The treatment of prisoners under international law
2nd ed.

Nigel S. Rodley.

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Second Edition

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IN MEMORY OF

RICHARD AND MINNA ROSENFELD

my grandparents, who were transported from their home in Germany
on 17 November 1941 and killed in a Nazi concentration camp
at Minsk on 28 July 1942

Preface to the Second Edition

The number of developments that have taken place since the first edition of this book have required substantial rewriting and extensive additions to the text. They are also too numerous to list here. Of a particularly far-reaching nature is the adoption by the United Nations of a Second Optional Protocol to the International Covenant on Civil and Political Rights, providing for abolition of death penalty, the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment and the Declaration against Forced Disappearance.

In the Inter-American Court of Human Rights, the *Velásquez Rodríguez* case has been influential beyond the region in clarifying the normative status and legal consequences of torture, extra-legal execution, and enforced disappearance. The same impact may be expected of a series of European Court of Human Rights decisions, involving Turkey, in respect of the same practices, particularly *Askoy, Aydın, Kaya* and *Kurt*. Its decision in *Soering* v. *United Kingdom* concerning extradition on capital charges to the Commonwealth of Virginia has proven to be of landmark significance.

International inspection of places of detention has been pioneered at the regional level with the adoption of the European Convention for the Prevention of Torture, Inhuman or Degrading Treatment or Punishment. Its system has inspired an initiative at the universal level, with the process now under way of drafting a protocol to the UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment.

The creation by the United Nations Security Council of *ad hoc* criminal tribunals in respect of the former Yugoslavia and Rwanda has spurred efforts culminating in a diplomatic conference aimed at establishing a permanent international criminal court. I expressly excluded this proposal from the first edition's general conclusion, considering it not feasible in the short or medium term.

In 1993, I was appointed by the Chairman of the United Nations Commission on Human Rights to succeed Professor (now Judge) Peter Kooijmans as its Special Rapporteur on the question of torture. Where it has been necessary to refer to this mandate, I have sought to depersonalize my own role by using the third person—I hope readers will not take this as a kind of inverse royal plural.

Many people have helped me by providing ideas and information. The following have been among the more frequent victims of my importunings: Christina Cerna, Federico Andreu, Professor Kevin Boyle, Carla Edelenbos, Camille Giffard, Professor Geoff Gilbert, Christopher Keith Hall, Professor

Françoise Hampson, Ahmed Mothali, Eric Prokosch, Aisling Reidy, Ian Seiderman, Trevor Stevens, Wilder Taylor, and Dr James Welsh.

Again the editorial assistance of my wife, Dr Lyn Rodley, has been of immeasurable help, and her moral support has been decisive in getting me through the ordeal.

While it has been possible to take account of some more recent developments, including the status of ratification of international treaties, the book aims to be accurate as of 31 March 1998.

N.S.R.

Colchester
June 1998

Stop Press

On 17 July 1998, the United Nations Diplomatic Conference of Plenipotentiaries adopted the Rome Statute of the International Criminal Court (UN document A/CONF.183/9). Designed to make it possible, when national jurisdictions fail, for an international tribunal to bring to justice the perpetrators of genocide, crimes against humanity and war crimes, it is a millenarian achievement.

The Statute confirms numerous notions heralded in various chapters of this book, especially chapters 4, 6 and 8. In particular, by Statute article 7, the systematic or widespread practice of torture, murder and enforced disappearance are confirmed as crimes against humanity, when committed as part of an attack directed against any civilian population. So are practices involving '[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health'. Indeed, the list of crimes against humanity includes '[i]mprisonment or other severe deprivation of liberty in violation of fundamental rules of international law'. This latter may be relevant to chapter 11. The vexed question of the definition of enforced disappearence is resolved as follows (approximating the approach proposed in chapter 8):

> 'Enforced disappearance of persons' means the arrest, detention or abduction of persons, by or with the authorization, support or acquiescence of a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom, or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.'

A crime against humanity may be committed without having to be linked to an armed conflict.

As well as covering war crimes committed in international armed conflict, article 8 of the Statute includes those committed in non-international armed conflict. Although the Court's jurisdiction over war crimes applies 'in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes', it is not restricted to such a context. In other words, individual acts qualify for the description of 'war crime'. They include, as had been expected, 'serious violations of article 3 common to the four Geneva Conventions of 12 August 1949'.

Also, in a clear rebuff to some retentionist states, the Court will not be empowered to impose the death penalty (chapter 7).

Colchester
August 1998

Contents

Selected Abbreviations

AJIL	*American Journal of International Law*
BYIL	*British Yearbook of Interntional Law*
CIOMS	Council for International Organizations of Medical Sciences
Ecosoc	Economic and Social Council of the United Nations
EHRR	European Human Rights Reports
ESCOR	*Official Records of the Economic and Social Council*
ETS	European Treaty Series
GAOR	*Official Records of the General Assembly*
HRLJ	*Human Rights Law Journal*
HRQ	*Human Rights Quarterly*
IAPL	International Association of Penal Law
ICJ	International Commission of Jurists
ICJ Rep	Reports, Advisory Opinions and Orders of the International Court of Justice
ICLQ	*International and Comparative Law Quarterly*
ICRC	International Committee of the Red Cross
ILO	International Labour Organization
ILR	International Law Reports
NQHR	*Netherlands Quarterly of Human Rights*
OAS	Organization of American States
PCIJ	Permanent Court of International Justice
SIM Newsletter	*Newsletter of the Netherlands Institute of Human Rights* (Studie- en Informatiecentrum Mensenrechten)
UN	United Nations
Unesco	United Nations Educational, Cultural and Scientific Organization
UNTS	United Nations, Treaty Series
WHO	World Health Organization
World Court	Permanent Court of International Justice and International Court of Justice
Yearbook	Yearbook of the European Conventions on Human Rights

Table of Treaties and Other International Instruments

Table of Cases

General Introduction

THE DEVELOPMENT OF AN INTERNATIONAL LAW OF HUMAN RIGHTS APPLICABLE TO PRISONERS

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED

> To save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person . . .

Thus begins the preamble to the Charter of the United Nations, adopted on 26 June 1945. It was more than a solemn statement of revulsion at the massive destruction of World War II, or at the 'disregard and contempt for human rights' that had 'resulted in barbarous acts which have outraged the conscience of mankind'.[1] It was more than a reaffirmation of commitment to prevent the recurrence of those barbarous acts. Beyond all this, it was an implicit statement of an argument made explicit three years later in the preamble to the Universal Declaration of Human Rights, which says that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'. Thus it asserted that assaults on the inherent dignity of human beings were recognized as being relevant to the stability of the international order. It follows that a profound transformation of international relations was being heralded and with it a profound transformation of international law; for international law, like any law, is largely a description, in terms of rules of behaviour, of the society it aims to regulate.

That transformation, engendered by growing concern for human rights, has certainly taken place. Before World War II there was virtually no general international law of human rights: in a major work on human rights published in 1982 the bibliography of analytical legal writing contains no entry for a book or article on international human rights law for the period before 1945.[2] As with all revolutions, there were of course antecedents: before World War I, international law had already begun to set its face against slavery, and by 1926 the Slavery Convention had been adopted. Also in the first quarter of this century, under the League of Nations, treaties guaranteeing the rights of some minorities were concluded, and populations living in territories subject

[1] The quoted words are from the second preambular paragraph to the Universal Declaration of Human Rights; see *infra* n. 7.

[2] Vasak (general ed.), *The International Dimensions of Human Rights* (revised English edn. by Alston, 1982), ii, Annex III, 701.

to the League mandate system were to have their human rights respected. The establishment of the International Labour Organization by the Treaty of Versailles in 1919 brought the real prospect of effective international legislation and action to protect trade union rights (a species of the right to freedom of association). International law had also already developed rules for the conduct of international warfare to protect non-combatants, especially prisoners of war. There were, therefore, diverse moves in the recognition of human rights on an international scale, but still, in principle, human rights were seen as a matter to be left to the *domaine réservé*, or domestic jurisdiction, of states. In other words, for most purposes governments could do what they wished with those under their jurisdiction and international law had no opinion on the matter, much less any means to act.[3]

Events leading up to, and most particularly the events of, World War II changed all that. There was widespread denial of civil rights and liberties on the basis of racial, religious, and political discrimination; forced labour; public and clandestine deportations of groups of people, or of individual 'undesirables' or 'subversives'; confiscation of property; routine and systematic detention and torture of prisoners; wanton murder; the ultimate atrocity of genocide; these things took place and require no documentation here. Of crucial importance to those left among the ruins was the recognition that the carnage had been perpetrated by a government that had unleashed a war of aggression, involving more bloodshed than the world had ever known, within living memory of a war that had already cost a generation of lives and whose wounds were still felt, and that much of the population taking part in this aggression was itself coerced and intimidated. It became clear to the Allied Powers who founded the United Nations that no peace could be secure where governments were free to break and obliterate their own people. Where there is no restraint at home, no limit to the exercise of official power, there need be none such abroad either. And law could not just rest at addressing the behaviour of a state beyond its frontiers. International law could no longer just be the law regulating behaviour between states, it had also to concern itself with what went on within them.

[3] Although in the nineteenth and early twentieth centuries some states claimed a right of armed 'humanitarian intervention' when certain population groups were threatened with massacre (a claim that has surfaced again in the post-World War II era), this is a doctrine that has not won widespread acceptance: see Ronzitti, *Rescuing Nationals Abroad and Intervention on Grounds of Humanity* (1985); Franck and Rodley, 'After Bangladesh: the Law of Humanitarian Intervention by Military Force', 67 *AJIL* 275 (1973); cf. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* (1988). It is particularly noteworthy that there was no question of any such intervention to protect the Jews or other minorities in Hitler's Germany: id., at 292–3. Since the end of the Cold War, it may be possible to detect the emergence of a doctrine whereby collective armed intervention, notably when authorized by the United Nations Security Council, may be considered a legitimate response to widespread or systematic gross violations of human rights: see Rodley (ed.), *To Loose the Bands of Wickedness—International Intervention in Defence of Human Rights* (1992); Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (1996).

Much of the thinking of those responsible for framing the new post-war human rights instruments was generated, naturally enough, by the events of the recent, grim past. Development of the law on the conduct of international armed conflict (*jus in bello*) preceded that of international human rights law and indeed had its forerunners in religious principles and practices of antiquity. It has been the subject of much learned writing and it is unnecessary to add to it here. Suffice it to say that in the immediate post-war period its inadequacies were bleakly obvious, and existing humanitarian law relevant to the conduct of international armed conflict and the protection of those caught up in it was considerably developed by the Geneva Conventions of 1949. The refinement of rules of humanitarian law on the treatment of prisoners of war, for example, even now in many respects goes far beyond that of rules of human rights law relating to the treatment of prisoners in peacetime.[4]

The concern here is primarily with the development of the new field of international human rights law, but the humanitarian law rules will be considered to the extent that they help elucidate the scope of the human rights rules generally, and also to the extent that they impose significant obligations in the case of violation of rules that are common to international human rights law and international humanitarian law (sometimes called, indeed, 'the law of human rights in armed conflict'). One branch of international humanitarian law will, in fact, be given special attention, namely the law applicable in non-international armed conflict. The development of this branch postdated World War II and can be ascribed to the same causes that led to the development of international human rights law. Its particular significance lies in the fact that it overlaps in many crucial respects with international human rights law and each will be seen to help clarify the other.[5]

The result of post-war efforts to protect people from serious abuse by their own governments has been the evolution of a general international law of human rights. Both the evolution and the general features of this law have been amply described by others and it is not intended to reiterate them

[4] The relevant law relating to the treatment of persons in the hands of a party to an armed conflict was codified in the Geneva Conventions of 12 August 1949: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II); Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV). These instruments were supplemented in 1977 by the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and by the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). See, generally, Best, *Humanity in Warfare* (1980); Cassese (ed.), *The New Humanitarian Law of Armed Conflict* (1979); International Committee of the Red Cross and Henry Dunant Institute, *Bibliography of International Humanitarian Law* (2nd edn., 1997).

[5] See Green, 'Human Rights and the Law of Armed Conflict', 10 *Israel Yearbook of Human Rights* 9 (1980); Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989).