

# Prisoners of the International Community

Denis Abels

# Prisoners of the International Community

The Legal Position of Persons Detained  
at International Criminal Tribunals

T · M · C · A S S E R P R E S S

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*'It is dangerous to show man too often how much he resembles the beasts, without showing him his grandeur. And it is even more dangerous to show him too often his grandeur without also his baseness. It is more dangerous still to let him ignore both'.*

Blaise Pascal<sup>1</sup>

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<sup>1</sup> Quoted in Mark Lilla, *The Hidden Lesson of Montaigne*, The New York Review of Books, Volume 58, Number 5, 24 March 2011, available at: <http://www.nybooks.com/issues/2011/mar/24/> (last visited by the author on 28 March 2011).

# Foreword

It matters greatly how international criminal tribunals treat persons they detain, for ultimately such tribunals are acting on behalf of all humankind. The example that these tribunals set in how they deal with these detainees will therefore have major implications. Prison authorities worldwide may argue that they cannot be expected to do more for the detainees for whom they are responsible than the international community requires in respect of the detainees held by international tribunals.

Denis Abels's book examines the legal position that pertains in the detention facilities at international criminal tribunals. It is built on two strong pillars. First, it explains in meticulous detail how as a matter of general legal principle the international tribunals that are currently operating should treat their detainees. Secondly, and in equal detail, it describes what the current tribunals are specifically required to do, and are doing, for and with the detainees in their care.

The construction of both these pillars requires careful scholarship. The general standards on how detainees should be treated are not set out in a single binding legal source. Instead they have been developed in several different ways and at both international and regional levels. At both levels there are human rights courts and tribunals that interpret abstract human rights standards and apply them to places of detention; inspecting bodies that examine whether such standards are being implemented in practice; and instruments, such as the United Nations Standard Minimum Rules for the Treatment of Prisoners or the European Prison Rules, that do address conditions of detention directly but that suffer from the twin weaknesses of not being binding law and of only setting minimum standards specifying what should be done. Abels investigates all these sources of standards. He draws masterfully from them both what they individually prescribe - his account of the standards implicit in the European Convention of Human Rights alone would justify publication as a study in its own right - and then combines the various sources to establish what the overall approach to detention should be as well as what specific standards should be applied to various aspects of its implementation.

Building the second pillar requires a description of the current position. This is hard as the internal rules governing detention in the facilities attached to the

international tribunals are relatively sketchy, having largely been developed post hoc by tribunals themselves. However, Abels supplements them by a very meticulous investigation of the pronouncements of the presidents of the tribunals or of individual judges on detention matters. He also examines the details of the administrative rulings and other communications on the subject of detention of the officials attached to the tribunals. This is an extraordinary work of synthesis. Nor is it as dry as it may sound, for Abels combines it cleverly with material gained from interviews with officials and in some instances with the detainees themselves. From these very diverse sources a rounded picture emerges of a nascent international detention system. It may have been set up without much thought, merely as a way of holding accused persons pending trial. However, it has ended up having to do much more, as the periods of detention have become much longer than envisaged, and as convicted detainees have ended up spending many months in these before they can finally be sent to serve their sentences in the prisons of states that volunteer to take them.

Having described so carefully and fully both the 'ought' and the 'is', Abels has a strong foundation for a sustained critique of the legal position of detainees in the existing system of detention. In this regard he is rightly critical of the International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda in particular, where the tribunals make the regulations governing detention, administer them and interpret them judicially, for example when it judges disciplinary matters where the allegation is that the rules that it drafted itself have been infringed. The absence of the conventional division of powers between legislative, executive and adjudicative organs raises many problems and Abels's proposed solution of an independent disciplinary adjudicator has much to commend it as a way of ensuring that detainees are treated impartially and fairly.

The true value of this book goes far beyond such specific reform suggestions, however. At its heart is a definitive account of a process where the need to manage a specialised area, detention facilities for international criminal tribunals, has generated rules and practices based on a large but inchoate body of principles. By bringing them together and systematising them in this volume into a statement of the legal position of detainees Denis Abels has done what institutional writers did in the nineteenth century before the principles of criminal law were codified, and more modern scholars, such as Horst Schüler-Springorum in Germany or Constantijn Kelk in the Netherlands, did prior to full legislation on national prison law in the late twentieth century. One may legitimately hope that this work will provide the basis for the principled codification of the law governing not only the detention facilities but also the prisons to which sentenced offenders are sent by international tribunals and, looking forward, the International Criminal Court in future.

Nottingham, Summer 2012

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# Abbreviations

A. Ch.	Appeals Chamber
ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACommHPR	African Commission on Human and Peoples' Rights
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CoE	Council of Europe
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECommHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
EPR	European Prison Rules
HRC	Human Rights Committee
I-ACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
OAS	Organization of American States
OPCAT	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
OTP	Office of the Prosecutor
Pres.	President
P.-T. Ch.	Pre-Trial Chamber

P.-T. J.	Pre-Trial Judge
RoC	Regulations of the Court (ICC)
RoR	Regulations of the Registry (ICC)
RPE	Rules of Procedure and Evidence
RSJ	Raad voor Strafrechtstoepassing en Jeugdbescherming
SCSL	Special Court for Sierra Leone
SMR	United Nations Standard Minimum Rules for the Treatment of Prisoners
SPT	Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
STL	Special Tribunal for Lebanon
T. Ch.	Trial Chamber
UDHR	Universal Declaration of Human Rights
U.N.	United Nations
U.N. Basic Principles	United Nations Basic Principles for the Treatment of Prisoners
U.N. Body of Principles	United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
UNDU	United Nations Detention Unit (ICTY)
UNDF	United Nations Detention Facility (ICTR)