



Prisoners' Rights in The Light of Non-Binding International Instruments

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ABSTRACT

Background

From a long time ago the condition of those individuals imprisoned or in other words deprived of physical freedom has been noted by the writers and scholars of the field of criminal law. The norms that exist in the literature of International law are divided into binding and nonbinding norms.

Materials and Methods

This is a theoretical inquiry and its methods are descriptive-analytical and the gathering of data is done by the library method and referring to documents, book and articles.

Ethical Considerations

In all steps of writing this inquiry, while observing the authenticity of the texts, honesty and fidelity have been observed.

Findings

Under the nonbinding documents and norms different instances of the rights of prisoners are put in a special class. The first class is the basic principles. These principles are in fact a part of the instances of basic human rights which in the literature of International law are an instance of imperative principles of International law and important effects come from them. The second type is the non-basic principles. These type of principles have no Conventional and common background.

Conclusion

The nonbinding documents and norms regarding the new instances of the rights of prisoners can by creating convergence in the international procedures of governments, prepare the grounds for the entry of the aforementioned principles into the realm of binding rights.

Key words

Non-binding Documents, Prisoner Rights, Human Rights, Humanitarian Rights.

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INTRODUCTION

The realm of law, is a set of norms the goal which is regulating the relations between the subjects of law [1]. One of the most important problems in the realm of law is the problem of executive guarantees for violating the norms. In a general classification executive guarantees are either criminal or non-criminal. Criminal executive guarantees are in fact the reaction of the state to committing crimes by the subjects of law [2]. Historically one of the oldest examples of criminal executive guarantees is "imprisonment". Hence, from a long time ago the condition of those imprisoned or in other words individuals deprived of physical freedom has been noted by the writers and scholars of the field of criminal law. In the realm of law, those imprisoned for punishment are either war prisoners or non-combat prisoners [3].

On the other hand, the problem of the rights of prisoners is on the branch of criminal law. In the realm of criminal law basically there is a general principle under the name of the principle of legality of crimes and punishments. In the view of many writers of international criminal law, considering the presence of this principle, there is no room left for the nonbinding norms to play a role in the realm of international criminal law. Because considering the aforementioned principle, basically the concept of crime and punishments must be thoroughly specified in the form of binding legal texts and documents [4]. Considering the extent and diversity of non-binding documents and norms related to the rights of prisoners, in the current inquiry we are asking what roles do

the aforementioned documents and norms play in the process of changing the rights of prisoners?

MATERIALS AND METHODS

This is a theoretical inquiry and its method is descriptive-analytical and the gathering of data is done by the library method and referring to documents, book and articles.

DISCUSSION

A. Examples of the Rights of Prisoners

In 1988, the set of principles for protecting the rights of all individuals under any form of imprisonment was ratified in the form of the 43/173 under the title of body of principles for the protection of all persons under any form of detention or imprisonment by the general assembly of the UN. Shortly after in 1990 the general assembly ratified the basic principles for the treatment of prisoners. In 2011 the general assembly of UN created a working group consisting of state experts in order to analyze the possibility of revision in the declaration of minimum standard principles of behavior towards prisoners. I. December 2015, the aforementioned standards were reviewed by the general assembly in the form of 175/70 agreement and out of respect for the deceased president of south Africa, Mr. Nelson Mandela, it was named the Rules of Nelson Mandela. Therefore, currently the Mandela Rules is the newest document related to the rights of people deprived of freedom [5]. But what rights have these non-binding documents added to the examples of the rights of those deprived of

freedom? In the following while examining the content of the Mandela Rules we will answer this question.

The first point is that Mandela Rules firstly introduce principles as basic principles which the aforementioned principles in the international processes and other International documents, by repetition and emphasis have a special status [5]. The content of the principles 1 to 5 are as such:

Principle Number One: All prisoners, considering their natural dignity and value as human being, must be respected. No prisoner should be tortured and all prisoners must be kept safe against torture and other cruel, inhumane and humiliating behaviors which in no way can be justified. Safety and security of prisoners, staff, service providers and visitors must be guaranteed at all times.

Principle Number Two: The present principles must be enforced impartially. No discrimination based on color, race, gender, language, religion political or non-political beliefs, national or social originality, property, birth or any other circumstance should no longer exist. The religious beliefs and moral principles of the prisoners must be respected.

Principle Number Three: Imprisonment or other actions which result in cutting people off from the outside world, since they deprive people from their right to choose their destiny by depriving them from their freedom, are painful. Therefore, prison systems must not, other than unusual cases of justifiable

Separation or for maintaining order, intensify the natural pain of this circumstance.

Principle Number Four: The goal of imprisonment or similar measurements of depriving individuals from their freedom is mostly protecting the society against crimes and their repetition. This goal is met only if the period of imprisonment is used for guaranteeing the maximum rejoining the society for these people after regaining their freedom in a way that they can lead a law-abiding and independent life.

Principle Number Five: The institution of prison must make efforts to reduce the differences between the life in prison and life in freedom, in order to reduce the responsibility of the prisoners or respecting their dignity as human beings.

Currently the contents of the five principles above, due to repetition in International Procedure have been acknowledged as the following principles:

1. Respectful attitude towards the human dignity and value of prisoners; This principle clarified before in Article 76 of Lieber Code (dated 1863 it was in fact the first try to codify the war Rules), Article 23 of Brussels Declaration, oxford manual (dated 1880 adopted by the institute of international law), Article 4 of IV Convention of the Hague Conventions, Common Article 3 of the Geneva Conventions, first section of basic principles for the treatment of prisoners (Resolution 45/111 adopted by the General Assembly dated 1990) and the first principle of the Body of

Principles for the Protection of All Persons under any Form of Detention or Imprisonment (Resolution 43/173 adopted by General Assembly dated 1988).

In addition to these documents this principle has been extensively considered in internal procedures of governments. Amongst the different examples of the internal procedures of governments, domestic laws which are mostly ratified and published in the field of the rights of armed conflicts in the form of military protocols, are the best examples for drawing the approaches of the government's procedures [6].

2. The prohibition of torture or any other forms of misbehavior; the prohibition of torture and its effects are clarified in Article 16 of Lieber Code, Article 6 of the Nuremberg charter, common Article 3 of the Geneva Conventions, Article 12 of the first Geneva Convention, Article 8 of the Rome statute (Grave breaches of the Geneva Conventions), the 6 and 33 principles of the body of principles for the protection of all persons under any form of detention or imprisonment. On another hand this principle is extensively accepted in governments' internal procedures [6].

3. Treatment with prisoners according to their needs and without discrimination; the prohibition of any form of discriminatory behavior has been clarified in the common Article 3 of the Geneva Conventions, Article 16 of the third Geneva Convention and Article 13 of fourth Geneva Convention, section 2 and 9 of the basic principles for the treatment of

prisoners, This principle is also widely emphasized upon in the internal procedures of governments [6].

4. The goal of imprisonment must be the protection of society and reduction of repeating crimes; this principle in contrast to the previous principles, has been less emphasized upon in international documents. But at the same time in the internal legal systems of governments and in the literature of the writers of criminal law is a part of general principles [7].

5. Guaranteeing the safety of prisoners, staff, service providers and visitors must at all time be a priority [8].

The second point that must be considered is that among the five aforementioned basic principles, the first three have been expressed in a general form in a way that they are applicable to both the discussion about war prisoners and the discussion about other prisoners. But the last two principles are specifically about non-combat prisoners. The first three principles (which are applicable to all individuals deprived of freedom) directly point out some examples of basic human rights [5].

The third point is about the examples of basic human rights and their special attributes. Examples of basic human rights or the irreversible rights in all circumstances (whether at the time of war or at the time of peace) have been expressed in the International Covenant on civil and political rights Based on the contents of the Article four of this Covenant Some rights have been considered as "Irreversible Rights" in all circumstances, or in

more simple terms retreating from this right by the government is in no circumstances acceptable. These irreversible rights include:

1. The prohibition of all forms racial discrimination whether it is discrimination based on color, race, gender, language, religious or social background;

2. The right to life, which is a natural human right. This right should be observed by law. No one can be deprived of his life arbitrarily or without cause, in states where the capital punishment has not been cancelled, ruling for capital punishment is not allowed except for the most important crimes by a law which is imperative at the time of the crime has taking place and is not contrary to the Rules of this Covenant and other Conventions about the prevention of the punishments of crimes. Also, anyone convicted to capital punishment has the right to ask for pardon or the reduction of his punishment. Ultimately due to the contents of the Article 6 of the Covenant, in no circumstance it is permissible to convict someone under the age of 18 or a pregnant woman to capital punishment.

3. The prohibition of harm or torture or mistreatment (including putting someone under medical or scientific experiments);

4. The prohibition of slavery and selling or buying slaves;

5. Prohibition of imprisoning a person because of incapability of executing a contractual obligation;

6. Ex post facto of criminal laws; due to the contents of the first paragraph of Article 15 of the Covenant of Civil and Political Rights, no one is to be convicted of a crime for an action or inaction at the time of which has not been a crime based on either national or international laws. Also, no punishment should be harsher than what had been decided at the time the crime was committed;

7. Commitment to the identification of the characters of human individuals;

8. The right of freedom of thought, conscience or religion. This right includes having the freedom of having or accepting a religious or one's own beliefs, whether individually or in a group, whether publicly or in secret, in worship and doing religious acts or doctrines. No one should be hated in a way that his freedom in having or accepting a religion or the beliefs of his choosing is harmed. Freedom of religion or beliefs cannot be subjected to limitations unless what is specifically foreseen by law and is necessary for the protection of security, public health or morals or the basic rights and freedoms of others [9].

B. Non Biding Rules and Principle

The special attribute of the basic human rights which should be considered here is the non-derogable quality. The difference between the two concepts of non-derogable and non-breachable should be noted here. When a state by a justifying cause like safe harbors (countermeasure or legitimate defense or etc.) refrains from holding an international obligation has in fact not violated the

aforementioned legal principle but has retract from it. Therefore, retracting from a principle is possible unless exceptionally the legal principle due to different reasons (for example being imperative) is basically un-retract. But in the discussion about breach, we must note that no legal principle (imperative or not imperative) is not to be violated.

All these said are in fact the common attribute of basic human rights and the concept of *Jus Cogens*. This is why many of the writers of international law consider basic human rights as one of the examples of the *Jus Cogens* [10], (11). All these said, it seems that the special status of basic principles (considering the extensive Conventional and common background) has divided the Mandela Rules into basic principles. Therefore, it seems that dividing the basic principles from other principles in this non-binding document (Mandela Rules) is in fact for strengthening the international procedure for promoting the basic principles to the field of imperative principles of International law.

1- Non-Basic Principles

Examples of non-basic principles are extensive and mostly lack Conventional and common background on a global or even regional level. But why is that? We must pay attention that the rights of war prisoners have definite Conventional and common principles due to the long history in the literature of law and international relations and the importance of individual human rights in the circumstances of armed conflicts (which is always one of the

concerns of the international community); but these conditions are not governing on the circumstances of the rights of prisoners (unrelated to armed conflicts) [5]. The reasonable conclusion is this: the influence of non-binding documents in the discussion about the rights of the prisoners of armed conflicts is *Erga Omnes* in the field related the common principles related to the rights of all individuals deprived of freedom (war prisoners and others) in order to uplift the status of the examples of humanitarian rights to the status of *Jus Cogens*. Contrastingly in the discussion about other prisoners, the role of non-binding documents is mostly aimed at innovation and defining new principles in favor of the condition of the prisoners [12]. After analyzing the basic principles of the rights of prisoners, in the following we will briefly point out the examples of second level rights of prisoners i.e. non-basic principles.

2- Non-Binding Mandela Rules

Non-binding Mandela Rules are divided by their subject into a number of categories and each of them has many examples which are:

1. Rules related to the acceptance of a prisoner; Some of these principles include the imprisonment of the individual in the prison closest to his place of residence (contents of the rule 59), precise documentation of the prisoner's information such as information related to identification, Diseases, injuries, etc. (Contents of Rules 7 and 8), informing the prisoners of the exact Rules of the prison in a language that he understands (contents of Rules

54 and 55), receiving and maintaining the properties which the prisoners cannot have during his sentence (contents of Rules 7 and 68) conducting the required medical experiments for his health needs (contents of Rules 30 and 34).

2. Rules related to the Separation of the prisoners; In order to facilitate the protection and maintenance of the prisoners, they must be classified based on gender, status (convicted and accused) and also age (adult and minor) (the contents of the rule 11). Also, prisoners must be separated based on being highly dangerous and not so dangerous (whether to the staff or to other prisoners) (contents of Rules 94, 93, 89).

3. Rules related to the prison staff; All time protection of the staff (content of the Rule 1) using female staff for services in the women's section (content of the Rules 74 and 81) holding educational courses for the staff (content of Rules 7-9 and 29 and 92)

4. Rules related to files and backgrounds; The necessity of establishing a standard system of management for the files of the prisoners (content of Rules 6 and 10), precise documentation of all backgrounds (including descriptions, medical background, etc.) in the aforementioned system (the content of Rules 7-9, 29 and 92).

5. Rules related to the quality of the residency of the prisoners; the necessity of the existence of clean W.C., access to water, also access to necessary clothes and health tools especially for women (the contents of Rules 16, 15 and

18-21), providing quality food and drinking water, also the impossibility of cutting or reduction of food or water rations as punishment (the contents of Rules 43, 42, 35, 22). Of course, related to the special condition of women, the general assembly of the UN in 2010 ratified the Rules for the treatment of women prisoners and noncustodial measures for women offenders. These principles are known as the Bangkok principles with are in fact more detailed and extended than the Mandela Rules.

6. Rules related to punitive and disciplinary issues; Information related to the internal Rules of prisons, rights and duties of prisoners, punitive punishments and the ways of access to legal counsel must be provided for the prisoners. Also, the way of providing these information must be in a form and language access able to the prisoners (the content of Principles 54 and 55) the methods of inspection must be inserted in the Rules and laws of the prison. Decisions based on the inspection must be made in necessary cases and during the inspection the privacy of the prisoners must be regarded for (The content of Principles 50, 53 and 60).

7. The Rules related to communicating with the outside world; Prisoners have the right to stay in touch with their friends and family through mediums of communication such as letter, phone, etc. Also, prisoners have the right to communicate with their friends and family about their condition of imprisonment, transportation, serious illnesses and injuries (The contents of Principles 43, 58-60, 68 and

70). Also, prisoners must have access to appropriate time and place and secret facilities for visitation from their lawyers (Principles 120, 119, 61, 53, 41). These principles are also expressed in the guidelines and principles of the UN concerning the access to legal helps in criminal justice systems ratified by the UN general assembly dated 2012.

Most of the Mandela rights are in fact retellings of principles of the rights of war prisoners which are extensively discussed in the Geneva Convention but it must be noted that the aforementioned rights in the Geneva Convention are specifically aimed at war prisoners. Therefore, through nonbinding documents the aforementioned rights which have a definite Conventional and common background for war prisoners have spread out to the condition of other prisoners. Although it must not be forgotten that the Mandela principles in some special issues especially in the treatment of prisoners has had innovation, these innovations are sometimes related to the execution of the existing general Conventional and common principles and sometimes also generally create new examples for the rights of prisoners. For example, using isolation cells has been accepted only in special cases (and only as a last resort and as shortly as possible) and under independent supervision and with regard to the permission of the capable authorities (Principle 45). Another example that can be pointed out here is the prohibition of using chains or other metal limitative tools which are inherently humiliating or painful (the content of principle 47). The aforementioned

examples are in fact related to the circle of liability and the way of executing the general principle of human treatment of prisoners.

CONCLUSION

Regarding the title "prisoners" we must make a distinction between two groups of people: A. War prisoners and B. Regular Prisoners (individuals who have been sentenced to imprisonment because of committing a crime). In the literature of International humanitarian rights, there are many binding norms and principles regarding the condition of the war prisoners. But regarding the condition of the normal prisoners, the aforementioned norms and principles are present only in small numbers and in the form of some principles and norms of International human rights. The reason for this is the principle of national sovereignty of governments, non-interference in domestic affairs especially in criminal affairs with emphasis on the principle of the legality of crimes and punishments. Considering the aforementioned principle, governments in the stage of international relations have fewer tendencies to accept hard or binding international commitments. Contrastingly the aforementioned documents do not put up much resistance.

Under the non-binding documents and norms, we saw that different instances of the rights of prisoners are put in a special class. The first class is the basic principles. These principles are in fact a part of the instances of basic human rights which are in the literature of International law, are an instance of the *Jus*

Cogens in International law. These principles are on top of the pyramid of the normative hierarchy of International law. An attribute of this class of principles is that basically the aforementioned principles are un-retract meaning that no state can by referring to justifying or disclaimer causes such as countermeasure or the consent of the prisoners or legitimate defense or etc. refrain from the execution of these principles. The principles of the basic rights of prisoners must at all time and all conditions be executed. It is the non-binding principles and documents that by creating convergence in the international affairs make the approach of the states concentrated and favorable and through this have made customary international law which can on the next step be promoted to level of imperative principles of International law.

The second Type is non-basic principles. This type of principles has no Conventional and Common background. In other words, the definition of these principles is an innovation and defining a new example for the rights of prisoners. It must be noted that nonbinding documents and norms regarding the new instances of Prisoner's rights can by creating convergence in the international procedure of governments prepare the grounds for entering of the aforementioned principle and norms to the realm of imperative rights.

ETHICAL CONSIDERATION

In all steps of writing this inquiry, while observing the authenticity of the texts, honesty and fidelity have been observed.

AUTHOR CONTRIBUTIONS

Planning and writing of the manuscript was done solely by the author.

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CONFLICT OF INTEREST

No conflict of interest was reported by the author. The author declare that he has no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.

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REFERENCES

- [1] Partington M. Introduction to the English Legal System. Oxford: Oxford University Press; 2019. P. 17.
- [2] Bloom R. Cases on Criminal Procedure. New York: Wolters Kluwer Law & Business; 2020. P. 1-2.
- [3] Mettraux G. International Crimes: Law and Practice: Crimes Against Humanity. Oxford: Oxford University Press; 2020. P. 420.
- [4] Olásolo H. International Criminal Law: Transnational Criminal Organizations and Transitional Justice. Boston: Brill; 2018. P.155.
- [5] Beyranvand F, The procedure of national courts in confronting with international soft law with emphasis on international humanitarian law.

PhD Dissertation. Tehran Iran: Islamic Azad University; 2020. 325p. [Persian]

[6] Henckaerts J, Beck L, Customary International Humanitarian Law. Cambridge: Cambridge University Press; 2009. Pp. 384, 386, 387, 388-389.

[7] Siegel L, Worrall J, Essentials of Criminal Justice. London: Cengage; 2018. P. 21.

[8] Louis-Léon C. Belgium: Religions and Prisons in Law. In: Ariño J, Zwilling A, Religion and Prison: An Overview of Contemporary Europe. London: Springer; 2020. P. 38.

[9] Yaghuti E, Khazaei A, Beyranvand F, Inquiries About Jus Cogens and Erga Omnes Obligations in International Law. Tehran: Islamic Azad University of Central Tehran Publisher; 2019. Pp. 35, 36, 37. [Persian]

[10] Weatherall T. Jus Cogens: International Law and Social Contract. Cambridge: Cambridge University Press; 2015. pp.200-264.

[11] Criddle E, Fox-Decent E. Fiduciaries of Humanity: How International Law Constitutes Authority. Oxford: Oxford University Press; 2016. pp.77-122.

[13] Beyranvand F, Jus Cogens and Erga Omnes Obligations in International Law. MA Dissertation. Tehran Iran: Islamic Azad University; 2013. 100p. [Persian]

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