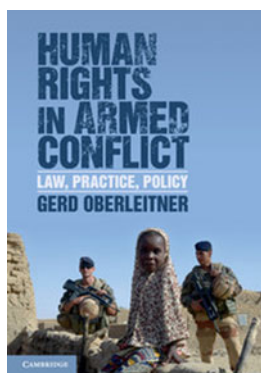


## BOOK REVIEW



# Human Rights in Armed Conflict: Law, Practice, Policy

Gerd Oberleitner\*

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There seems to be no doubt about the application of human rights in armed conflicts, but until now, how they are applied had been only partially explored. In *Human Rights in Armed Conflict*, Gerd Oberleitner offers a meticulous analysis and asks profound questions about the “purpose, nature and scope of the whole *jus in bello*”. Indeed, the book’s main hypothesis is that human rights impact upon and are gradually changing the *jus in bello* as we know it. This issue, however, is not merely a matter of legal theory, but a confrontation between advocates of a human rights-oriented law enforcement paradigm and advocates of a security-oriented armed conflict paradigm.

Rather than presenting a lengthy discussion on the interaction between international human rights law (IHRL) and international humanitarian law (IHL) or a collection of topical essays, Oberleitner explores whether the language of IHRL can and should be used to express matters hitherto articulated in military codes from a practical and accessible perspective. *Human Rights in Armed Conflict* should thus be viewed as part of a growing trend which comes with an exponential explosion of jurisprudence and academic legal literature on this subject.<sup>1</sup> Its arrival should not be surprising and is certainly welcome.

Oberleitner’s book fills an important gap in the literature, and it serves to revisit the practical application of IHRL in armed conflicts. In the words of the author, the book is

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an inquiry into how the *law* of human rights impacts upon, contradicts, changes or complements international humanitarian law, and it is also interested in understanding if the *policy* of human rights ... is compatible with or opposed to the aims, purposes and objectives of regulating warfare under the law of armed conflict as it stands.<sup>2</sup>

Finally, the book examines whether the practice of IHRL and its international mechanisms and institutions have a role to play in IHL issues.

The analysis of these topics is organized in five parts, which are filled with a good amount of academic literature and case law. A general introduction presents the idea of human rights in armed conflict as a matter of political and legal thought. This is based on the “ideas, trends and events which have shaped the law of war throughout history” and explores “how the law connected with the emerging idea of human rights, up to and including their contemporary convergence”.<sup>3</sup> The introduction begins by affirming that IHL represents the precursor of IHRL and one of its most important sources, taking into account that IHRL “in the strict sense of the word” has existed since the 1940s, while IHL has a long story of codification prior to that decade.<sup>4</sup> This is the reason why Oberleitner reviews IHL historically, concluding that the relationship between these two frameworks can only be reasonably discussed after 1948. It is interesting to note that this part presents the Martens Clause as an interpretative tool through which IHL can reference IHRL. The author takes as an example a case involving the maltreatment of interned civilians during the German occupation of Belgium in 1950, where the Conseil de Guerre de Bruxelles “reasoned that because such acts of inhuman treatment were not specifically prohibited under the Hague Regulations one must resort to the Martens Clause to fill this gap. This, in turn, necessitates drawing on international human rights law.”<sup>5</sup>

The second part of the book deals with the theoretical relationship between IHL and IHRL, analyzing three main approaches: *lex specialis*, complementarity and the possible integration of both legal regimes. Oberleitner recognizes that today it remains unclear if *lex specialis* is a tool for interpreting norms or for solving norm conflicts. Yet, he addresses how it has been applied by different entities within the international realm, concluding that, for instance, the International Committee of the Red Cross (ICRC) applies either IHL or no law at all, offering its humanitarian services instead in the latter case. Although the ICRC advocates for the complementarity of IHL and IHRL, it continues to emphasize their

1 Within this vast body of literature, there are a few books that stand out: see, for instance, Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law*, Oxford University Press, Oxford, 2011; Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law*, Edward Elgar, Cheltenham and Northampton, 2013.

2 *Human Rights in Armed Conflict*, p. 2.

3 *Ibid.*, p. 6.

4 *Ibid.*, p. 9.

5 *Ibid.*, p. 34.

differences and the indispensability of the *lex specialis* of IHL for determining their relationship.<sup>6</sup>

Oberleitner's general conclusions on the subject are certainly enlightening. He affirms that deriving the speciality of IHL merely from the existence of an armed conflict simply refers to the temporal scope of this legal regime, and the argument that it is made for armed conflicts "says nothing else than precisely that: international humanitarian law applies in armed conflict. But it says nothing about its relationship with other legal regimes in such a situation."<sup>7</sup> The author finally affirms that the idea of *lex specialis* is not an adequate device for explaining this relationship, since it has not allowed a predictable clarification of the complementary application of IHRL and IHL. In his words, it is only "an artificial solution for a real problem and has effectively only served to argue for the exclusivity of humanitarian law and to keep human rights at bay".<sup>8</sup>

Though the author offers an insightful analysis, two issues should be noted at this stage. Oberleitner argues that Article 3 common to the four Geneva Conventions of 1949 is "special" for the prohibition against taking hostages since it has no counterpart in IHRL,<sup>9</sup> dismissing the possible application of the International Convention against the Taking of Hostages.<sup>10</sup> In addition, more practical examples could have better clarified certain problematic scenarios suggested by the author. For instance, only at the end of the second section is it pointed out that with respect to the right to life, IHL may be the *lex specialis* in situations of armed conflict, but for judicial guarantees it would be IHRL.<sup>11</sup> Certainly, a reference to other provisions earlier in the text could have been helpful.

In any case, after rejecting the *lex specialis* maxim, Oberleitner explores the possibility of an interpretative framework guided by the idea of maximum protection through the norms that are most favourable to the individuals concerned. This is why, according to the author, the complementary character of both regimes must be understood as an active interplay and mutual influence, and as a process geared towards this policy goal. Oberleitner vigorously argues that more humanitarian law should apply in situations of armed conflict, whereas in scenarios which resemble law enforcement operations (such as situations of

6 *Ibid.*, p. 73. Recently the ICRC has restated its view confirming that "IHL constitutes the *lex specialis* governing the assessment of the lawfulness of the use of force against lawful targets in [international armed conflict]". ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Report, 31 October 2015, pp. 34–35, available at: [www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts](http://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts) (accessed on 18 November 2015).

7 *Human Rights in Armed Conflict*, p. 97.

8 *Ibid.*, p. 342.

9 *Ibid.*, p. 102.

10 International Convention against the Taking of Hostages, UN Doc. A/34/46, 1979. Regarding its application in non-international armed conflicts, a complementary analysis should be done with respect to Articles 12 and 13, leading to the conclusion that the Convention applies to cross-border non-international armed conflicts or when the hostages or alleged offenders are foreigners. See also Andrew Clapham, "The Complex Relationship between the Geneva Conventions and International Human Rights Law", in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, pp. 707–708.

11 *Human Rights in Armed Conflict*, p. 102.

occupation and peace operations, but also when individuals are detained in armed conflict), more human rights provisions should be relevant.<sup>12</sup> In the final chapter of this second part, however, Oberleitner criticizes that both “exclusivists” and “complementarists” agree that the distinctiveness of both legal frameworks needs to be preserved, and “deny and reject any further integration of human rights into humanitarian law”.<sup>13</sup> While, according to him, a technical merger of IHRL and IHL is difficult to imagine in practical terms, this criticism is why he explores a possible “human rights-based *jus in bello*” approach,<sup>14</sup> which is described as a legal regime governing “all questions of armed conflicts in their various forms” and constituted by IHL, but where IHLR “is applied in a complementary or cumulative fashion while at the same time providing the foundational normative value and operational direction”.<sup>15</sup> Although this is an interesting alternative, the reasons why he moves from the complementarity theory towards this view could have been better explained.

The third part of the book deals with different challenges presented in real-life scenarios, involving the right to life, the extraterritorial application of IHRL, the idea of derogations, and States’ obligations to respect, protect and fulfil human rights obligations. In a very interesting sense, Oberleitner proposes a unified use-of-force regime for all situations outside “combat” governed by IHRL jointly with IHL. He refers, in particular, to those individuals who are exposed to measures such as physical violence, arrest, detention or any other act outside combat; according to Oberleitner, these people are actually subject to law enforcement-like practices to which human rights law can suitably be applied by way of analogy.<sup>16</sup>

With regard to the extraterritorial application of IHRL, after referring to the existent jurisprudence, the author accepts its application without territorial restrictions when any State exercises effective and factual control over territory or persons, but at the same time recognizes that the different approaches to qualifying such control or power still need to be reconciled.<sup>17</sup> Interestingly, he then focuses on situations of occupation and suggests the adoption of a capability approach based on the distinction between positive and negative obligations. While State agents can always refrain from carrying out certain actions (and thus respect IHRL), “they do not always have the capabilities to secure or ensure these obligations and protect against violations by third parties. As a consequence, only [positive] obligations can meaningfully be placed on a state acting extra-territorially”.<sup>18</sup> Although Oberleitner seems to look for a more effective legal framework based upon the degree to which a State can reasonably be said to

12 *Ibid.*

13 *Ibid.*, p. 122.

14 *Ibid.*, p. 124.

15 *Ibid.*, p. 126.

16 *Ibid.*, p. 141.

17 *Ibid.*, p. 165. It shall be noted that Oberleitner recognizes this despite the attempts by the United States to argue “that persons held in secret detention facilities outside” its territory were not under the jurisdiction of the United States as they were held in “places” rather than “territories”. He finally affirms in this sense that “there is nothing that puts an end to the ever-shrinking space over which jurisdiction can extend”. *Ibid.*, p. 166.

18 *Ibid.*

exercise control,<sup>19</sup> a fair criticism is again the lack of practical examples: it remains unclear *which* positive obligations should be respected by a State acting abroad.

In the fourth part of the book, the author analyzes the dynamics of war and law, recognizing that changes in either have an impact on the other.<sup>20</sup> He explores the application of IHRL to peace operations<sup>21</sup> and in non-international armed conflicts. Unfortunately the latter is not addressed extensively, which could have been useful considering that recent surveys have concluded that the great majority of ongoing armed conflicts around the world are non-international.<sup>22</sup>

Some additional issues are worth noting. Firstly, Oberleitner reiterates his alternative approach in which low-intensity non-international armed conflicts could be governed by more IHRL, and high-intensity conflicts by more IHL rules. Secondly, he reviews several theories that support or reject the existence of non-State armed groups' IHRL obligations, namely: that a non-State armed group which controls territory or otherwise takes over governmental functions may be seen as a government at an embryonic stage, and can only claim legitimacy through embracing international norms – a theory which is later rejected by Oberleitner since it does not function where no territorial control exists or where the taking over of governmental functions is not envisaged; that the human rights obligations of non-State actors are correlative to the human rights which their individual members enjoy; and finally, that “one may simply focus on the capability of non-State actors to adhere to international human rights law”.<sup>23</sup> Oberleitner concludes that whether or not non-State actors are capable of complying with IHRL needs to be decided on a case-by-case basis. Thirdly, the author recognizes that including these entities in the creation of norms will ensure they feel bound by those norms: “utilizing existing and emerging unilateral declarations, codes of conduct or agreements adopted by non-state armed groups may induce the likelihood that they feel bound by such texts”.<sup>24</sup> He presents some concerns in this regard, however, by affirming that:

The danger of watering down human rights obligations in this process of “shaping” international human rights law norms so that non-state armed groups can comply with them is, however, real and must be countered. If the standard for, say “due process” is not the one applicable to states under international humanitarian law, is it then a self-defined standard set by the non-state armed group? In other words, can state law simply and generally be substituted by the self-created “law” of a given armed group, or by agreement among groups or governments?<sup>25</sup>

19 *Ibid.*, p. 167.

20 *Ibid.*, p. 192.

21 *Ibid.*, pp. 201–205.

22 According to different sources, the total number of armed conflicts in recent years fluctuates between thirty and thirty-eight, and only two or three of them are considered to be international. See Stuart Casey-Maslen (ed.), *The War Report 2013*, Oxford University Press, Oxford, 2014, pp. 28–29.

23 *Human Rights in Armed Conflict*, p. 213.

24 *Ibid.*, p. 217.

25 *Ibid.*

Even though this raises some interesting concerns, it is not clear if Oberleitner is casting doubt as to the possibility of actually achieving protective outcomes through decision-making processes by armed groups – although admitting afterwards that rejecting the idea “fails the victims of their acts”<sup>26</sup> – or simply dismissing the idea that a parallel normative system could be created (and therefore challenging a State-centrism ideal). In any case, he then moves to the duties of occupying powers, and finally addresses a possible humanization of international law.

The last part of the book is dedicated to how IHRL enforcement mechanisms have dealt with IHL issues. Oberleitner focuses his attention on six institutions to illustrate one of his main conclusions: given the lack of enforcement procedures under IHL, IHRL bodies should stand in as the second-best alternative.<sup>27</sup> This is why he discusses the practice of the Human Rights Council, the High Commissioner for Human Rights, the United Nations human rights treaty bodies, the Inter-American Court and Commission, the European Court of Human Rights and the African Commission on Human and People’s Rights. The reasons why these are chosen are extensively supported by jurisprudence and doctrine. Certainly, they do represent the most important human rights institutions acting in the international realm, and the only ones that are able to

provide guidance to States, allow a more informed debate on human rights in armed conflict in concrete situations, put pressure on violators of the law, make humanitarian obligations better known and help to ensure the systemic coherence of the law.<sup>28</sup>

Although this approach seems a helpful step towards having more protective legal regimes, the role of non-State actors is seemingly left aside. If we consider that these bodies will only be able to solve legal disputes, possibly attributing international responsibility to one or more States, the consequences of breaches by armed groups remain unexplored, as is recognized by Oberleitner: “The human rights obligations of non-state actors (or the lack thereof) will again pose a considerable problem in need of further scrutiny: how can they be held accountable by human rights bodies for violations of the law?”<sup>29</sup>

Overall, *Human Rights in Armed Conflict* presents novel arguments on the reasons why IHRL should be integrated into IHL, and on how to do it in order to have a more protective legal regime for victims of armed conflicts, and it does so insightfully. A more extensive analysis of non-international armed conflicts would

26 *Ibid.*

27 *Ibid.*, p. 349.

28 *Ibid.*

29 *Ibid.*, p. 338. For recent studies addressing this issue, see Noemi Gal-Or, Cedric Ryngaert and Math Noortmann, *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place*, Brill Nijhoff, Leiden and Boston, MA, 2015; Ezequiel Heffes, “The Responsibility of Armed Opposition Groups for Violations of International Humanitarian Law: Challenging the State-Centric System of International Law”, *Journal of International Humanitarian Legal Studies*, Vol. 4, No. 1, 2013, pp. 81–107.

have been useful, but this piece still represents a very welcome addition to the literature on human rights in armed conflicts. It is, indeed, another recognition that the humanitarian consequences of armed conflicts for civilian populations around the world call for the development of new and effective protection tools.

