Book Reviews

The Treatment of Prisoners Under International Law: 2nd Edition

by Nigel Rodley, Clarendon Press, Oxford, 1999, xxix pp, 388 pp, annexes 389–472 pp, index 472–479 pp.

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Any proper analysis of the international rules concerning the treatment of prisoners is bound to be a complex and challenging task. This is because such an analysis must involve a number of interrelated fields, the most important being international law, international human rights law, international humanitarian law, international criminal law and penology. Furthermore, there are a confusing number of overlapping treaties and other international instruments directly relevant to the topic,[1] and there is a complex web of United Nations (UN) bureaucracy and mechanisms germane to human rights that directly impacts on international law relating to prisoners. However, by means of a thorough, careful and detailed analysis, Nigel Rodley's second edition[2] of *The Treatment of Prisoners under International Law*[3] enables the reader to unravel the mysteries of this intricate and relatively new field of international law.[4]

There is probably no greater test of how a state respects the human rights of people under its jurisdiction than how it treats 'prisoners', defined broadly by Rodley as, 'any persons who are so positioned as to be unable to remove themselves from the ambit of official action and abuse'.[5] One very important parameter of the book emphasised early is that it is generally not concerned with the propriety of *how* the prisoner came to be detained. Instead, the book is exclusively concerned with the situation of people who, rightly or wrongly, find themselves under the control, in some form or another, of the state or agents of the state. The rights of prisoners in such circumstances is an area where the crucial clash between the concept of state sovereignty and a properly functioning international legal system is potentially at its climax. This conflict permeates most issues in international law and is familiar to all those who study international law. It is not surprising that prior to 1945 there was little or no talk of international rules restricting a

1 This is illustrated by the fact that the book contains some 83 pages of annexes, consisting of carefully edited extracts from 18 of the most important international instruments relevant to the treatment of prisoners under international law.

2 The first edition was published in 1987. All page references herein, in both the text and the footnotes, unless otherwise stated, refer to the second edition.

3 Rodley N, *The Treatment of Prisoners Under International Law 2nd Edition*, Clarendon Press, Oxford, 1999.

4 Note 3 at 4. Rodley points out that the development of international human rights with respect to the treatment of prisoners really only developed since 1975, the year the UN General Assembly passed the *Declaration on the Protection of All Persons from Being Subjected to Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment*, GA Res 3452 (XXX), 9 Dec 1975 (the 'Declaration against Torture').

5 Note 3 at 5–6. This would thus include people held in detention, whether having been brought before the courts or otherwise, people held in any types of government sanctioned institution or held incommunicado by governments forces or by forces that have the direct or indirect acquiescence of the government.

state's treatment of prisoners in times of peace[6] as the concept of state sovereignty was still dominant and no international human rights system had yet emerged. Many repressive States, and even some not so repressive States, were and still are reluctant to subscribe to international rules which may limit their ability to do as they please with people they regard as 'subversive' or 'dangerous'.

The book adopts a highly logical pattern when discussing and analysing each of the international rules relevant to prisoners. First, it assesses the legal status of the particular rule, then appraises the scope of the rule (including any definitional issues), the legal consequences of a breach of a rule (covering both state responsibility and individual responsibility), and finally it analyses the specific international remedies established for the purpose of implementing the rule. Despite the complexity and the number of rules of international law relating to prisoners, in reality all are interrelated and at the end of the day all come down to the two most fundamental — the right to life and the prohibition against torture and other ill-treatment.[7] In fact, practically all of the numerous international norms and rules mentioned throughout the book are ultimately geared towards the protection of prisoners' right to life and their right to freedom from torture and other ill-treatment. This would not be surprising to most human rights lawyers, who would regard these two norms as probably the most essential to human dignity. The importance of these two fundamental norms is also shown by the fact that the book devotes a total of eight out of twelve Chapters to dealing solely with these two rules. The other rules discussed are also ultimately interrelated with these two norms.

The first five Chapters specifically deal with the prohibition against torture and other ill-treatment under international law. Following an introduction to how the UN General Assembly first dealt with the issue of torture (Chapter One), the book in Chapter Two then assesses the legal status of the prohibition. It does so by carefully analysing the various international Treaties and instruments prohibiting torture and other ill-treatment,[8] and whether general international law also outlaws torture. The author concludes, not surprisingly, that the prohibition against torture is a rule of customary international law, and may even now be a rule of *jus cogens*. In examining the scope of the prohibition, Chapter Three then attempts to unravel the precise meaning of 'torture' and the phrase 'other cruel, inhuman or degrading treatment or punishment'. Unfortunately, international human rights bodies have not generally taken a consistent approach to these definitions, and sometimes appear to say that there is no or a negligible difference between these expressions. This is despite the fact that the definitions of 'torture' and 'other ill-treatment' need to be distinguished as the legal consequences of a finding of either may be significantly different.[9]

Chapter Four then analyses the legal consequences of a breach of the rules against torture and other ill-treatment. If it can be shown that a State is responsible for torture,[10] they then must investigate the violation, bring any perpetrators to justice, provide

6 There were, however, considerable developments in the field of international humanitarian law, mainly as a result of agitation by concerned individuals and non-governmental organisations such as the International Committee of the Red Cross. This resulted in a number of rules of customary international law and international treaties on the treatment of prisoners of war being established. These also formed the basis of the War Crimes charges at the International Nuremberg Military Tribunal against the remnants of the Nazi leadership.

7 The phrase 'other ill-treatment' will be used in this review as shorthand for the phrase 'cruel, inhuman and degrading treatment or punishment' found in article 5 of the *Universal Declaration of Human Rights* (the 'UDHR') and Article 7 of the *International Covenant on Civil and Political Rights* (the 'ICCPR').

8 Note 3 at 47–62. These include Regional Treaties, Humanitarian Law Treaties and others.

9 For example, most of the obligations on States imposed by the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* only apply if there is a finding of torture, and not to a finding of other ill-treatment.

10 State responsibility for other ill-treatment is almost the same, although there are some differences, such as article 3 of CAT only applying to suspected torture; Note 3 at 130–131.

compensation to any victims and take measures against any possible recurrence. Furthermore, Article 3 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[11] (the 'CAT') obliges States not to forcibly send someone to a country where they may be in danger of torture. Finally, Chapter Five describes and analyses the effectiveness of the various international remedies established for the purpose of implementing the prohibition against torture and other ill-treatment. The most important of these include the Special Rapporteur on Torture, the UN Committee Against Torture,[12] the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment[13] and the UN Voluntary Fund for Victims of Torture.

The second part of the book (Chapters Six, Seven and Eight) refers to three different aspects of the right to life, a breach of which will violate customary international law, if not a rule of *jus cogens*, in a similar fashion to the prohibition against torture. Rodley refers to a breach of the right to life as the 'paradigm violation of international human rights'.[14] International law is violated whenever a State 'arbitrarily' deprives someone of their life (Article 6(1) ICCPR). This occurs where there is an 'extra-legal' execution (Chapter Six), where there is a legally sanctioned death following a court decision that does not comply with any of the death penalty safeguards laid down by international law (Chapter Seven), or where death follows or is presumed to follow someone who has been in detention by the State or its agents, but not acknowledged as such (a 'disappearance'; the subject of Chapter Eight).

Chapter Six makes it clear that some State sanctioned deaths may not violate international law. Examples include killings in connection with law enforcement, in situations where, for example, one is defending a person from unlawful violence, affecting a lawful arrest, preventing an escape of a felon or lawfully detained person, or in riot and insurrection cases. In all these circumstances, the principles of necessity and proportionality must be satisfied in order for such killings to be valid under international law. This may often be a fine line depending on the facts of the specific case.[15] Other forms of 'legal' killings occur in international and non-international armed conflict situations, where people who are still combatants[16] are slain in the actual course of the conflict. Where there is an 'extra judicial' killing the legal consequences in terms of state responsibility and individual responsibility are similar to those described earlier in relation to a breach of the prohibition against torture and other ill-treatment.[17]

The controversial issue of the death penalty is the subject of Chapter Seven. The most important provisions of key international instruments, such as Article 6 of the ICCPR, expressly allow for the death penalty to be an exception to the right to life, but restrict the use of the death penalty. Any violation of these restrictions turn what would otherwise be a valid use of the death penalty under international law into an 'arbitrary deprivation' of

11 Adopted by the UN General Assembly by resolution 39/46 of 10 December 1984, and entered into force 26 June 1987.

12 This is the body established by Article 17 of CAT to scrutinise compliance with this Treaty. The most innovative aspect of this Committee's work is its ability to inquire into systematic practices of torture pursuant to Article 20 of CAT.

13 Established pursuant to the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987.*

14 This is substantiated by Article 6(1) ICCPR, which refers to the 'inherent' right to life. Nowhere else in the ICCPR or the *International Convention on Economic, Social and Cultural Rights 1966* is the word 'inherent' used.

15 See, for example, the 10–9 decision of the European Court of Human Rights in *McCann and Others v United Kingdom* (1995) 16 HRLJ 260.

16 However, once a combatant can no longer participate, through surrender, sickness or injury, it is then clear that they cannot be summarily executed or otherwise deprived of their right to life.

17 However, some different international instruments (such as the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* 1989) and mechanisms (such as the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions) have been developed.

life, and thus a violation of international law. The three broad categories of restrictions are limitations on the type of offences for which the death penalty can be pronounced,[18] various procedural guarantees[19] and certain types of people who cannot be executed.[20] One interesting argument supported by the author and writers such as William Schabas[21] is that the death penalty is inherently a violation of the prohibition against torture and other ill-treatment.[22] This is despite the explicit words of Article 6 of the ICCPR which expressly allow states to use the death penalty provided certain conditions are met.[23]

Chapter Eight refers to the most recent issue in relation to the right to life, that of 'disappeared' prisoners.[24] Of course, a disappearance does not always result in death. In fact, UN human rights bodies, without physical evidence of a death or evidence of a pattern of killings following disappearances in the state, have a policy of not presuming death.[25] After acknowledging the difficulties of defining a 'disappearance', Rodley argues that disappearances violate practically all basic human rights, describing the phenomena as 'the ultimate reduction of the citizen to an object of political expediency'.[26] The most important human rights that are violated are the right to liberty and security of person,[27] the requirement of humane conditions of detention,[28] the right to life in cases of death, and the prohibition against torture and other ill-treatment. This further indicates the connection between aspects of the right to life and the prohibition against torture and other ill-treatment. Human rights bodies have held that the family of the detainee suffers torture or other ill-treatment upon hearing of the 'disappearance' of their loved one,[29] and the detainee suffers at least cruel and inhumane treatment[30] in the absence of evidence of actual physical torture.

The final part of the book concern a disparate set of international rules, also ultimately aimed at preventing a violation of the right to life and torture or other ill-treatment. For example, in Chapter Nine Rodley introduces the discussion of the legal rules regarding conditions of imprisonment in the following manner: '[m]uch of what follows will continue to involve an examination of the scope of the prohibition of torture or [other ill-treatment] with an accent on 'punishment''.[31] This Chapter, unlike the first five specifically dealing with torture or other ill-treatment, is more concerned with long-term prisoners, where the incentive for torture, such as confessions or information, has passed. Thus, torture is not

18 Note 3 at 219–220. Generally the death penalty is restricted to the 'most serious crimes', which the international human rights bodies have generally interpreted as crimes which do not result in death. The death penalty also cannot be imposed for crimes which may breach other provisions of the ICCPR, such as criminal statutes that prohibit peaceful dissent, which are violations of Article 19 of the ICCPR.

19 The most important of which is the right to a fair trial (see Article 14 of the ICCPR).

20 These include persons under 18 at the time of the offence and pregnant women.

21 Schabas W, *The Death Penalty as Cruel Treatment and Torture*, Northeastern University Press, Boston, 1996.

22 Article 7 ICCPR.

23 Note 3 at 206. The European Court of Human Rights rejected this argument in the important case of *Soering v UK* (1990) 11 HRLJ 335.

24 Note 3 at 272. 'Disappearances' in the formal legal usage of the term started in Guatemala in the 1960s, and were brought to world attention by the 1973 coup in Chile. Although popular perception would have us believe that it is predominantly a Latin American problem, it is now clearly a worldwide predicament. In fact, as at the end of 1997 complaints of 'disappearances' have occurred in 76 jurisdictions, and two non-Latin American states are the worst offenders, Iraq (16,486 complaints up until the end of 1997) and Sri Lanka (12,208 complaints).

25 Note 3 at 262. This is mainly out of respect for the victim's family, and to ensure states do not avoid their responsibility to account for anyone abducted by their agents.

26 Note 3 at 255.

27 Article 9(1) ICCPR.

28 Article 10(1) ICCPR.

29 See *Quinteros v Uruguay* (107/1981), Report of the HRC, GAOR 38th Session, Supplement No. 40 (1983), Annex XXII and the Working Group on Enforced Disappearances.

30 See *Mojica v Dominican Republic* (HRC) (1996) 17 *HRLJ* 18 and *Velasquez Rodriguez* (IACHR) Judgment of 29 July 1988 Series C, No. 4.

31 Note 3 at 278.

the main legal issue here; rather it is far more likely to be whether 'other ill-treatment' is present.

The most detailed international instrument regarding conditions of imprisonment is the *Standard Minimum Rules for the Treatment of Prisoners*.[32] Although these rules are not legally binding per se, they do provide guidance to the interpretation of the more general rule concerning other ill-treatment.[33] There are a number of difficult issues here, such as at what point do sub-standard prison conditions constitute a violation of other prohibited ill-treatment, and the permissibility of prison practices such as solitary confinement and forced feeding. Once again, these are thoroughly and competently appraised in detail by Rodley, using the jurisprudence of the various international human rights bodies and the work of the Special Rapporteur on Torture.

An even more tricky issue analysed in Chapter Ten is whether certain types of corporal punishments that are specifically prescribed by national laws can be considered to be torture or other ill-treatment, and thus violative of international law. These punishments still occur in various former British colonies and in some states where *shari'a* (Islamic law) is practiced, and include punishments such as flogging, stoning, amputation of limbs and crucifixion.[34] Rodley carefully analyses the provisions of international instruments,[35] the jurisprudence of international human rights bodies[36] and of some domestic courts[37] to conclude that in most instances corporal punishments do amount to torture or other ill-treatment. However, one possible problem is that the definition of 'torture' in the CAT includes the sentence: '[Torture] does not include pain or suffering arising only from, inherent in or incidental to *lawful* sanctions' (emphasis added). Does the word 'lawful' mean lawful according to national laws, in which case duly prescribed punishments would never be torture under the CAT definition, or does it mean they must be lawful according to *international law*? Unfortunately, there is very little authority on this issue. Rodley takes a very universal human rights approach to this issue, only briefly mentioning cultural relativist arguments and rather unsatisfactorily dismissing them by stating: '. . . the better view would be that in humanitarian matters the uniformity of the rule should prevail, as evidenced by the generally recognized international illegality of the apartheid system.'[38]

Chapter Eleven concerns international rules that attempt to ensure that proper procedures are in place with respect to the process of arrest and detention. Again, the main purpose of these rules is to minimise the occurrence of torture and other ill-treatment.[39] The main international instrument in respect of norms prohibiting arbitrary arrest and detention is the *Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment.*[40] Although these Principles contain numerous safeguards, most of the Chapter is devoted to the circumstances when the rules may be lawfully derogated

32 Endorsed by General Assembly Resolution 663C (XXIV), 31 July 1957. For an interesting recent case that discusses the position of these rules under Australian domestic law, see *Collins v State of South Australia* (1999) 74 SASR 200.

33 Article 10(1) ICCPR (requiring 'treatment with humanity and with respect for the inherent dignity of the human person') can also be violated by prison conditions. Rodley makes clear that not every rule in the Standard Minimum Rules constitutes a legal obligation. The best example is Rule 40, which requires that prison libraries 'must be adequately stocked with both recreational and instructional books'.

34 For example, the Iranian Penal Code contains examples of each of such punishments for various crimes. See Newman F & Weissbrodt D, *International Human Rights*, Anderson Publishing, Cincinnati, 1990, at 310–313.

35 Such as article 87 of the 1948 *Geneva Convention Relative to the Treatment of Prisoners of War* and rule 31 of the *UN Standard Minimum Rules for the Treatment of Prisoners.*

36 In particular the case of *Tyrer v United Kingdom* (1976) 19 *Yearbook of the European Convention on Human Rights* 512.

37 In particular the case of *The State v Ncube and Others* [1987] (2) ZLR 246 (Zimbabwe Supreme Court).

38 Note 3 at 320.

39 Other important human rights that are also relevant are the right to liberty and security of person and not to be subjected to arbitrary arrest and detention (Article 9(1) ICCPR).

40 Adopted by UN General Assembly Resolution 43/173, 9 December 1988 (found in Annex 4 of the text).

from in times of public emergency. The author concludes that the most important of the Principles, namely those that ensure recourse to habeas corpus and those prohibiting incommunicado detention, can never be derogated from.

Chapter Twelve consists of a detailed analysis of the various codes of ethics for professionals who are likely to deal with prisoners during the course of their work. These include three instruments concerning law enforcement officials,[41] one addressing the medical profession[42] and three addressing different categories of lawyers.[43] Again, while the scope of each is wide, they all contain provisions specifically designed to minimize the possibility of torture and other ill-treatment.

The final part of the book consists of a short section where the author lists his general agenda for reform. This includes urging all States to ratify the various treaties and subject themselves to the various international mechanisms of scrutiny; ensuring that the various Rapporteurs and Working Groups are supported with adequate resources; and encouraging States to agree to the preventative mechanism of random visits to prisons and other places of detention. The author admits these proposals are deliberately modest in the hope that they are achievable goals. However, in a world where the various international rules concerning prisoners are generally flouted extensively and regularly, one must remain sceptical of these exclusively legal solutions.

In conclusion, the very logical, detailed, and comprehensive approach that the book adopts is ironically both its major strength and its major weakness. On the positive side, this approach means that one is very likely to be able to locate in the book the status of international law on a particular issue that concerns the treatment of prisoners. No other text, to the writer's knowledge, does so as comprehensively in this complex area of international law. This means that the book is highly suitable as an important reference work for its intended audience, namely government officials, lawyers, academics and prisoners pleading cases in jurisdictions where international law is relevant to national law.[44]

However, on the negative side there are a number of problems that are the consequences of this logical, lawyerly, 'black letter' approach. First, like all texts based on legal rules, important developments after publication are not be included. In the case of this book, this means that such developments as the 1998 Rome agreement to a Statute for an International Criminal Court and the *Pinochet* cases are excluded.[45] The text must thus be treated with caution by practitioners and others, and to remain relevant it will need to be updated at regular intervals. Secondly, the book is not the type that can be easily read from start to finish. At times it is so detailed it can be tedious to read, particularly when the author reviews the protracted history of the drafting of some of the specific international instruments or mechanisms. A further note of warning is that readers not having a basic knowledge of international law will find the book particularly hard going as it does presume some understanding of how the international legal system works. Finally, and probably most importantly, the 'black letter' approach means that the book does not really tackle some of the most interesting and significant jurisprudential and theoretical questions

41 The UN *Code of Conduct for Law Enforcement Officials*, General Assembly Resolution 34/169 of 17 Dec 1979; the UN *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* 1990 and the *Council of Europe's Declaration on the Police — Part A* (resolution 690 (1979)). These are all found in Annex 5 of the text.

42 *Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* GA Res. 37/194 1982 (found in Annex 6 of the text).

43 These are judges (*Basic Principles on the Independence of the Judiciary* (1985)); lawyers in general (*Basic Principles on the Role of Lawyers* (1990)) and prosecutors (*Guidelines on the Role of Prosecutors* (1990)).

44 Note 3 at 15–16.

45 The book claims to be up to date until the 31 March 1998, although developments relating to the proposed International Criminal Court are included in a brief 'Stop Press' section.

concerning international law regarding prisoners. These include cultural relativist arguments as to whether certain punishments prescribed by national laws should be considered a violation of international law (see above), and feminist arguments in relation to whether torture is a gendered concept because it seems to exclude the possibility that private harms may amount to torture.[46]

These criticisms aside, there is little doubt that for the what the book sets out to achieve, which is to provide an account of the state of international law relating to prisoners, it does so in a very skilled and comprehensive manner. This book makes a major contribution to a very complex but important area of international law, and is thus highly recommended.

46 This is because of the commonly accepted requirement for torture as having to be committed by 'a public official or person acting in an official capacity' (see Article 1 of CAT). Many feminists disagree that the state is not involved with private harms, and argue that this is evidence of international human rights law marginalising events that take place in the private sphere, thereby ignoring women's experiences of domestic violence and sexual abuse. See MacKinnon C, 'On Torture: A Feminist Perspective on Human Rights', in Mahoney K & Mahoney P (eds), *Human Rights in the Twenty-First Century*, Martinus Nijhoff, Netherlands, 1993.