THE OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE AND THE DETENTION OF REFUGEES

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Abstract The Optional Protocol to the Convention against Torture entered into force on 22 June 2006. It establishes a Sub-Committee for the Prevention of Torture that has authority to visit places of detention and to assess the conditions of that detention as a way to reduce the incidence of torture or cruel, inhuman or degrading treatment or punishment. Additionally, States parties are required to set up complementary national preventive mechanisms. This article explores both how these mechanisms established under the Optional Protocol could operate in the context of the detention of refugees and/or asylum-seekers, which is an increasingly common occurrence in many parts of the world, as well as whether they add value to existing international mechanisms that are already available in this field. It examines the purported applicability of the Optional Protocol to four refugee/asylum situations, namely detention at airports and other border zones; immigration (or administrative) detention, including semi-open (or semi-closed) asylum centres; closed refugee camps; and extraterritorial processing or holding centres. Reviewing definitional, jurisdictional, and practical issues that may impact on the success or otherwise of these new preventive mechanisms, this article concludes by making a number of recommendations to aid their work in the refugee/asylum context.

I. INTRODUCTION

The detention of non-citizens is one of the most controversial issues on the international displacement agenda. It is increasingly resorted to by many governments in response to national security threats, terrorism, and global

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irregular migration, in all parts of the world. The constant blurring of the lines between asylum and migration and the difficulty of distinguishing asylum-seekers from other migrants who regularly travel along the same routes or who resort to the same smuggling networks, has seen asylum-seekers and refugees subject to forms of detention usually reserved for other non-citizens. In mass influx situations, some governments impose restrictions on the movement of refugees or confine refugees to camps, commonly in remote or dangerous locations, which may, in certain circumstances, amount to deprivations of liberty. In recent years, a number of proposals to process asylum-seekers extraterritorially have emerged and, in a few cases, been implemented, in which detention has featured as either a specific component of the proposal or has been necessarily inferred by the location or modalities of such arrangements.

In all these situations, refugees and asylum-seekers may face standards of treatment below those required by international law, whether under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984[1] (UNCAT), equivalent provisions in the International Covenant on Civil and Political Rights 1966[2] (ICCPR) and regional human rights instruments,[3] or under international refugee law, including the 1951 Convention relating to the Status of Refugees,[4] (1951 Refugee Convention), as amended by its 1967 Protocol.[5]

The United Nations High Commissioner for Refugees ('UNHCR') reports annually on the penalization of refugees and asylum-seekers through the use of detention and other restrictions on freedom of movement.[6] No accurate statistics are available as to the total number of refugees and/or asylum-seekers detained, not least due to disagreement as to whether various restrictions on the freedom of movement of refugees and/or asylum-seekers actually

[1] GA Res 39/46, 10 Dec. 1984; entered into force 26 June 1987.

[2] GA Res 2200 A (XXI), 16 Dec. 1966; entered into force 23 March 1976.

[3] Regional instruments include: European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (Rome, 4.XI.1950, as amended by its protocols); European Convention on Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987, Strasbourg, 26.XI.1987, as amended by Protocols No. 1 (E.T.S. No. 151) and No.2 (E.T.S. No. 152); American Declaration on the Rights and Duties of Man 1948 (Res XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc 6 rev 1 at 17 (1992)); American Convention on Human Rights 1969 (signed on 22 Nov 1969 at Inter-American Specialized Conference on Human Rights, held in San José, Costa Rica; entered into force 18 July 1978); Inter-American Convention to Prevent and Punish Torture 1985 (OAS Treaty Series No. 67, Doc OEA/Ser.L.V/II.82 Doc 6 Rev 1 at 83 (1992); entered into force 28 Feb 1987); African Charter on Human and Peoples' Rights 1981 (Adopted at the 18th Assembly of Heads of State and Government of the African Commission, 26 June 1981; entered into force 21 Oct 1986; 21 ILM 59).

[4] 189 UNTS 137, 28 July 1951; entered into force 22 April 1954.

[5] 606 UNTS 267, 31 Jan. 1967; entered into force 4 October 1967.

[6] See, UNHCR, Note on International Protection, UN Doc A/AC.96/1038, 29 June 2007, para 15. See, further, Executive Committee of the High Commissioner's Programme, Standing Committee, *Detention of Asylum-Seekers and Refugees: The Framework, the Problem and Recommended Practice*, UN Doc EC/49/SC/CRP.13, 4 June 1999.

amount to deprivations of liberty as defined by international law.[7] According to the United States' immigration authorities, more than 230,000 non-citizens were detained in the US in the fiscal year 2003, of which 6 per cent were asylum-seekers;[8] the corresponding figure for the United Kingdom has been put at approximately 35,000 in 2003 and 32,000 in 2004.[9] The UNHCR has consistently stated that the detention of asylum-seekers and refugees is 'inherently undesirable'.[10] The Organisation's Agenda for Protection calls on governments 'more concertedly to explore appropriate alternatives to the detention of asylum-seekers and refugees.'[11] While much international focus has been given to *the fact* of detention or other restrictions on the liberty or freedom of movement of refugees and asylum-seekers, less attention appears to have been paid to date to the *conditions* of that detention. The entry into force of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[12] (OPCAT) represents an important opportunity to bolster existing monitoring and supervision mechanisms in the context of refugee/asylum detention. This is not least because the OPCAT is a human rights instrument and thereby offers complementary protection to the minimal guarantees available in the 1951 Refugee Convention. Notably, the 1951 Refugee Convention does not contain express prohibitions against torture or arbitrary detention.[13]

[7] For country-specific information on detention of asylum-seekers, refugees and/or migrants, see O Field and A Edwards, *Study on Alternatives to Detention of Asylum Seekers and Refugees*, UNHCR, Legal and Protection Policy Series, UN Doc POLAS/2006/03, Geneva, 2006, which contains 34 country annexes, available at: http://www.unhcr.org/protect/PROTECTION/4474140a2.pdf; 'Barbed Wire Europe: Conference against Immigration Detention', held Ruskin College, Oxford, 15–17 Sept 2000 (2000) 13(4) J Ref Studies 415; UNHCR, *Detention of Asylum-Seekers in Europe*, European Series, Vol 1, No 4, 1995, reprinted Jan 1996, UNHCR Geneva; J Hughes & O Field, 'Recent Trends in the Detention of Asylum Seekers in Western Europe', in J Hughes & F Liebaut (eds), *Detention of Asylum Seekers in Europe: Analysis and Perspectives* 5 (1998); Jesuit Refugee Service, Detention in Europe website at http://www.detention-in-europe.org/.

[8] US Immigration and Customs Enforcement, Fact Sheet: ICE Office of Detention and Removal Operations, 4 May 2004, referred to by B Frelick, Amnesty International USA, 'US Detention of Asylum-Seekers and Human Rights', Migration Policy Institute Migration Information Resource, March 2005.

[9] Amnesty International, *United Kingdom: Seeking Asylum is Not a Crime: Detention of People Who Have Sought Asylum*, AI Doc. EUR 45/015/2005, 20 June 2005, 43.

[10] UNHCR, *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers*, Feb 1999, para 1.

[11] UNHCR, Agenda for Protection (3rd edn, 2003) 38, available at: http://www.unhcr.org/protect/PROTECTION/3e637b194.pdf.

[12] GA Res A/RES/57/199, 18 Dec. 2002; entered into force 22 June 2006.

[13] The 1951 Refugee Convention contains two relevant provisions, namely Arts 31(1) (prohibits the penalisation of asylum-seekers and refugees who have entered or are staying in the territory illegally, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence), 31(2) (limits the restrictions a state party may impose on the movement of refugees falling under Art 31(1)), and 26 (guarantees the right of refugees lawfully in the territory to choose their place of residence and to move freely within the territory subject only to any regulations applicable to aliens generally in the same circumstances). For more information, see G Goodwin-Gill, 'Article 31 of the 1951 Convention Relating to the

Divided into six parts, this article addresses definitions, situations, and institutions associated with this new inspection regime in the refugee/asylum context. This Introduction is followed by a brief overview of key aspects of the OPCAT in Part II. Part III then examines the operating definitions of the OPCAT and inquires into the extent to which its mandate extends to detention situations commonly faced by asylum-seekers and refugees. In doing so, it explores whether these definitions correspond to definitions and standards already in use in the refugee/asylum context. In the event of a conflict between standards, I argue that the higher standard must apply due to the particular vulnerabilities of asylum-seekers and refugees.

Part IV explores how the OPCAT and its twin inspection bodies – the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT)[14] and the national preventive mechanisms (NPMs)[15]—would operate in four types of detention contexts prevalent in the refugee/asylum field, namely: the detention of asylum-seekers upon arrival at airports and other border posts; immigration detention (otherwise referred to as administrative detention), including semi-open (or semi-closed) asylum or refugee centres; closed refugee camps; and extraterritorial processing or holding centres. It draws on some key examples of such practices from a range of countries, while noting that only 34 States have so far ratified the OPCAT.[16] As a matter of law, I argue that the mandate of the OPCAT mechanisms extends, largely without controversy, to border detention and immigration detention centres, noting that such detention facilities have already been subject to a range of international and regional monitoring efforts. Rather, potential difficulties that may arise in these places are practical rather than legal in nature. Other situations of detention, such as closed refugee camps and extraterritorial processing centres, raise more complex, albeit not insurmountable, definitional, jurisdictional, as well as practical, issues. I argue that the favourable resolution of these issues is vital to safeguard the relevance and effectiveness of the OPCAT mechanisms in the refugee/asylum context.

Part V of this article considers the value of the OPCAT mechanisms given their overlapping institutional mandate with the primary refugee authority, the UNHCR. The UNHCR monitors detention conditions of refugees and asylum-seekers under its supervisory mandate over the international protection of refugees.[17] Although there are a range of other international and regional

Status of Refugees: Non-Penalization, Detention, and Protection', in Feller, Türk and Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003) 185.

[14] Part III, OPCAT.

[15] Part IV, OPCAT.

[16] For up-to-date status of ratifications, see http://www2.ohchr.org/english/bodies/ratification/9_b.htm#ratification

[17] Art. 35, 1951 Refugee Convention; Art. 8, 1950 Statute of the Office of the United Nations High Commissioner for Refugees, GA res. 428 (V), 14 Dec. 1950.

bodies and institutions that deal with the detention of asylum-seekers and refugees,[18] focus in this article is restricted to the UNHCR. Nonetheless, some of the problems and recommendations outlined in this article may also have relevance to other bodies. I highlight a number of situations in which the OPCAT mechanisms may be better placed than the UNHCR to visit and inspect refugees and asylum-seekers in detention, not least because of rights of automatic access contained in the OPCAT. In conclusion, I make a number of recommendations that will hopefully assist the OPCAT mechanisms, at both the international and national levels, in their first forays into preventing torture and other forms of inhuman or degrading treatment in relation to refugee/asylum detention.

This article does not deal with the detention or imprisonment of refugees and asylum-seekers in connection with ordinary criminal charges or penal sentences, although I note that they fall within the mandate of the OPCAT mechanisms. Furthermore, this article does not deal directly with the often different realities facing migrants who are not seeking asylum or who have been rejected for asylum and are awaiting deportation. As it is rarely simple to distinguish between asylum-seekers and other migrants upon arrival or pending their removal and as they are consequently frequently held together in the same facilities and under the same or similar conditions, some of this commentary may equally apply to migrants.

For the purposes of this article, a 'refugee' is understood to mean a person who satisfies the definition in Article 1 of the 1951 Refugee Convention, as amended by its 1967 Protocol, namely an individual who is outside their country of origin and is unable or unwilling to return there owing to a well-founded fear of being persecuted on account of their race, religion, nationality, membership of a particular social group, or political opinion, and who is not otherwise excluded from protection. Expanded definitions of a 'refugee' as defined by one of the regional instruments, or obligations relating to subsidiary protection, are equally valid in those regions where they apply.[19] An asylum-seeker is, by comparison, an individual who has

[18] eg the International Committee of the Red Cross in the context of armed conflict; the Working Group on Arbitrary Detention (its mandate was extended in 1997 to cover administrative custody of asylum-seekers and immigrants); UN Special Rapporteur on Torture and Cruel, Inhuman or Degrading Treatment; African Commission Special Rapporteur on Prisons and Conditions of Detention in Africa; the European Committee on the Prevention of Torture; the Inter-American Special Rapporteur on the Rights of Persons Deprived of their Liberty.

[19] Art 1(2), Organisation of African Unity (now African Union) Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted by the Assembly of Heads of State and Government, Addis Ababa, Sept 10, 1969; entered into force June 20, 1974) expands the 1951 Convention definition to include persons who are compelled to leave their place of habitual residence due to 'external aggression, occupation, foreign domination or events seriously disturbing public order in either the whole or part of the territory.' Similarly, the 1984 Cartagena Declaration recommends an enlargement of the definition of a 'refugee' in the 1951 Convention to incorporate 'persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation

applied for status as a refugee but who has yet to be recognised as such by the applicable national asylum body.

II. THE OPCAT IN A NUTSHELL

The OPCAT supplements the UNCAT. Operating as a preventive mechanism, the OPCAT establishes a dual and complementary system of regular inspections or visits to places of detention by a single international body and one or more national organs. The aim of these mechanisms is to prevent torture and other cruel, inhuman or degrading treatment or punishment.[20] Collectively these bodies are referred to as the OPCAT mechanisms. Having been in process for over 20 years,[21] the final form of the Optional Protocol resembles, although does not mirror, the system of the Council of Europe.[22] Distinctively, the OPCAT sets up a dual system in which national preventive bodies supplement the work of an international sub-committee. The addition of these national mechanisms has been heralded as a significant and innovative approach under international law, requiring States to utilize such mechanisms in combating torture 'as a matter of international legal obligation, rather than as a matter of exhortation.'[23]

The first mechanism established by the OPCAT, the SPT,[24] has the authority to conduct regular, as well as (arguably) unannounced, visits to places of detention.[25] States parties may object to a visit of the SPT only on a

of human rights or other circumstances which have seriously disturbed public order.' (Cartagena Declaration on Refugees 1984, adopted by the Colloquium of the International Protection of Refugees in Central America, Mexico and Panama, Part III, para 3). Arts. 2(c) (refugee) and (e) (subsidiary protection), EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who otherwise need International Protection and the Content of the Protection Granted, places obligations on EU Member-States to grant subsidiary protection to individuals fleeing (a) death penalty or execution; (b) torture or inhuman or degrading treatment or punishment; (c) individual and serious threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

[20] Art 1, OPCAT.

[21] On background to the OPCAT, see MD Evans, 'Getting to Grips with Torture' (2002) 51 ICLQ 365.

[22] eg the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (n 3), establishes a Committee on the Prevention of Torture that, 'by means of visits, examine[s] the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment' (Art 1). See, http://www.cpt.coe.int/en/.

[23] M Evans and C Haenni-Dale, 'Preventing Torture? The Development of the Optional Protocol to the UN Convention Against Torture' (2004) 4 Hum Rts L Rev 19, 50.

[24] Art 2(1), OPCAT.

[25] Arts 4 & 12, OPCAT. Evans and Haenni-Dale (n 23) 47 refer to the fact that the OPCAT does not require prior consent to visit a place of detention, plus the fact that the SPT has the 'liberty to choose the places it wants to visit . . .' (Art 14(1)(e)), as 'at best a mealy-mouthed way of providing for a right of unannounced access to all places of detention.' But they later go on to state that '[t]he truth is that the text neither prohibits nor authorises such [unannounced] visits . . .'

limited number of grounds,[26] and this has been interpreted as allowing the postponement, but not the prevention, of a visit.[27] The SPT is made up of 10 members, to be increased to 25 after the 50th ratification or accession.[28] These members are to be persons of high moral character, and proven professional experience in the field of the administration of justice, in particular criminal law, prison or police administration, or in the various fields relevant to the treatment of persons deprived of their liberty.[29] They act in their individual capacity, and must be independent and impartial, and serve with efficiency.[30] Consideration is to be given to equitable representation on the basis of geography, different forms of civilizations and legal systems, and gender.[31]

The OPCAT provides that the SPT shall cooperate with relevant actors, including UN agencies and institutions;[32] and offers safeguards for any person or organisation against sanction or penalty for having communicated with the SPT.[33] Experts 'of demonstrated professional experience and knowledge in the fields covered by the Protocol' may be invited to join the members of the SPT undertaking these missions.[34] A roster has now been compiled, made up of nominees from States parties, the Office of the High Commissioner for Human Rights (OHCHR), and the UN Centre for International Crime Prevention.[35] Notably the UNHCR is not listed specifically as a nominating body so in order for refugee experts to be included on the roster, the UNHCR would need to communicate any recommendations to one of the nominating bodies.

The outcome of these visits is to make recommendations to the State party 'concerning the protection of persons deprived of their liberty . . .'[36] These recommendations are communicated directly to the State party in confidence, the aim of which is to establish constructive dialogue with the authorities concerned in order to provide guidance on how best to resolve any identified problems.[37] Guidance can include recommendations for training and capacity building for the national preventive mechanisms.[38] The SPT's recommendations may be communicated to the NPMs, 'if relevant'.[39] The decision as to relevance rests with the SPT, rather than the State party. Short follow-up visits

[26] Art 14(4), OPCAT provides: 'Objection to a visit to a particular place of detention may be made only on urgent and compelling grounds of national defence, public safety, natural disaster or serious disorder in the place to be visited that temporarily prevent the carrying out of such a visit. The existence of a declared state of emergency as such shall not be invoked by a State party as a reason to object to a visit.'

[27] Evans and Haenni-Dale (n 23) 48.

[28] Art 5(1) OPCAT.

[29] Art 5(2) OPCAT.

[30] Art 5(6) OPCAT.

[31] Art 5(3) and (4) OPCAT.

[32] Art 11(c) OPCAT.

[33] Art 15 OPCAT.

[34] Art 13(3) OPCAT.

[35] The list has yet to be made public however.

[36] Art 11(a) OPCAT.

[37] Art 16 OPCAT.

[38] Art 11(b) OPCAT.

[39] Art 16(1) OPCAT.

by the SPT 'may be proposed' after a regular visit, but it appears that a State party may have an option to object to such visits.[40]

The second aspect of the OPCAT is that States parties are required to 'set up, designate or maintain' one or several national bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment, within one year of ratifying or acceding to the Protocol.[41] The NPMs are to be functionally independent, to have the necessary expertise, gender balance, and 'adequate representation of ethnic and minority groups', and to be adequately resourced.[42] The principles relating to national human rights institutions are to be given due consideration in establishing an NPM.[43] Their general functions are regularly to examine the treatment of persons in detention, to make recommendations, and to comment upon existing or draft legislation.[44] The NPMs are granted the same powers to visit places of detention as the SPT;[45] and they are to have unhindered access to any place of detention, to related information, and to interview detainees in private.[46] Similar safeguards are provided for individuals or bodies that communicate with the NPM as those applying in favour of those communicating with the SPT.[47] Recommendations made by the NPMs are to lead to dialogue with the State party[48] and, unlike the confidential communication of recommendations of the SPT, the State party undertakes to publish and disseminate the annual reports of the NPMs.[49] The SPT's role in respect of the NPMs is to advise and assist, when necessary; and to maintain direct, and if necessary confidential, contact; and offer training and technical assistance.[50]

III. DEFINITIONAL DIALOGUE

In order to determine the applicability of the Optional Protocol in the refugee/asylum context, five definitional questions need resolution. These are dealt with below, while any practical issues arising from them are addressed in the specific refugee/asylum situations in Part IV. These questions are:

A. Who is covered by the OPCAT?
B. What constitutes a deprivation of liberty and a 'place of detention' for the purposes of the work of the OPCAT mechanisms?
C. When does a State have jurisdiction and/or control over a place of detention for the purposes of the work of the OPCAT mechanisms?

[40] Art 13(4) OPCAT. For more information on the OPCAT, see Association pour la Prévention de la Torture, *The Optional Protocol—A Manual for Prevention*, available at: http://www.apt.ch/.

[41] Art 3 OPCAT.

[42] Art 18 OPCAT.

[43] Art 18(4) OPCAT. These principles would include the Paris Principles relating to the Status of National Institutions, Human Rights Commission Res 1992/54, 1993; GA Res 48/134, 1993.

[44] Art 19 OPCAT.

[45] Art 4 OPCAT.

[46] Art 20 OPCAT.

[47] Art 21 OPCAT.

[48] Art 22 OPCAT.

[49] Art 23 OPCAT.

[50] Art 11(b)(i) and (ii) OPCAT.

D. What is meant by torture and cruel, inhuman or degrading treatment of punishment for the purposes of the work of the OPCAT mechanisms?
E. What other standards may be applicable to the work of the OPCAT mechanisms in the refugee/asylum context?

A. Who is Covered by the OPCAT?

In spite of the existence of a separate refugee protection regime, refugees and asylum-seekers are entitled to benefit from the protection of other human rights instruments. According to the UN Human Rights Committee, 'the general rule is that each one of the rights [under international human rights law] must be guaranteed without discrimination between citizens and aliens.'[51] As the 1951 Refugee Convention does not contain the range of rights available under international human rights law—in particular it does not contain explicit provisions either in relation to freedom from arbitrary detention or from torture—the human rights regime becomes an important complement.[52] The Executive Committee of the High Commissioner's Programme in 1997 'reiterate[d] . . . the obligation to treat asylum-seekers and refugees in accordance with applicable human rights and refugee law standards as set out in relevant international instruments.'[53] As human beings, refugees and asylum-seekers benefit from international human rights law, including the protections afforded by the UNCAT and via the prevention mandate of the OPCAT.

B. What Constitutes a Deprivation of Liberty and a 'Place Of Detention' for the Purposes of the Work of the OPCAT Mechanisms?

Article 4(1) of the OPCAT provides that visits may be conducted to:

> *any place* under [a state's] jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority

[51] Human Rights Committee General Comment No 15 on 'The Position of Aliens under the Covenant', UN Doc CCPR/C/21/Rev.1 (19 May 1989) para 2. See also, Human Rights Committee, 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN Doc CCPR/C/21/Rev.1/Add.13 (29 March 2004); Committee on the Elimination of Racial Discrimination, 'General Recommendation XI on Non-Citizens,' UN Doc A/46/18 (19 March 1993).

[52] On the inter-relationship between international refugee law and international human rights law, see A Edwards, 'Human Rights, Refugees and the Right to "Enjoy" Asylum' (2005) 17(2) Int'l J Ref L 297; A Edwards, 'Crossing Legal Borders: The Interface Between Refugee Law, Human Rights Law and Humanitarian Law in the "International Protection" of Refugees', in R Arnold & N Quenivet (eds), *International Humanitarian Law and International Human Rights: Towards a New Merger in International Law* (Brill Publishing, 2008).

[53] Executive Committee Conclusion No. 82(XLVIII) on *Safeguarding Asylum*, P (d)(vi) (1997). See also, EXCOM Conclusion Nos 19 (XXXI), P (e) (1980); 22 (XXXII), P B (1981); and 36 (XXXVI), P (f) (1985). See further, UNHCR, *A Thematic Compilation Of Executive Committee Conclusions On International Protection* (2nd edn, reprinted Sept 2005) Chapter on 'Human Rights' 183–205, available at: www.unhcr.org/publ/PUBL/3d4ab3ff2.pdf.

> or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention).[54]

For the purposes of the OPCAT, Article 4(2) defines a 'deprivation of liberty' as:

> any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is *not permitted to leave at will* by order of any judicial, administrative or other authority[55] [my emphasis].

Article 4 is ambiguous in so far as there appear to be two different standards in place between its sub-paragraphs: Article 4(1) focuses on any publicly authorised *place* of deprivation of liberty compared with Article 4(2), which deals with public or private custodial settings where *a person* is not permitted to leave at will by judicial, administrative, or other order. The emphasis on the former is on *the place* of detention, whereas the latter is on *the person* in detention. The second sub-paragraph appears more restrictive than the first. In resolving this ambiguity, general principles of treaty interpretation require that any interpretation be in good faith and in light of the object and purpose of the treaty.[56] The object and purpose of the OPCAT is the prevention of torture and this impresses for a generous interpretation.

The UNHCR, in contrast, defines detention as:

> confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is *substantially curtailed*, and where the only opportunity to leave this limited area is to leave the country.[57]

The key distinction between the OPCAT and the UNHCR definitions is that the latter accepts situations where the freedom of movement of a refugee is 'substantially curtailed' and in doing so, it does not require a complete deprivation of liberty as otherwise required by international law. The OPCAT definition, in comparison, focuses more on either the place of detention or whether an individual is being held or is suspected of being held against their will and whether their detention was ordered by judicial, administrative, or other authority, or at its instigation or with its consent or acquiescence. Moreover, the UNHCR definition expressly includes closed camps.

The UNHCR notes that there is a 'qualitative difference' between detention and other restrictions on freedom of movement.[58] With this in mind, the UNHCR holds that '[p]ersons who are subject to limitations on domicile and residency are not generally considered to be in detention.'[59] Even though arbitrary or unreasonable restrictions on movement that do not meet the

[54] Art 4(1) OPCAT.
[55] Art 4(2) OPCAT.
[56] Art 31 Vienna Convention on the Law of Treaties 1969, 23 May 1969; entered into force 27 Jan 1980; 1155 UNTS 331.
[57] UNHCR, *Revised Guidelines on Detention* (n 10) Guideline 1, para 1 (emphasis added).
[58] ibid.
[59] UNHCR, *Revised Guidelines on Detention* (n 10) Guideline 1, para 2.

threshold of a deprivation of liberty may continue to breach international law, they appear to fall outside the mandate of the OPCAT which concerns institutional or physical confinement.[60]

In addition to the UNHCR definition, the *European Council Directive on minimum standards for the reception of asylum-seekers* defines 'detention' as 'confinement . . . within a particular place, where the applicant is deprived of his or her freedom of movement.'[61] The UNHCR commentary on this definition notes that the EU's definition does not extend as far as its own.[62]

In spite of these discrepancies between available definitions, and the OPCAT's immanent ambiguity, the OPCAT definition covers a very broad range of places where the option to leave at will is not available, including not only police stations, prisons, or military facilities, but also immigration centres.[63] It is not necessary that the only option available is to leave the country, as unhelpfully required by UNHCR's definition. In support of this analysis, the European Court of Human Rights has held that the mere fact that an asylum-seeker could be returned to a transit location did not preclude a finding of a deprivation of liberty. The Court has stated that 'this possibility becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in.'[64] That is, an ability to leave the place of detention must be more than a mere theoretical possibility.

Under the OPCAT, the detaining institution can be one that is public or private,[65] or presumably a combination of the two, such as statutorily mandated detention in privately-run institutions, which is increasingly becoming a common detention practice adopted for asylum-seekers and/or refugees in a number of countries.[66] The OPCAT also applies to refugees confined by judicial, administrative, or other order in closed refugee camps, or

[60] The guarantee of freedom of movement and choice of residence in Art 12 ICCPR applies to those 'lawfully in the territory' rather than more broadly, although the Human Rights Committee has held that '[c]onsent for entry may be given subject to conditions relating, for example, to movement, residence and employment. A State may also impose general conditions upon an alien who is in transit. However, once aliens are allowed to enter the territory of a State party they are entitled to the rights set out in the Covenant.' (para 6) On freedom of movement generally, see Human Rights Committee General Comment No 27: Freedom of movement (Art 12), UN Doc CCPR/C/21/Rev.1/Add.9, 2 Nov 1999. See, further, C Harvey & RP Barnidge Jr, 'Human Rights, Free Movement, and the Right to Leave in International Law' (2007) 19(1) Int'l J Ref L 1.

[61] Art 2(k), EU Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, L31/18 Official Journal of the European Union 6.02.2003.

[62] UNHCR annotated comments on COUNCIL DIRECTIVE 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, dated 1 July 2003, available at: http://www.unhcr.org/doclist/protect/436730642/skip-15.html.

[63] Evans and Haenni-Dale (n 23) 44.

[64] *Amuur v France*, ECtHR, 25 June 1996 (1996) I.I.H.R.L. 39 (25 June 1998) para 48.

[65] Art 4(2) OPCAT.

[66] On private companies operating immigration detention, see C Bacon, *The Evolution of Immigration Detention in the UK: The Involvement of Private Prison Companies* (Refugee Studies Centre, Oxford University, Working Paper No 27, Sept 2007).

who are otherwise restricted to camps with the consent or acquiescence of the State, including arguably by its location in isolated or remote sites. Extra-territorial processing or holding centres also fall within Article 4, provided they are under the jurisdiction or control of the State party, which is addressed below.

C. When Does a State Have Jurisdiction and/or Control Over a Place of Detention for the Purposes of the Work of the OPCAT?

A further element of Article 4(1) of the OPCAT is that 'any place' to be visited by the OPCAT mechanisms is to be under the 'jurisdiction and control' of the State party. For most detention centres, this additional criterion is unlikely to present any legal difficulties. However, it raises a number of legal issues in the context of extraterritorial detention centres. In particular, can the SPT or the NPMs visit a State party's detention facility if it is located in a non-State party? Can the SPT or the NPMs visit detention centres owned and managed by non-State parties located within a State party? While these questions are also dealt with later in this article under Part IV in connection with extraterritorial detention centres, this section presents some initial insights into the legal issues arising under Article 4(1).

In the sense of Article 4(1), jurisdiction is taken to mean 'the competence of the State in international law.'[67] It is well accepted that of the range of bases of jurisdiction—territory, nationality, effect, protection, passive personality, and universality[68]—territoriality is the least controversial.[69] Jennings has stated that 'there is general agreement that a State may not, unless by permission, exercise its power in a physical sense in the territory of another State.'[70] However, jurisdiction may be concurrent with the jurisdiction of other States or it may be exclusive.[71]

No definitions of 'jurisdiction' or 'control' are contained in the OPCAT, but arguably any of the heads of jurisdiction available at international law would apply in the context of the OPCAT. This would include the 'effective control'

[67] RY Jennings, 'Extraterritorial Jurisdiction and the United States Antitrust Laws' (1957) 33 Brit YB Int'l L 146, fn 1.

[68] See DJ Harris, *Cases and Materials on International Law* (6th edn, Sweet & Maxwell, 2004) Chapter 6.

[69] J Beale in (1923) Harvard Law Review 36, 241 stating that territorial jurisdiction is 'everywhere regarded as of primary importance and of fundamental character.' (re-stated in Jennings (n 67) 148). See, also, *Banković v Belgium and 16 Other Contracting States*, Applic No 52207/99, Admissibility Decision 12 Dec. 2001, 41 ILM (2002), paras 59–61, in which it was stated: 'The jurisdictional competence of a State is primarily territorial.'

[70] Jennings (n 67) 149.

[71] ILC Articles on State Responsibility for Internationally Wrongful Acts, 31 May 2001, Yearbook of International Law Commission 2001, vol. II, Part 2, UN Doc. A/56/10, GA res. 56/83, 12 Dec 2001 and corrected by A/56/49 (Vol I) Corr 4, available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

principle, namely that a State is responsible for any 'acts of authorities, whether performed inside or outside national boundaries . . . [that] produce . . . effects outside their own territory.'[72] Put simply, detention facilities under the de facto effective control of a State would fall within the jurisdiction of that State.[73]

The OPCAT Preamble recalls Articles 2 and 16 of the UNCAT, in particular that they oblige each State party to take effective measures to prevent acts of torture and other cruel, inhuman or degrading treatment or punishment '*in any territory* under its jurisdiction'.[74] Although the parent treaty emphasises territorial links, other UNCAT provisions acknowledge additional heads of jurisdiction.[75] The Committee against Torture has also applied the principle of 'effective control'[76] and has stated that certain human rights obligations, such as *non-refoulement*, apply to individuals detained outside a State party's territory.[77] Likewise, the Human Rights Committee has opined that jurisdiction under the ICCPR extends 'to anyone within the power or effective control of that State party, even if not situated within the territory of the State party.'[78] The same position has been accepted by the Inter-American Commission on Human Rights;[79] while the International Court of Justice ('ICJ') has observed that 'while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory,'[80] including where military personnel [or other officials] commit human rights violations in another's

[72] *Loizidou v Turkey* (Preliminary Objections) (1995) 20 EHRR 99. See further (n 76) 78–81. See, also, *Banković* (n 69); cf *Al-Skeini v Sec'y of State for Defence* [2007] UKHL 26 (UK House of Lords rejected the responsibility of the UK for the actions of members of its armed forces in Iraq in killing and mistreating Iraqi civilians, with the exception of one complainant who was mistreated and killed in a British military prison). See further M Happold, 'Bankovic v. Belgium and the Territorial Scope of the European Convention on Human Rights' (2003) 3 Hum Rts L Rev 77; M Gondek, 'Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?' (2005) 52 Neth Int'l L Rev 349.

[73] Committee against Torture, 'Conclusions and Recommendations of the Committee against Torture on the United States of America', UN Doc CAT/C/USA/CO/2, 18 May 2006, paras 15 and 26. See, further, Committee against Torture, 'Conclusions and Recommendations of the Committee against Torture on the United Kingdom of Great Britain and Northern Ireland, Crown Dependencies and Overseas Territories', UN Doc CAT/C/CR/33/3, 25 Nov 2004, para 4(b).

[74] Preambular para 3, OPCAT (emphasis added).

[75] Art 5 of the UNCAT reveals that territorial jurisdiction is not exclusive and other types of jurisdiction are acknowledged, including where torture is committed on board a ship or aircraft registered to the state [flag], where the alleged offences are committed by a national of the state [nationality], or where the victim is a national of the state where it is considered appropriate [passive personality].

[76] CAT, Conclusions and Recommendations on the USA (n 73) paras 15 and 26. See further CAT, Conclusions and Recommendations on the UK (n 73) para 4(b).

[77] CAT, Conclusions and Recommendations on the USA, ibid para 20.

[78] HRC, General Comment No 31, above (n 51) para 10.

[79] Inter-American Commission on Human Rights, *Precautionary Measures in Guantanamo Bay, Cuba*, 13 Mar 2002: the detainees at Guantanamo Bay 'remain wholly within the authority and control of the United States government and jurisdiction is, therefore, exercised over them.'

[80] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Advisory Opinion* [2004] ICJ Reports 136, 9 July 2004, para 108.

territory.[81] The Human Rights Committee has further commented that human rights obligations are not limited to citizens of States parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum-seekers, refugees, migrant workers, and other persons, who may find themselves in the territory *or* subject to the jurisdiction of the State party.[82]

On a strict literal reading of Article 4, the place of detention must be under *both* the jurisdiction *and* control of the State for the OPCAT to have effect, suggesting some difference in meaning and scope between the two terms, and that both components need to be satisfied. However, the French version of the text uses 'or' not 'and', thus leading to arguments that the more human rights friendly version ought to be favoured.[83] Generally, if a State party has jurisdiction, ipso facto it is assumed that control is simultaneously being exercised. As the OPCAT mechanisms possess mandates to visit '*places* of detention' (rather than *incidences* of detention), it is unlikely that they will be concerned with situations of an alleged exercise of control not within a particular physical detention space.

Where a detention facility is located *within the territory of a State Party*, it is widely accepted that it is within that State's jurisdiction and control, whether it exercises that control legally, politically, physically, financially, or administratively. According to the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, States include all organs and agencies of the government or other persons or bodies exercising governmental authority.[84] Further included are other persons or entities not an organ of the State but which are empowered by the State to exercise elements of governmental authority.[85] On this basis, public as well as private prisons and detention facilities would satisfy Article 4(1), the latter to the extent that they are generally granted permission to operate by law or other administrative order of the State. In addition, Article 4(2) explicitly provides that public and private custodial settings are included within the scope of the OPCAT.[86] Such places of detention were exactly the situations the drafting

[81] See, eg International Court of Justice, *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)*, ICJ General List No 116, 19 Dec 2005, para 220.

[82] HRC, General Comment No 15 (n 51) para 1. See further *Lopez Burgos v Uruguay*, HRC Case No R.12/52, UN Doc Supp No 40 (A/36/40) 176 (1981), para 12.2. This case involved the kidnap, abduction and mistreatment of Lopez Burgos, a Uruguayan national, on Argentine soil by Uruguayan intelligence and security forces. See, further, *Lilian Celiberti de Casariego v Uruguay*, No 56/79 and *Montero v Uruguay*, Case No 106/81.

[83] For more on this, see The Optional Protocol to the Convention against Torture: Preventive Mechanisms and Standards, Conference Report, Report on the First Annual Conference on the Implementation of the Optional Protocol to the UN Convention Against Torture (OPCAT), University of Bristol, 19–20 April 2007, 34, available at: http://www.bristol.ac.uk/law/research/centres-themes/opcat/conference.html (last accessed 12 Oct. 2007) 17.

[84] Art 4 ILC Articles on State Responsibility (n 71).

[85] Art 5 ILC Articles on State Responsibility, ibid.

[86] Of course, this would not alleviate any private contractors from criminal prosecution or civil suit under national law.

conference had in mind in preparing the protocol. By analogy, the granting of permission to non-State parties to operate detention centres on a State party's territory would not remove the mandate of the OPCAT mechanisms to inspect them as they would still fall within the territorial jurisdiction of the host State party.

The more complex question concerns detention facilities located *outside the State Party in a Non-State Party*. This is dealt with in more detail in Part IV. D. At this juncture, it is sufficient to note that although there is nothing in the OPCAT that requires any place of detention to be located within the territory of the State party for its mandate to be activated, detaining asylum-seekers or refugees in other non-State parties is likely to frustrate the Optional Protocol's object and purpose. It is further likely to bring States into breach of their explicit OPCAT commitments. Moreover, general principles of international law that do not allow States to escape their international obligations by exercising jurisdiction outside their national territory continue to apply.

D. What is meant by Torture and Cruel, Inhuman or Degrading Treatment or Punishment for the Purposes of the OPCAT?

The OPCAT does not define other relevant terms such as 'torture' or 'cruel, inhuman or degrading treatment or punishment.' The only guidance as to the meaning of these terms within the text of the Optional Protocol is Article 2(2), which provides that the Sub-Committee is mandated to carry out its work 'within the framework of the Charter of the United Nations and shall be guided by the purposes and principles thereof, as well as the norms of the United Nations concerning the treatment of people deprived of their liberty.'[87] Similarly, in making recommendations, the NPMs are to 'tak[e] into consideration the relevant norms of the United Nations.'[88] One of the roles of the NPMs is to submit proposals and observations concerning existing or draft legislation and, in this way, they can contribute to ensuring that national laws are brought into line with international standards.[89] These provisions should be interpreted to mean, at a minimum, that the SPT and the NPMs are not at liberty to disregard UN norms in favour of more restrictive national standards.

But which international standards ought to apply? The preventive role of the OPCAT mechanisms calls for a broad definition of torture and other forms of ill-treatment. There is no express limitation in the OPCAT that the definition of torture as defined in the UNCAT and as interpreted by the Committee against Torture is to be the accepted definition for the purposes of the work of the SPT or the NPMs.[90] In fact, there is no mention of any official relationship

[87] Art 2(2) OPCAT.

[88] Art 19(b) OPCAT.

[89] Art 19(c) OPCAT

[90] Art 1(1) of the UNCAT provides: 'For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him [or her] or a third person

between the Committee against Torture and the SPT, with the exception of Article 16(3) and (4).[91] On the one hand, it may be argued that interpretations elaborated by the Committee against Torture should be prioritised in order to ensure schematic consistency between the parent and subsidiary treaties. After all, the standards developed by the Committee against Torture are authoritative statements of what it considers best practice (or, at least, minimum standards).

On the other hand, it may equally be argued that the broadly phrased statement in Article 2(2) of the OPCAT is to be interpreted as implying that the mandates of the SPT and the NPMs are not strictly limited to the meaning of torture and ill-treatment as understood by the UNCAT or the Committee against Torture.[92] Even Articles 1(2) and 16(2) of the UNCAT state that the definitions therein are 'without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.' The SPT and the NPMs can and should borrow interpretations of torture and other forms of ill-treatment from a wide range of international and regional bodies in the hope that it may prevent torture to the highest possible standards. Malcolm Evans has argued that definitions in other jurisdictions are better suited to the prevention function than the definition in the UNCAT.[93] In particular, he asserts that the 'relatively flexible and open-textured approach' of Article 3 of the ECHR (equivalent to Article 7 of the ICCPR) 'makes it easier to "ground" prevention recommendations',[94] than the criminal law style definition of the UNCAT. Adopting the most flexible definition of torture to guide the work of the OPCAT mechanisms would further be important in the

information or a confession, punishing him [or her] for an act he [or she] or a third person has committed or is suspected of having committed, or intimidating or coercing him [or her] or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.' Art. 16 of the UNCAT provides: 'Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment'

[91] Art 16(3) provides that the SPT shall present a public annual report on its activities to the Committee against Torture; and Art 16(4) allows the Committee against Torture, at the request of the SPT, to make a public statement about the SPT's report where the State Party refuses to cooperate with the SPT (in accordance with Arts 12 and 14 – mostly relating to access to detention facilities and information about those detention facilities).

[92] See on the difficulties of the definition of 'torture' under international law: Evans (n 21); A Edwards, 'The "Feminizing" of Torture under International Human Rights Law' (2006) 19 Leiden J Int'l L 349; DJ Harris, M O'Boyle, C Warbrick, and E Bates, *Law of the European Convention on Human Rights* (Oxford University Press, 1995); A Mowbray, *Cases and Materials on the European Convention on Human Rights* (2nd edn, Oxford University Press, 2007).

[93] Evans (n 21) 368.

[94] ibid 369.

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refugee/asylum context due to their particular vulnerability to non-traditional forms of torture or ill-treatment.

Clearly, refugees and/or asylum-seekers may be tortured in detention within the sense of Article 1 of the UNCAT. However, they may also be subjected to torture and other forms of ill-treatment that are not pursued for interrogation purposes or to force a confession, or which are not committed at the hands of public officials, or with their consent or acquiescence. For example, they often face torture or torture-like injuries committed by State and non-State actors, such as rape, sexual violence, human trafficking, sexual and economic exploitation, forced recruitment into armed groups, or deprivation of economic dignity, which do not always meet the criminal law style definition in the UNCAT.

A second reason why the OPCAT mechanisms are encouraged to utilise standards of treatment and definitions of torture beyond Article 1 of the UNCAT is because, unlike the UNCAT, the Optional Protocol has an explicit mandate over 'private custodial settings' and although arguably such settings could fall within the mandate of the UNCAT where they operate under order or with the acquiescence of the State, many may not.

E. What Other Standards May Be Applicable to the Work of the OPCAT Mechanisms in the Refugee/Asylum Context?

In addition to protection from torture and arbitrary detention under international human rights law and specific guarantees against penalisation for illegal entry or presence or other restrictions on freedom of movement in the 1951 Refugee Convention,[95] other protection standards relevant to asylum-seekers and refugees have been developed by the international community. These standards should be used as supplementary materials to guide the work of the OPCAT mechanisms in the refugee/asylum context. The UNHCR states that there is a need to distinguish between standards of treatment owed to refugees and/or asylum-seekers held in connection with criminal offences or detained in respect of expulsion orders for national security or public order grounds, and those standards where detention is based merely on illegal entry or presence.[96] In the latter situation, the UNHCR advocates that the treatment should be 'as humane as possible' and that the detention should not have 'the "punitive" character associated with detention or imprisonment [in the former situation]'.[97] Whether individually or cumulatively these conditions of detention amount to torture or cruel, inhuman or degrading treatment, or inhumane conditions, is a question of both law and fact.

[95] Arts 26 and 31 Refugee Convention 1951.

[96] UNHCR, Note on Accession to International Instruments and the Detention of Refugees and Asylum-Seekers, UN Doc EC/SCP/44, 19 Aug 1986, paras 46 & 47.

[97] ibid para 47.

The Executive Committee of the High Commissioner's Programme has expressed the opinion that 'in view of the hardship which it involves, detention should normally be avoided [for refugees and asylum-seekers].'[98] This view is reflected in UNHCR's *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers*.[99] In particular, the Executive Committee in 1986 stated that the permissible reasons for detention should be limited. Detention should only be resorted to if it is considered necessary, and only on grounds prescribed by law in order to verify identity; determine the elements of an asylum claim; to deal with persons who have destroyed their travel and/or identity documents or who have used fraudulent documents in order to mislead authorities; or to protect national security or public order.[100] UNHCR in its revised guidelines refers to these grounds as '*exceptional* grounds for detention'.[101]

The 1986 conclusion further stressed that conditions of detention must be humane, including that refugees and asylum-seekers shall, wherever possible, not be accommodated alongside common criminals[102] or be located in areas where their physical safety is endangered;[103] that any detention measures be subject to judicial or administrative review;[104] that access to the UNHCR be granted;[105] and that detention ought not be unduly prolonged.[106] Earlier and subsequent resolutions have criticised the arbitrary or unjustified detention of children;[107] have discouraged detention or custody in connection with an expulsion order except for reasons of national security or public order;[108] and have dealt with detention within the context of voluntary repatriation.[109]

In 1985, the UN adopted a Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live, which included rights not to be arbitrarily or unlawfully detained,[110] or subjected to torture or

[98] EXCOM Conclusion No 44 (XXXVII) (1986) Detention of Refugees and Asylum-Seekers, para (b).

[99] UNHCR, *Revised Guidelines on Detention* (n 10) para 1.

[100] EXCOM Conclusion No 44 (XXXVII) (1986) Detention of Refugees and Asylum-Seekers, para (b). See, further, EXCOM Conclusion No 55 (XL) (1989), para (g).

[101] UNHCR, *Revised Guidelines on Detention* (n 10) Guideline 3 (my emphasis).

[102] EXCOM Conclusion No 44 (XXXVII) (1986) Detention of Refugees and Asylum-Seekers, para (f).

[103] ibid.

[104] ibid para (e).

[105] ibid para (g).

[106] ibid, para (c). See, further, EXCOM Conclusion No 3 (XXVIII) (1977), para (a). See, also, EXCOM Conclusion Nos 36 (XXXVI) (1985), para (f); 46 (XXXVIII) (1987), para (f); 47 (XXXVIII) (1987), para (e); 50 (XXXIX) (1988), para (i); 55 (XL) (1989), para (g); 65 (XLII) (1991), paras (c) & (j); 68 (XLIII) (1992), para (e); 71 (XLIV) (1993), para (f); 85 (XLIX) (1998), para (cc), (dd) & (ee); 89 (LI) (2000), preamble; 93 (LIII) (2002), preamble.

[107] See, eg EXCOM Conclusion No 85 (XLIX) (1998), para (cc).

[108] EXCOM Conclusion No 3 (XXVIII) (1977), para (e).

[109] See, eg EXCOM Conclusion No. 65 (XLII) (1991), para (j).

[110] Art 5(1)(a) UN Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, GA Res 40/144, 13 Dec 1985.

cruel, inhuman or degrading treatment or punishment.[111] This was followed by the insertion of similar provisions in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990[112] (Migrant Workers' Convention). Even though refugees are expressly excluded from the coverage of the Migrant Workers' Convention, it may apply to asylum-seekers.[113]

The Executive Committee in 2002 adopted a conclusion on reception conditions, making specific mention of the importance that any reception measures 'respect human dignity and international human rights law and standards.'[114] Although the earlier Conference Room Paper on reception standards, drafted as part of the Global Consultations on International Protection in 2001, referred in an annex to the general principle that asylum-seekers should not be detained, this language did not make its way into the Executive Committee Conclusion the following year.[115] The Conference Room Paper set out a number of standards of treatment for asylum-seekers in detention, namely that they have rights to be informed of the reasons for their detention and of their corresponding rights in a language and in terms they can understand; to legal assistance; to conditions of detention that are humane, with respect for the inherent dignity of the person, and prescribed by law; and access to the UNHCR or non-governmental organizations.[116] Many of these standards have also been recognised by the UN Human Rights Committee in relation to asylum-seekers.[117]

In terms of specific references to torture or cruel, inhuman or degrading treatment or punishment outside the context of *refoulement*,[118] the Executive Committee in 1981 stated that asylum-seekers should, even if temporarily

[111] Art 6 UN Declaration, ibid.

[112] Arts 10 (prohibition on torture and cruel, inhuman or degrading treatment or punishment), 16(1) (liberty and security of person) & 16(4) (individual or collective arbitrary arrest or detention), GA Res 45/158, 18 Dec. 1990; entered into force 1 July 2003.

[113] Art 2(1) defines a 'migrant worker' as 'a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.' Art 3 excludes 'Refugees and stateless persons, unless such application is provided for in the relevant national legislation of, or international instruments in force for, the State Party concerned.' See Edwards (n 52).

[114] EXCOM Conclusion No 93 (LIII) (2002), Conclusion on Reception of Asylum-Seekers in the Context of Individual Asylum Systems, para (b) (iii).

[115] UNHCR, *Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems*, Global Consultations on International Protection, 3rd meeting, UN Doc EC/GC/01.17, 4 Sept 2001, Annex, para (e).

[116] UNHCR, Reception of Asylum-Seekers, ibid., Annex, para (e).

[117] See *A v Australia*, HRC 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997).

[118] It is well accepted under international law that individuals cannot be returned or expelled to places where they would be subject to torture or other forms of ill-treatment (see *Chahal v United Kingdom*, 15 Nov 1996, Reports 1996-V), but note that Article 33 of the 1951 Convention (the *non-refoulement* provision in refugee law) is not absolute. On the latter, see Sir E Lauterpacht and D Bethlehem, 'The scope and content of the principle of *non-refoulement*: Opinion', in Feller, Türk and Nicholson (n 13) 90–140.

admitted to the territory pending arrangements for a durable solution, be treated in accordance with 'basic human standards,' including treatment 'as persons whose tragic plight requires understanding and sympathy.' This same paragraph went on to state that '[t]hey should not be subjected to cruel, inhuman or degrading treatment.'[119]

At the European level, the EU Council Directive on minimum reception standards provides that: 'When it proves necessary, for example for legal reasons or reasons of public order, Member States may confine an applicant to a particular place in accordance with their national law.'[120] The UNHCR in its annotated commentary on the directive pointed out that such national legislation would benefit from the inclusion of provisions on the conditions of detention in order to ensure humane treatment with respect for the inherent dignity of the person.[121] In addition, the UNHCR listed a number of other factors that ought to be considered, including the particular situation of children, pregnant women, and asylum-seekers affected by trauma and other psychological illness.[122]

IV. REFUGEE/ASYLUM DETENTION SITUATIONS

A. Airports, Seaports, Border Posts, and 'International Zones'

In spite of efforts by some governments to exclude the application of international law from airports, islands, or other border territory, it is not permitted by the rules of treaty interpretation. The *Vienna Convention on the Law of Treaties 1969* makes clear that international legal obligations apply to the entire territory of a State party, unless specified otherwise.[123] Furthermore, the European Court of Human Rights has stated that it is irrelevant that an airport zone (or by analogy border or other territory) is called an 'international zone'; it is still part of the territory of the State and human rights obligations continue to apply.[124]

Detention facilities located in so-called 'international zones' or in other locations that have been purportedly 'excised' or removed from the application of national asylum or immigration laws,[125] therefore, continue to fall within the mandate of the OPCAT mechanisms. These facilities ought to be visited regularly by the OPCAT mechanisms, regardless of their status under

[119] EXCOM Conclusion No 22 (XXXII) (1981), Part II B 2 (d).
[120] Art 7(3), *EU Council Directive on minimum reception conditions* (n 61).
[121] UNHCR annotated comments on *EU Council Directive on minimum reception conditions* (n 62).
[122] ibid.
[123] Art 29 VCLT.
[124] See *Amuur v France* (n 64).
[125] eg Australia introduced laws in 2001 and later that 'excised' territory from the operation of its national migration laws. See A Edwards, 'Tampering with Refugee Protection: The Case of Australia' (2003) 15(3) Int'l J Ref L 192 (in which I argue that these laws contravene basic principles of treaty law).

national law. There is precedent for this in the work of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which regularly visits airport holding cells.[126]

Any difficulties in visiting such locations are likely to be practical, rather than definitional or legal in nature, although discrepancies between national and international definitions of detention may well impact on the ability to achieve the desired aims of any investigation. Although periodic and ongoing visits to border detention facilities would be possible by the SPT or the NPMs, asylum-seekers and refugees subject to detention at land borders, seaports, or airports are often only in such zones for limited periods, their existence there is not always known or acknowledged by governments, and failure to register individuals upon arrival is not uncommon in some countries.[127] Moreover, they may be expelled or transferred without access to appropriate judicial or administrative procedures, including refugee status determination. Thus, fully-functioning national preventive mechanisms could become an important first line of defence, including by alerting the SPT to new situations of detention. Key issues to be investigated in the context of asylum-seekers and/or refugees in detention facilities at border zones ought to include ensuring humane conditions of detention, access to asylum procedures and UNHCR if requested, and importantly, protection against *refoulement* to threats to life or freedom, or torture or cruel, inhuman or degrading treatment or punishment.[128] It is at these earliest stages of entry that potential violations of international and customary *non-refoulement* obligations are most at risk.

B. Immigration or Administrative Detention

A large number of industrialized countries detain asylum-seekers for part or the duration of asylum procedures, with a wide spectrum of policies in existence.[129] Policies range from mandatory and non-reviewable detention[130] to

[126] See http://www.cpt.coe.int/en/

[127] EXCOM Conclusion No 91 (LII) (2001) Conclusion on Registration of Refugees and Asylum-Seekers.

[128] Art 33 Refugee Convention 1951.

[129] See Field and Edwards (n 7); Jesuit Refugee Service (n 7).

[130] At the time of writing, this internationally criticized policy still formed part of Australian national law, although it is noted that the recent change in government may lead to a revision of this unpopular policy. See, Australian Human Rights and Equal Opportunity Commission (HREOC), *Summary observations following the Inspection of Mainland Immigration Detention Facilities 2007*, Jan 2008; HREOC, *A Last Resort? The report of the National Inquiry into Children in Immigration Detention*, 13 May 2004; Amnesty International, *The impact of indefinite detention: the case to change Australia's mandatory detention regime*, AI Index: ASA 12/001/2005, 30 June 2005; United Nations Working Group on Arbitrary Detention, Visit to Australia, UN Doc. E/CN.4/2003/8/Add.3, 24 Oct 2002, para 14.; *Al Kateb v Godwin* [2004] HCA 37, 6 Aug 2004 (and *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* [2004] HCA 38, 6 Aug. 2004; *A v Australia* (n 117); *C v Australia*, HRC 900/1999, UN Doc. CCPR/C/76/900/1999 (2002).

temporary and initial detention for the purposes of initial registration and health and security checks of periods of seven to 10 days, or discretionary detention upon the authorization of immigration officers.[131] Other countries operate 'semi-open' detention centres for the duration of the asylum process, in which an asylum-seeker needs leave permission to be granted by centre officials for specific periods of time.[132] Still other countries have adopted policies of selective detention, in which asylum-seekers originating from particular countries are singled out for detention.[133] Many of these policies do not conform to the requirements of international law prohibiting arbitrary detention, including the right of asylum-seekers to an individual assessment as to the necessity and proportionality of detention, the right to periodic review before a court, or general prohibitions against discrimination.

The UNHCR reported in 1999 on some of the commonly identified deficiencies in relation to administrative detention, including serious overcrowding; failure to provide separate quarters for men and women; and living spaces which lack appropriate furniture and sanitary and other facilities, such as proper bathing or washing areas or outdoor space for recreational purposes. In some cases, the UNHCR has argued that such inadequate living conditions may amount to breaches of human dignity, privacy, or inhuman and degrading

[131] The UK ratified the OPCAT on 10 December 2003. Detention of asylum-seekers is not mandatory in the UK but can be ordered by an immigration officer according to internal Home Office Guidelines. Questions relate to the asylum seeker's previous compliance with immigration law, record of absconding, illegal entry or the use of false documentation, expectations regarding the outcome of the claim, the likelihood and ease of removal, family ties in the UK, compassionate circumstances and whether there are 'factors which afford an incentive for him [or her] to keep in touch with the port'. In line with its obligations under the OPCAT, the UK has allocated responsibility for national prevention to existing bodies that are already engaged in prisons and custodial inspection, see presentation by Mr. John Kissane, Department of Constitutional Affairs, 'Optional Protocol to the United Nations Convention against Torture' at a Seminar on Implementation in Latvia and other Baltic States, Riga, Latvia, 27–28 May 2005. For reports conducted by these immigration inspections, see http://inspectorates.homeoffice.gov.uk/hmiprisons/inspect_reports/. It is immediately evident that such an approach may not cover all forms of detention, nor do so in a systematic manner. See, Field and Edwards (n 7) 206–222 (Annex on United Kingdom). Amnesty International, *Seeking asylum is not a crime: detention of people who have sought asylum*, AI Index: EUR 45/015/2005, 20 June 2005, 35–59; *Secretary of State for the Home Department ex parte Saadi (FC) And Others (FC) (Appellants)* [2002] UKHL 41 (Oakington Detainees Case); *Saadi v United Kingdom*, European Court of Human Rights, Applic No 13229/03, 11 July 2006; Grand Chamber decision 29 Jan 2008.

[132] New Zealand ratified the OPCAT on 14 Mar. 2007 and has designated the Ombudsman as the NPM who has been granted specific authority to visit places of detention of refugees and migrants, see Crimes of Torture Act 1989 (NZ), Part 2 and Ombudsmen Act 1975 (NZ). See, further, Field and Edwards (n 7) (Annex on New Zealand).

[133] The US, for example, in 2001 and 2003 introduced nationality-based detention policies targeting Haitian asylum-seekers and asylum-seekers from 33 other countries and two territories—mostly Middle Eastern and other Muslim countries and territories. See, eg UNHCR News Story, 'UNHCR concerned about US detention of asylum seekers', 21 March 2003; Human Rights First, 'Haitian Refugees and the U.S. Asylum System' (undated; 2003); Human Rights First, *The Detention of Asylum Seekers in the United States: Arbitrary under the ICCPR*, Jan 2007, 8.

treatment.[134] Similar concerns have been identified in Europe by the Jesuit Refugee Service.[135] Still other reports document the serious negative psychological and developmental effects of detention on children.[136]

The issue for the OPCAT mechanisms is whether these types of immigration control measures constitute a deprivation of liberty and thereby invoke its mandate to inspect them. I would argue that many of these facilities amount to deprivations of liberty or places of detention within the meaning of Article 4 of the OPCAT. Even the 'semi-open' centres operate in effect as places of detention for the purposes of the OPCAT, the right to leave at will not being available. As noted in Part III, adopting a broad approach to Article 4 matches the prevention purpose of the OPCAT.

C. Closed Refugee Camps

The majority of the world's refugees are located in developing countries and are housed in camps. The US Committee on Refugees and Immigrants estimates that approximately 8.8 million refugees are housed in refugee camps for five years or longer.[137] Frequently the living conditions in such camps are difficult, if not deplorable.[138] Opening up some of these camps to additional scrutiny, such as by the OPCAT mechanisms, could reduce acts of torture and ill-treatment occurring within them. Three questions need to be addressed in order for the OPCAT mechanisms to visit and inspect such locations. First, are closed refugee camps places of detention? Secondly, what would constitute torture or other forms of inhuman or degrading treatment in such locations? Are there any special standards? Thirdly, given the role of the UNHCR in the day-to-day management of many such camps, is the State party or the UNHCR responsible for the conditions in these camps, including any violations, and for instituting prevention practices? These questions will be dealt with in turn below.

First, refugees that are assigned to camps by way of judicial, administrative, or other orders under so-called camp confinement policies are within detention

[134] EXCOM, *Detention of Asylum-Seekers and Refugees: The Framework, the Problem and Recommended Practice* (n 6), paras 19 and 20.

[135] The JRS noted a wide range of concerns in regards to asylum-seekers in detention, such as the prolonged nature of that detention; detention alongside criminals; housing of men and women together when not related by blood or marriage; lack of access to legal advice; inability to pursue meaningful activities; psychological effects of detention, such as withdrawal, depression, or self-harm; inadequate facilities; denial of visitors; riots and other forms of violence; and separation of families: see, Jesuit Refugee Service, *Detention in Europe: Administrative Detention of Asylum-Seekers and Irregular Migrants*, 17 Oct 2005.

[136] HREOC, *A Last Resort?* (n 130); Amnesty International, *The Impact of Indefinite Detention*, (n 130).

[137] US Committee on Refugees and Immigrants, *World Refugee Survey 2007*, Table I.

[138] ibid.

for the purposes of the OPCAT.[139] Closed refugee camps deny refugees the right to leave at will. Even where camps operate under only informal confinement policies, their location in remote, inhospitable, and/or semi-arid areas, away from transport links and close to borders, can mean that refugees are effectively restricted to those areas.[140] In its definition of 'detention,' the UNHCR distinguishes between deprivations of liberty and designation to live in particular locations; suggesting that the latter may implicate freedom of movement rights[141] or constitute a penalty within Article 31 of the 1951 Refugee Convention (depending on the location and/or conditions), but that such dispersal policies are not equivalent to detention. Closed refugee camps operate as de facto (as well as de jure, subject to the particular situation) detention centres. Likewise, dispersal programmes that transfer refugees to remote or isolated locations may similarly amount to detention under Article 4 of the OPACT. Whether a refugee camp constitutes a de facto place of detention is a question of fact and degree, regardless of its name or label.

Secondly, in assessing the standards of treatment to be enjoyed by refugees in such camps, minimum standards adopted by the Executive Committee in 1981 are of useful guidance. In relation to the protection of asylum-seekers and refugees in large-scale influx, the Executive Committee recommends that

[139] eg Kenya operates camp confinement policies, in which refugees are confined to closed camps by order, decree or law and are not able to leave at will. Departure from such camps is prohibited and those found outside the camps are liable to prosecution for illegal stay, entry or vagrancy. Kenya has not acceded to the OPCAT. See, eg Human Rights Watch, *Hidden in Plain View: Refugees living without protection in Nairobi and Kampala*, Human Rights Watch, Nov 2002. A new development since HRW report is publication of: the *Refugees Act 2006*, in Kenya Gazette Supplement No 97 (Acts No 13), Republic of Kenya, Nairobi, 2 Jan 2007 (on file with the author). The new law provides that any person claiming refugee status shall not be 'detained or penalized in any way . . .' for 'merely . . . illegal entry . . .' (s 11(3)) and that the management of refugee camps is the responsibility of the Commissioner for Refugee Affairs (s 7(2)(k)). It further provides that the Minister may designate places and areas in Kenya to be 'transit centres' or 'refugee camps' (s 16(2)). Within such refugee camps, a 'refugee camp officer' may 'issue movement passes to refugees wishing to travel outside the camps . . .' (s 17(f)). No mention is made in the Act that refugees will be required to live in these camps, but this can be implied from the language. Further regulations relating to the 'control and regulation of persons who may be required to live within a designated place or area' may be issued (s 26(2)(h)). See also EO Abuya, 'Past Reflections, Future Insights: African Asylum Law and Policy in Historical Perspective' (2007) 19 (1) Int'l J Ref L 51.

[140] By way of comparison, see *Guzzardi v Italy*, ECtHR (1981) 61 ILR 227 or (1981) EHRR 333. In this case, the applicant, a suspect in illegal mafia activities, was ordered to live for 16 months on a remote island off the coast of Sardinia. He was restricted to a hamlet in an area of the island of some 2.5 sq kms that was occupied solely by persons subject to such orders, although the applicant's wife and child were allowed to live with him. He was able to move freely in the area and there was no perimeter fence. He was also required to report twice daily and was subject to curfew. The European Court of Human Rights held that the applicant's conditions fell within Art 5 ECHR (that is, arbitrary detention). In *Ashingdane v UK*, ECtHR Case No A 93 (1985), the European Court found that the compulsory confinement of a mentally ill patient in a mental hospital under a detention order invoked Art 5 protections, even though he was in an 'open' (ie unlocked) ward and was permitted to leave the hospital unaccompanied during the day and over the weekend (para 42). Parallels can be made between these cases and the asylum detention practices of some states.

[141] Art 12 ICCPR.

they be located by reference to their safety and well-being, as well as the security of the country of refuge; that they be provided with basic necessities of life; that the principle of family unity be respected and that assistance be provided to trace relatives; that minors and unaccompanied children be adequately protected; that the sending and receiving of mail, and receipt of material assistance from friends, be allowed; that access to UNHCR be permitted; and that, where possible, appropriate arrangements be made for the registration of births, deaths, and marriages. In other words, the Conclusion calls on States to treat such persons with 'special understanding and sympathy'.[142] Of course, these minimum standards are not the full range of rights enumerated in the 1951 Refugee Convention to which the majority of the prima facie refugees in the developing world do not have access.[143] Under the OAU Convention, countries of asylum in Africa shall, for reasons of security, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin.[144] Again, this is not always respected in practice.

Whether conditions of detention below these standards constitute torture or other inhuman or degrading treatment is a technical, legal question. However, in the light of the prevention purpose of the OPCAT, it is relevant only that individually or cumulatively conditions in these camps may fall below international standards. There is case law to provide content and meaning to the terms in issue. For example, the United Kingdom House of Lords has ruled that concurrent denial of both work rights and social security benefits amounts to degrading treatment;[145] while the South African Supreme Court of Appeal has ruled that issuing a blanket prohibition on employment for asylum-seekers, without offering social benefits, violated the constitutional right to dignity.[146] Following these cases, it is arguable that reductions in food rationing below the World Health Organization's minimum standards could also amount to inhuman or degrading treatment; likewise the prolonged nature of these camps or their isolated location, leading to serious psychological and other health problems.[147] Given the prevention framework of the OPCAT—rather than a focus on violations—all such issues ought to be taken into account during inspection missions.

In addition to these standards of treatment, some refugee camps are notorious for violence,[148] such as rape, sexual abuse, sexual exploitation, abduction, intimidation, forced military recruitment, and physical assaults. Many of the perpetrators of such violence are non-State actors, such as other

[142] EXCOM Conclusion No 22 (XXXII), The Protection of Asylum-Seekers in Situations of Large-Scale Influx, 21 Oct 1981.

[143] G Goodwin-Gill and J McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press, 2007) 466–471.

[144] Art 2(6) OAU Convention.

[145] *R (Limuela, Tesema, & Adam) v Sec'y of State for the Home Department* [2005] UKHL 66.

[146] *Minister for Home Affairs v Watchenuka* (2004) 1 All SA 21 (SA SCA 28 Nov 2003).

[147] See HRC, *C v Australia* (n 130).

[148] J Crisp, 'Forms and Sources of Violence in Kenya's Refugee Camps' (2000) 19 Ref Survey Qty 54.

refugees, armed groups, government officials, UN peacekeepers, or UN or NGO humanitarian workers.[149] International law has increasingly recognised such acts as torture or inhuman or degrading treatment, including when perpetrated by non-State actors in situations where the State has failed to protect or prevent such acts. Taking up such issues renders the OPCAT mechanisms relevant to detention in all its forms. It is the view of the Human Rights Committee, for example, that rape and sexual violence, domestic violence, female genital mutilation, lack of access to abortions for rape victims, and forced abortion or sterilisation, constitute either torture or a lesser form of ill-treatment.[150] The European Court of Human Rights has similarly held that rape, including outside State custody, is a form of torture.[151] Likewise, the Inter-American Commission on Human Rights has treated rape and sexual violence as either torture or inhuman treatment.[152] Within the framework of State custody or consent or acquiescence, the Committee against Torture has incorporated within its torture definition rape and sexual violence, both inside and outside State custody, female genital mutilation, domestic violence, and punishment for having transgressing social mores.[153]

The third issue for the OPCAT mechanisms in the context of refugee camps is the fact that such camps are often under the direct management of non-State actors, such as the UNHCR. Many refugee camps are managed and staffed by the UNHCR (and its implementing partners) by virtue of its 1950 Statute or various General Assembly resolutions, primarily due to lack of resources or political will of host governments, including particularly in countries not party to the 1951 Refugee Convention. The traditional view is that while the UNHCR may be exercising de facto sovereignty, it is 'de jure merely an invited guest, assisting in the host State's performance of its obligations in a manner wholly governed by the terms of the invitation'.[154] This is consistent

[149] eg *UNHCR/Save the Children Investigation into sexual exploitation of refugees by aid agencies in West Africa*, 2002; 'The UN Sex Scandal,' *The Weekly Standard*, 3–10 Jan. 2005 (on UN peacekeeper sexual violence against refugees in Democratic Republic of Congo).

[150] UN Human Rights Committee General Comment No. 28, *Equality of rights between men and women (article 3)*, UN Doc. CCPR/C/21/Rev.1/Add.10, 29 Mar. 2000. See, further Edwards (n 92).

[151] See, eg *Aydin v Turkey*, ECHR 1997-VI (GC), Judgment (Merits and just satisfaction), 25 Sept 1997; *MC v Bulgaria*, ECHR Appl No 39272/98, 4 Dec 2003.

[152] See, eg *Raquel Martí de Mejía v Peru*, Case 10.970, Report No 5/96, IACHR, OEA/Ser. L/V./II.91 Doc. 7, 157 (1996); *Loayza-Tamayo v Peru*, C33, Judgment 17 Dept 1997. The Inter-American Court of Human Rights.

[153] eg Concluding Observations on Greece, UN Doc. CAT/C/CR/33/2, 10 Dec 2004, para 5(k); Zambia, UN Doc. A/57/44, 25 Aug. 2002, para. 7(c); Concluding Observations on USA, contained in *Report of Committee against Torture*, UN Doc. A/55/44 (2000), para 179; Concluding observations on Egypt, contained in *Report of Committee against Torture*, UN Doc A/55/44 (2000), para 209. The Special Rapporteur on Torture has recognised sexual violence as a method of physical torture, UN Doc E/CN.4/1986/15, para 119; see, further, Edwards (n 92).

[154] R Wilde, '*Quis Custodiet Ipsos Custodes?:* Why and How UNHCR Governance of "Development" Refugee Camps Should be Subject to International Human Rights Law' (1998) 1 Yale Hum Rts & Dev L J 107, 113.

with UNHCR's own position that the primary responsibility for international protection rests with the host government, and only secondarily with the UNHCR.[155] According to the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, a State's responsibility extends to actions or omissions attributable to the State under international law and that constitute a breach of an international obligation.[156] Thus, where a State fails to prevent torture or cruel, inhuman or degrading treatment or punishment committed by non-State actors, including by the UNHCR or its partner agencies, it continues to bear international responsibility by way of omission.

However, even UNHCR's position does not exclude concurrent or exclusive responsibility of an international organisation for human rights violations. In practice, the State may have delegated day-to-day management to the UNHCR. Andrew Clapham has argued that international organizations are capable of bearing international responsibility, even as States retain their own liability.[157] The UNHCR's Statute provides that '[t]he [UNHCR], acting under the authority of the General Assembly, shall assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute . . .'.[158] Moreover, under the ILC's draft Articles on Responsibility of International Organizations, the UNHCR would be responsible for any acts or omissions that are attributable to the organisation and which constitute a breach of an international obligation.[159] The International Court of Justice has held that the United Nations 'is a subject of international law and capable of possessing international rights and duties . . .'[160] Thus, the UNHCR can be said to possess duties under international human rights law, including international obligations not to commit as well as to prevent acts of torture or cruel, inhuman or degrading treatment or punishment.[161] However, as Ralph Wilde has noted, a

[155] See, eg EXCOM Conclusion No 81 (XLVIII), para (d) (1997): '*Emphasizes* that refugee protection is primarily the responsibility of States, and that UNHCR's mandated role in this regard cannot substitute for effective action, political will, and full cooperation on the part of States . . .'

[156] Art 2 ILC Articles on Responsibility of States (n 71).

[157] A Clapham, *Human Rights Obligations of Non-State Actors* 109 (2006), citing the European Court of Human Rights in *Waite and Kennedy v Germany* (2000) 30 EHRR 261, P 67. See also *Report of the International Law Commission*, 58th Session, UN Doc A/61/10, P 284–286 (2006).

[158] Art 1 Statute of the UNHCR 1950.

[159] Draft Arts 1 and 3(2), ILC, *Report of the International Law Commission on the Work of its 56th Session*, UN Doc A/59/10 (2004), para 71.

[160] *Reparations for injuries suffered in the service of the United Nations* [1949] ICJ Reports 174, 179. See, also, *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt* [1980] ICJ Reports 73, 89–90, in which it was stated that 'international organizations are subjects of international law and, as such are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under agreements [to] which they are parties.'

[161] As the UNHCR is not a party to the human rights treaties, it has obligations under customary international human rights law, although its mandate over international protection may well invoke a still wider array of human rights obligations.

balance needs to be struck between the obligations of the State and those of UNHCR, in view of the fact that the latter is not a sovereign State.[162]

Despite political and legal difficulties, it is important that the UNHCR and other international organisations operating in such locations are held accountable for human rights violations, including failures to institute systems to prevent torture and other sub-standard treatment. Refugees, as first and foremost human beings, must be entitled to the same rigour of investigation and inquiry as other individuals in detention. Although problematic, this is so even though it may result in one UN body, albeit an independent treaty body (the SPT), technically investigating another UN agency (the UNHCR); or alternatively, internationally mandated NPMs inspecting the standards of care of international agencies. This in no way absolves, however, the concomitant responsibility of the State party for the care of those within its jurisdiction or under its control [or for that matter, the international community under responsibility-sharing principles].

D. Extraterritorial Processing or Holding Centres

Removing asylum-seekers to other countries for processing is a threat to the underlying humanitarian spirit of the international refugee protection regime, not to mention broader principles of international solidarity and responsibility-sharing. The idea has appeared in several forms, including national and regional 'safe third country' programmes,[163] bilateral and regional readmission agreements, domestic 'first country of asylum' policies or other more rudimentary schemes that involve the simple transfer of asylum-seekers to other countries under bilateral agreements. Madeleine Garlick asserts that although some extraterritorial initiatives are supported by neither the vast majority of EU States nor the UNHCR, there are some 'lingering' fears that they could resurface or that current EU Regional Protection Programmes in regions of origin could be extended for more dubious purposes.[164] Moreover,

[162] R Wilde, '*Quis Custodiet Ipsos Custodes?* (n 154) 119.

[163] The EU Dublin II Regulation is an example of a regional legal regime that involves the transfer of asylum-seekers from one EU Member State to another, depending on which State is deemed (more) responsible: Council Regulation EC/343/2003 of 18 Feb 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national [2003] OJ No L 50/I ('Dublin II Regulation'). Another example is the Council Directive 2005/85/EC of 1 Dec. 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L 326/13 under which Member States can return asylum applicants to 'safe third countries' or 'super safe third countries' outside the EU if a connection is found between that person and the so-called 'safe third country'.

[164] The current format of the Regional Protection Programmes are two-fold: first they aim to strengthen protection capacity in regions of origin with the support of EU funds and second they envisage an EU resettlement scheme in which refugees selected from the target region would be transferred to the EU, see M Garlick, 'The EU Discussions on Extraterritorial Processing: Solution or Conundrum?' (2006) 18 Int'l J Ref L 601, 624–629.

such proposals have not been removed permanently from international or regional dialogues, but occasionally re-appear in various fora.

External asylum processing became particularly popularized in the early 2000s, following the *Tampa* incident in 2001. The Australian government transferred 433 Afghan intercepted asylum-seekers, who had entered Australian territorial seas and others who were later picked up by the Australian coastguard floating in international waters, to Nauru and Papua New Guinea in exchange for foreign aid.[165] Subsequently, the European Union, led by the United Kingdom, put forward a proposal for the transfer of asylum-seekers to transit processing centres, to be located outside the EU.[166] The proposal also included the idea of 'regional protection areas' that envisaged the removal of rejected asylum-seekers to these areas pending return to their countries of origin. In 2004 the German Interior Minister Otto Schily advocated more far-reaching proposals to set up 'safe zones' or 'camps' in North Africa with the financial assistance of the EU. The Austrian Minister of the Interior similarly suggested that such a scheme might be applied also to the EU's eastern borders.[167] Although these proposals have been shelved amid widespread criticism from the UNHCR and NGOs, and in spite of disapproval from the European Parliament,[168] Italy has entered into secret bilateral negotiations with Libya to accept 'irregular migrants' arriving on the former's territory.[169]

The UNHCR's *State of the World's Refugees 2006* clarifies that the main problem with external processing centres is the 'necessity of barbed wire'; or in other words, detention.[170] Under the 'Pacific Solution,' asylum-seekers were housed in fenced and isolated camps on remote island-nations that were not parties to the 1951 Refugee Convention.[171] Asylum-seekers deemed not to be refugees and unable to repatriate to their countries of origin were, for a

[165] On the Tampa saga, see, eg T Magner, 'A Less than "Pacific" Solution for Asylum Seekers in Australia' (2004) 16 Int'l J. Ref. L. 53; A. Schloenhardt, 'To Deter, Detain and Deny: Protection of Onshore Asylum Seekers in Australia' (2002) 14 Int'l J Ref L 302. Migration Amendment (Designated Unauthorised Arrivals) Act; Bill No 06058, Explanatory Memorandum 11 May 2006. See, Amnesty International, Public Statement: *Australia: One step forward—two steps back: Amnesty International calls for an immediate halt to proposed legislation to punish asylum seekers arriving by boat*, AI Index: ASA 12/002/2006, 26 April 2006. See, further, failed attempts at expanding the reach of the policy to include all unauthorised entrants, Australian Senate Legal and Constitutional Affairs Committee, Report on Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, 13 June 2006. Note that the newly elected government has closed the Nauru refugee camps and relocated the remaining detainees to Australia, see 'Last refugees bid farewell to Nauru', *The Age*, 6 Feb 2008.

[166] UNHCR, *State of the World's Refugees, 2006*, Chapter 2.

[167] For a thorough overview of the details of such proposals, see Garlick (n 164).

[168] European Parliament, Resolution on Lampedusa, EP Res P6_TA(2005)0138, April 2005, para G.

[169] Amnesty International, *Italy: Lampedusa, the island of Europe's forgotten promises*, AI Index: EUR 30/008/2005, 6 July 2005.

[170] UNHCR, *State of the World's Refugees* (n 166).

[171] For a description of the early camps, see Amnesty International, *Australia-Pacific: Offending human dignity—the 'Pacific Solution'*, AI Index: ASA 12/009/2002, 25 Aug 2002.

range of legal and practical reasons, left to languish in such places for extended periods.[172] While not explicit within the UK/EU proposal, the UNHCR and Amnesty International accepted that detention, even temporary detention, would be a necessary feature of these arrangements.[173] Similar concerns are raised in relation to the Italy-Libya agreement, which apparently includes the construction of holding or transit centres in Libya, which may be closed (ie detention) or with some movement restrictions.

A discussion at the First Annual Conference on the OPCAT in 2007 called for access to these facilities,[174] although access is far from a straightforward issue. As noted above in Part III, extraterritorial detention or holding centres fall under the purview of the OPCAT mechanisms where either jurisdiction or control is exercised by the State party. Clearly, where both the sending and the receiving States are parties to the OPCAT, the SPT and the NPMs are authorized to visit any such places of detention. A more challenging issue in this context for the SPT and the NPMs will be to determine which State actually exercises jurisdiction or control over such centres, or whether concurrent jurisdiction is being exercised. If, as a matter of fact or law, both countries exercise jurisdiction or control simultaneously, the SPT and the NPMs would need to take this into account in directing their recommendations. Relevant questions to determine the extent of the jurisdiction or control might include whether the facility in question is either financed or managed by the sending State or its agents. Are officials or agents of the sending State active in the facilities, either in relation to oversight or day-to-day operations? What are the terms of any agreement between the sending and receiving State?

Where a deal has been struck between two States in relation to the intercountry transfer of asylum-seekers and/or refugees, the general position at international law provides that such agreements cannot lead to the release of responsibility for the sending State if it is aware of or can prevent mistreatment in the receiving State (such as within a detention facility), even if it plays no subsequent role in the day-to-day or oversight operations there. At a minimum, *non-refoulement* obligations would apply.[175] This position is based

[172] See 'Sri Lankan asylum-seekers left in limbo', *The Age*, 19 Mar 2007 (Sri Lankan Tamil asylum-seekers transferred to Nauru); 'The Forgotten', *The Age*, 28 Mar 2005 (54 Iraqi asylum-seekers on Nauru).

[173] Amnesty International, *UK/EU/UNHCR: Unlawful and Unworkable—Amnesty International's views on proposals for extraterritorial processing of asylum claims*, AI Index: IOR 61/004/2003, 18 June 2003.

[174] For more on this, see Report on the First Annual Conference on the OPCAT (n 83) 17.

[175] *Kindler v Canada*, UN Doc A/48/50, 138, 30 July 1993: 'If a State party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party *itself* may be in violation of the Covenant.' For additional cases that elaborate the position of the HRC, see D McGoldrick, 'Extraterritorial Application of the International Covenant on Civil and Political Rights', in F Coomans and MT Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp, 2004) 41. See further S Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective

on the principle that it would be unconscionable to permit a State party to perpetrate human rights violations on the territory of another State [or allow those violations to occur by omission], such violations it could not perpetrate on its own territory.[176]

The ICJ, for example, has clarified that the drafters of the ICCPR (and, therefore, other human rights instruments) did not intend to allow States to escape their obligations by exercising jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but that of the State of residence.[177] In this way, it should be considered impermissible for States to circumvent their responsibilities under international law simply by transferring asylum-seekers and refugees to other States and detaining them there. This would be antithetical to basic understandings of treaty interpretation and underlying human rights principles. Moreover, Chapter II of the ILC Articles on State Responsibility provides that responsibility for the same conduct may be attributable to several States at the one time.[178]

But the real issue in such situations is one of access. Can the OPCAT mechanisms visit and inspect facilities located in non-State parties? As a non-State party has no obligations to cooperate with the OPCAT mechanisms, the ability to visit such locations will be at the discretion of the non-State party. In fact, only the State exercising territorial jurisdiction would be in a position to grant or deny access to its territory to the SPT or the NPMs. Even though the sending State may as a matter of international law retain full or partial international responsibility for the acts or omissions carried out at those places of detention, only the State exercising territorial jurisdiction is in a position to grant entry rights and visas under national immigration laws.

In essence, such detention facilities directly undermine the prevention purpose of the OPCAT. Specifically, the act of sending asylum-seekers or refugees by a State party to the OPCAT to detention in a non-State party may bring the State party into breach of its explicit obligations under the OPCAT. First, such schemes prevent the OPCAT mechanisms from accessing such places automatically in breach of a number of provisions of the

Protection' (PPLA/2003/01, UNHCR, Department of International Protection, 2003) and S Taylor, 'Protection Elsewhere/Nowhere' (2006) 18 Int'l J Ref L 283.

[176] *Lopez Burgos v Uruguay* (n 82) para 12.3. See also *Lilian Celeberti de Casariego v Uruguay* (n 82).

[177] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Advisory Opinion* (n 80) para 109, referring to Commission on Human Rights, UN Doc E/CN.4/SR.194, para 46 and UN, *Official Records of the General Assembly, Tenth Session, Annexes* A/2929, Part II, Chapter V, para 4 (1955). In making this statement, ultimately the ICJ concluded that the territories occupied by Israel for 37 years have been and are subject to the 'territorial jurisdiction' of Israel as the occupying Power.

[178] ILC Articles on State Responsibility (n 71) para (6).

OPCAT.[179] Whether national preventive mechanisms are able to visit such detention facilities is likely to be dependent on the bilateral or multilateral agreement underpinning the arrangement, but, again, any lack of access would bring the sending State into breach of its obligations under the OPCAT. Secondly, such schemes undermine the object and purpose of the OPCAT and breach treaty principles to act in good faith.[180] Extraterritorial detention in non-State parties constitutes a *male fides* observance of the OPCAT in agreeing to its terms and then purposefully depriving individuals of their liberty in locations inaccessible to the OPCAT mechanisms.

E. Additional Issues Relevant to all Four Refugee/Asylum Situations

In addition to the situation-specific issues outlined above, there are two further issues that are likely to arise as the OPCAT mechanisms engage in the refugee/asylum field. The first is whether the OPCAT mechanisms should comment on the *legality* of the detention (as judged according to international standards), in addition to the *conditions* of that detention. As preventing individuals being unlawfully or arbitrarily detained in the first place directly contributes to obviating torture or other forms of ill-treatment in those settings, I would argue that the OPCAT mechanisms must engage with both these facets of detention in order to fulfil their mandate.[181]

A second question for the OPCAT mechanisms relevant to the effectiveness of their interventions for the lives of individual asylum-seekers and/or refugees is the extent to which they will document and ensure follow-up in relation to particular *individuals or groups of individuals* in detention, rather than focusing only on *places* of detention. Many of the UN monitoring bodies and special rapporteurships have developed the practice of recording the names of individuals brought to their attention during visits, with some success in terms of release or improved conditions. The public listing of names plays a preventive role in reducing the ability of the State party to clandestinely engage in ill-treatment.[182] Such an approach also recognises that although prevention is a global objective, it has an individual face. As the language in Article 4(2) of the OPCAT is drafted in terms of preventing 'persons' from being subjected to torture, it is open to the OPCAT mechanisms to similarly list individuals in situations of need in any reports. The international focus of the SPT makes it better placed in this regard, although

[179] See, eg Arts 1, 4, 11, 12 and 14 OPCAT. [180] Arts 26 and 31 VCLT.

[181] Of course, any assessments on detention would ultimately need to be made by an independent judicial authority taking into account the particular circumstances of the individual's case, but there are still some situations in which it is possible to state that detention per se is unlawful (such as mandatory detention without periodic judicial review).

[182] eg a range of reports of the UN Working Group on Arbitrary Detention, available at: http://www.ohchr.org/english/issues/detention/index.htm; and the UN Special Rapporteur on Torture, available at: http://www.ohchr.org/english/issues/torture/rapporteur/.

its reports are confidential[183] so it may well be the NPMs that will ultimately be able to secure release of or improved conditions for specific persons.

V. THE UNHCR AND THE OPCAT MECHANISMS: INSTITUTIONAL OVERLAP OR COMPLEMENTARITY?

The UNHCR has supervisory responsibility over the implementation of the 1951 Refugee Convention,[184] and it exercises its mandate functions of international protection and the pursuit of durable solutions for refugees under its 1950 Statute.[185] In spite of the absence of explicit guarantees to liberty (excepting Articles 26 and 31) or freedom from torture in either the 1951 Refugee Convention or regional refugee treaties,[186] the UNHCR has attained a general mandate over detention issues in view of its wide international protection responsibilities, which are increasingly being defined by international human rights law. In 2000, the Sub-Commission on Human Rights recommended to States in which detention is employed that they provide information to the UNHCR, pursuant to Article 35 of the 1951 Refugee Convention, on how detention policies and practices conform to relevant international standards, including the UNHCR *Revised Guidelines*.[187] As far as I am aware, this has not developed into general practice, although a number of reports have been conducted by the UNHCR on this, including with the cooperation of some States.[188] Under its mandate functions, the UNHCR engages with the issue of detention, including through the production of authoritative guidelines.[189] Its staff pursue access to places of detention where asylum-seekers and refugees are being detained, regularly visit such locations, and advocate for improved standards of detention and/or release.

So what would the OPCAT mechanisms add to the role of UNHCR in relation to investigating and monitoring the detention conditions of asylum-seekers and refugees?

In spite of its broad mandate, the UNHCR regularly experiences problems of gaining access to detainees. It also faces political, administrative, and/or judicial barriers to following up on individual cases. In its favour, the size of the UNHCR is to be compared to a single sub-committee established under the OPCAT made up of 10 members, who may add specialist experts to its team for particular visits.[190] The UNHCR operates in 111 countries and has over

[183] A further concern is that the transfer of names of individuals to the government in confidence could pose security risks to such individuals and would need to be taken into account by the SPT before doing so.

[184] Art 35 Refugee Convention 1951.

[185] Art 8 Statute of the UNHCR.

[186] See above (n 3).

[187] Sub-Commission on Human Rights Res 2000/21, *Detention of Asylum-seekers*, 27th meeting, 18 Aug 2000, para 7.

[188] See, eg Field and Edwards (n 7); UNHCR, *Detention of Asylum-Seekers in Europe* (n 7).

[189] See above (n 10).

[190] In addition, the number of sub-committee members will increase to 25 upon the 50th ratification: Art 5(1) OPCAT.

6,000 staff.[191] Clearly, the SPT's capacity to engage with all the various forms of detention will be limited, and a prioritising exercise will have to be undertaken by the SPT, not only in relation to which countries to visit but also the particular types of detention facilities to be visited once there.[192]

In view of this, the NPMs are likely to play a much greater role in torture prevention due to their ability to conduct visits regularly and to be 'on the scene' speedily. The effectiveness of any national mechanisms will be dependant on such factors as resources, expertise, and their independence and impartiality.[193] Because of these limitations on the work of the OPCAT mechanisms, it is envisaged that the UNHCR will remain the primary international monitor of both the legality of detention policies as well as general conditions of detention of asylum-seekers and/or refugees, not least in the short-term due to the low number of OPCAT ratifications from major refugee-hosting countries.[194]

However, the UNHCR has faced situations in which it has been unable to negotiate access to sites of detention, or where access has been temporarily denied.[195] With the capacity to carry out unannounced inspections and without requiring pre-departure permission, the SPT could potentially step in and act as an advance team aimed at preventing, at a minimum, acts of *refoulement*. Permanent or unreasonable withholding of visas for SPT members would contravene both the letter and spirit of the OPCAT.[196] Similarly, an effective and independent NPM could act as an early response mechanism, not least because it would already be in-country.

There are other situations where the UNHCR is not able to exert sufficient pressure locally to improve the detention conditions of refugees and/or asylum-seekers. This can be due to local politics, government blockage, inaction, or corruption. Unlike other international bodies that similarly monitor detention, the UNHCR, as noted above, is often directly involved in service delivery in relation to some detention places, such as closed refugee camps, and must balance competing political priorities. It also faces threats of the expulsion of its officials or closure of its offices, which can hinder it acting assertively.[197] Similarly, the security of refugees and its staff can be factors in

[191] UNHCR, see www.unhcr.org.

[192] Any prioritizing exercise may be initially hindered as the OPCAT provides, in the first instance, that visits are to be organised by lot: Art 13 OPCAT.

[193] See Report on the First Annual Conference on the OPCAT (n 83).

[194] Some States Parties that have had major refugee populations in the past include Croatia (ratified 25 April 2005); Liberia (acceded 22 Sept 2004); Mali (acceded 12 May 2005).

[195] eg in 2005 and 2006, UNHCR officials were initially denied access to the Italian island of Lampedusa where over 1,000 asylum-seekers and/or migrants were being held. When the UNHCR officials were finally granted entry rights, they arrived to find that 1,000 asylum-seekers and other migrants had already been transferred to Libya. See Amnesty International, *Lampedusa: Italy's Island of Forgotten Promises*, AI Index: EUR 30/008/2005, 6 July 2005.

[196] Art 14(2) OPCAT.

[197] eg Human Rights Watch, *Do Not Close U.N. Refugee Office*, 23 Mar 2006 (UNHCR expelled from Ukraine).

dealing with host governments. Writing prior to the entry into force of the OPCAT, Rachel Brett and Eve Lester argued that these factors were exactly the reasons why an independent treaty-monitoring body with fact-finding powers and a complaints mechanism was needed.[198]

Whether the OPCAT mechanisms will be able to step in to bolster the international protection regime for refugees and asylum-seekers will depend on a number of factors. These factors might include access (as noted above, theoretically the State party cannot deny access to the SPT entirely and only delay it for specific reasons);[199] the ability to put together a delegation when necessary and quickly; and to ensure safeguards are in place for the security of its own inspection teams. Fundamentally, the OPCAT mechanisms will only be effective complements to the UNHCR if the number of ratifications increase.

Although the OPCAT is an independent regime, it would be prudent in most situations to coordinate such missions with the UNHCR (or at least to inform it of such missions). This is not least because the UNHCR, potentially in conjunction with any NPM, will be the body that remains in the territory to follow up on any recommendations. Having said this, the confidentiality provision in Article 16 of the OPCAT may undermine the ability of the SPT to cooperate fully with other international bodies.[200] In fact, the confidentiality provision appears to conflict with the mandatory obligation of the SPT to cooperate with international bodies in Article 11(c). Arguably, the latter must take priority in view of the overarching prevention purpose of the Optional Protocol. Confidentiality could consequently be interpreted to apply to those outside, but not those inside, this inner circle of international bodies. Additionally, the UNHCR might take advantage of the OPCAT arrangements by informing them of particular detention facilities that need inspection. In the interests of asylum-seekers and refugees, a two-way dialogue between the UNHCR and the OPCAT mechanisms ought to be established.[201]

VI. RECOMMENDATIONS: THE WAY FORWARD

The OPCAT represents an important complement to the international refugee and human rights regimes. However, its relevance and effectiveness in the

[198] R Brett and E Lester, 'Refugee law and international humanitarian law: parallels, lessons and looking ahead' (2001) 83 (843) Int'l Rev. Red Cross 713, 723. It should be noted that the OPCAT is not necessarily what Brett and Lester had in mind when making their point, as they were certainly aware of the range of monitoring mechanisms already available under international human rights instruments.

[199] Art 14(2) OPCAT.

[200] For more on the issue of confidentiality and cooperation between the SPT and other international bodies, including NGOs, see Report on the First Annual Conference on the OPCAT (n 83) 34.

[201] Notably the UNHCR already cooperates on a regular basis with other aspects of the treaty bodies, such as regularly providing reports on particular state party performance under relevant human rights treaties in respect of refugees and asylum-seekers and others of concern to the Office.

refugee/asylum context is likely to be dependent on a number of factors. First, the OPCAT mechanisms must take account of refugee standards, in particular those developed by the UNCHR and the Executive Committee that reflect the special situation of asylum-seekers and refugees. Where there is a clash between standards, the highest applicable one must prevail.

Secondly, the OPCAT mechanisms would be encouraged to apply a broad interpretation of what amounts to a deprivation of liberty and a place of detention. This would ensure that detention situations specifically applicable to asylum-seekers and refugees fall within their operating mandates. Broad interpretations match its prevention purpose. Adopting an interpretation of jurisdiction and control compatible with the general position at international law, and beyond the narrow view of national territory, is also imperative to be able to keep up with the changing realities of States' approaches to refugee protection and migration management. States parties to the OPCAT cannot be allowed to remove the possibility of being scrutinized by the OPCAT mechanisms by transferring asylum-seekers and others to detention centres beyond their territorial borders. As a preventative mechanism, at a minimum, the OPCAT mechanisms must engage with the issues of direct and indirect *refoulement*.

Thirdly, cooperation between the UNHCR and the OPCAT mechanisms must be fostered, especially as the Offices of the UNHCR and the NPMs would be in situ to follow up on any recommendations of the SPT. In doing so, the OPCAT mechanisms would need to balance the responsibility for any actual violations committed either wholly or concurrently by the UNHCR and/or the State party, and their respective roles in implementing any prevention recommendations. One facet of cooperation should involve ensuring that refugee experts are included on visits to refugee/asylum detention facilities.

Fourthly, the OPCAT mechanisms are urged to accept a broad interpretation of torture and cruel, inhuman or degrading treatment or punishment, taking account of the range of international instruments, decisions, general comments, and authoritative papers available. Only then will some of the worst grievances committed outside of the context of interrogation and State custody be addressed, including particularly violence perpetrated by State and non-State actors against refugees and/or asylum-seekers.

Fifthly, the SPT must be prepared to comment upon not only the conditions of detention, but also the legality of detention, giving consideration to both international human rights law as well as international refugee law.[202] In this context, the SPT ought to take account of whether alternatives to detention are available in a given context. Meanwhile, NPMs should actively review existing and draft legislation in order to detect any inconsistencies with international standards and to advocate for their removal. Sixth, the OPCAT

[202] The OPCAT mechanisms should also take account of international humanitarian law, where applicable.

mechanisms should consider documenting and addressing the situation of particular individuals in detention.

As noted throughout this article, the OPCAT and its preventive mechanisms represent a positive opportunity to bolster existing monitoring or supervisory mechanisms in relation to the prevention of torture generally, including in the refugee/asylum context. In particular, the unhindered access to detention sites and information is one of their greatest strengths. However, the impact of this new instrument in the refugee/asylum context will be contingent upon such situations being prioritised (by both the SPT and the NPMs), that any visits and follow-up be well-managed and coordinated with other international and regional bodies, such as the UNHCR, and that they are sufficiently resourced so that they are able to undertake their work effectively and independently. In particular, the capacity of the OPCAT mechanisms to respond to urgent or emergency situations by virtue of the possibility to undertake spontaneous visits or because the NPMs are already on the ground with unhindered access, has the capacity to add value to existing monitoring bodies but certainly should not (and is unlikely to) usurp or replace them.