights, with only limited (and well-justified) forays into IHL when necessary.

The Council should implement these recommendations for a number of reasons. It must
do so in order to avoid losing its credibility like its predecessor. As the United Nations’
main human rights body, the Human Rights Council must uphold the strictest human
rights standards and ensure that it does not become, \textit{de facto}, enforcer of IHL – mandate
it does not possess. A not-insignificant number of states and scholars have questioned
the authority of human rights bodies to interpret and apply IHL (as distinct from their
ability to use IHL, from time to time, as a tool of interpretation of human rights law). If
the Council continues to deal with IHL matters without showing deference to the issues
raised by these states and scholars, the normative weight of its IHL-related findings and
resolutions will eventually be called into question. In addition, I have shown how the
human rights-infused approach adopted by the Council has challenged the fundamentals
of IHL. The Council must change its \textit{modus operandi} in order to avoid causing any
further damage to the integrity of humanitarian law and preserve its legitimacy.

\textsuperscript{142} Though the creation of an IHL-specific enforcement mechanism has been raised (see
Hampson, \textit{supra} note 42, at 572), it unfortunately does not offer an immediate and
urgently needed solution to the issues brought up in this paper.
Finally and importantly, the Council must make a point to preserve the delicate and important relationship between IHL and human rights law – at the risk of losing the support of states. As feared by Yuval Shany, states could easily come to disregard IHL altogether if they feel it sets unrealistic standards. Maintaining the fragile but important paradigm between IHL and human rights law is necessary to ensure that states continue to trust international institutions designed to promote and ensure respect for human rights. What weighs in the balance, eventually, is the human rights Charter- and treaty-based system:

“[C]ompliance with IHL rules cannot be directly supervised by a human rights tribunal unless formally stated in its constitutive document…But good will needs to find its place within the limits of pre-existing law and, in the absence of international tribunals specifically addressed to care for the respect of IHL, enlarging the competence of human rights courts requires careful thinking if the mechanism aspires to maintain the support of states.”

How the Human Rights Council contends with this challenge will affect its prestige and legitimacy as the main UN human rights body. In turn, this will reflect upon the normative weight of its decisions and resolutions. For the sake of human rights and IHL, let us hope that the Council begins to take full measure of its limitations.

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143 Buis, supra note 49, at 293.
Conclusion

The assumption that the Council can *and ought to* address violations of IHL – as Human Rights Watch assumed with respect to the war in Sri Lanka – must be reconsidered. As we have seen, IHL is not within the Human Rights Council’s mandate, despite ample opportunity to include IHL in the Council’s founding resolution. Beyond the question of its mandate, having the Council deal with IHL raises an array of problems: it is well equipped, trained, and able to investigate and assess states’ compliance with norms of IHL? Should we maintain the long-held paradigm between human rights and IHL? That is, should human rights and IHL become inseparable rather than merely complementary?

In and of itself, the convergence of human rights law and humanitarian law at the doctrinal level has not been questioned in this paper. Rather, this paper has called for a re-assessment of the relationship between the two bodies of law at the enforcement level – highlighting the singular treatment of IHL by the Council in comparison to the treatment of IHL by other human rights bodies. Neither the past practice of the Commission on Human Rights nor the absence of a suitable mechanism capable of enforcing IHL, the lack of deference to a treaty, the right of victims to an effective remedy, or the appointment of IHL specialists by the Council, can justify the Council’s pattern of incursion into humanitarian law. Next time the Human Rights Council addresses a situation of armed conflict, we ought to ask ourselves whether there is a point at which we should draw the line. This must be done to prevent the Council from losing
its credibility and legitimacy, to maintain state support for IHL and human rights mechanisms, and to preserve the integrity of humanitarian law.