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THE OPTIONAL PROTOCOL TO THE UN CONVENTION AGAINST TORTURE

Rachel Murray,
Elina Steinerte, Malcolm Evans,
and Antenor Hallo de Wolf

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OXFORD
UNIVERSITY PRESS

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Great Clarendon Street, Oxford ox2 6dp
Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide in
Oxford New York
Auckland Cape Town Dar es Salaam Hong Kong Karachi
Kuala Lumpur Madrid Melbourne Mexico City Nairobi
New Delhi Shanghai Taipei Toronto
With offices in
Argentina Austria Brazil Chile Czech Republic France Greece
Guatemala Hungary Italy Japan Poland Portugal Singapore
South Korea Switzerland Thailand Turkey Ukraine Vietnam
Oxford is a registered trade mark of Oxford University Press
in the UK and in certain other countries
Published in the United States
by Oxford University Press Inc., New York

First published 2011

British Library Cataloguing in Publication Data
Data available
Library of Congress Cataloging in Publication Data
Data available
Typeset by SPI Publisher Services, Pondicherry, India
Printed in Great Britain
on acid-free paper by
CPI Antony Rowe, Chippenham, Wiltshire
ISBN 978–0–19–960219–3
1 3 5 7 9 10 8 6 4 2

Foreword

This book by Bristol University's OPCAT team is a welcome contribution to our understanding of a unique advance in the field of protection against torture and other cruel, inhuman, or degrading treatment or punishment. The authors are well placed to examine how OPCAT has built on existing international human rights law concerning prevention of torture, whilst marking a historic departure in UN human rights treaties: the first treaty instrument with a primary focus on implementation and work in the field rather than the traditional emphasis on monitoring through a reporting system. OPCAT's central concept involves a system of visits at the international and national level for the prevention of torture and other forms of ill-treatment. This concept is analysed in detail, with attention to each of the component parts of the OPCAT system:

- the Subcommittee on Prevention of Torture (SPT), as a new generation of UN treaty body focused on preventive operational work;
- the National Preventive Mechanisms (NPMs), arguably the most important new feature, as independent mechanisms that States Parties are obliged to develop and maintain at national level to carry out regular visits to all places of deprivation of liberty; and
- the various international bodies already carrying out similar work at the universal or regional level.

In its sequence of chapters, the book considers OPCAT within the context of international law relating to torture and other forms of ill-treatment and examines the key issues as they have emerged over time: during the drafting stages, the eventual adoption of OPCAT, and through the first years after its entry into force. It is important that these developments are viewed from a variety of perspectives; the team brings research to bear on the complex challenges posed by OPCAT, demonstrating the range of ideas about how torture and other ill-treatment may be prevented in practice and exploring the variety of models that might be developed in future.

As the SPT and the emerging NPMs have struggled to fulfil the different but equally important elements of their mandates as set out in OPCAT—to carry out visits regularly, to cooperate and to engage directly with their counterparts at other levels—they have faced serious challenges deriving not only from the difficult work of torture prevention but also from the contexts in which they must operate. OPCAT provides for considerable powers to be accorded to the visiting bodies, both in relation to the visits themselves and their wider preventive role in improving the system of safeguards within each state through recommendations for legislative and policy improvements. In addition, the SPT has faced obstacles in the form of deficiencies in the support provided by the UN, especially as regards the mandated work with NPMs. Similarly, the NPMs have been confronted with

numerous challenges including a frequent lack of ring-fenced resources to take on their preventive role, deficiencies in their legal mandate, and limitations on their independence.

As the enlarged SPT and developing NPMs continue to demonstrate commitment to the preventive mandate, they will benefit, as in the past, from the significant support of the key organizations forming the OPCAT Contact Group, including Bristol University's OPCAT team. The group has provided much needed support to the SPT in its creative and determined search for opportunities to work directly with NPMs, including in regional meetings across the world organized by the APT, Bristol University, the Council of Europe NPM Project, Penal Reform International, and the OSCE.

The book's contribution of an academic perspective on the issues at stake provides an opportunity at this crucial stage in OPCAT's development to step back and consider both its origins and its future possibilities. It also reminds us of the imperative to maintain an open, but constructively critical, stance towards the variety of models emerging in the many different settings in which the vision of OPCAT will be translated over time into a working reality.

Dr Silvia Casale
Former Chairperson of the Subcommittee on Prevention of Torture (SPT)
And former Chairperson of the European Committee on the Prevention of Torture (CPT)

Preface

This book arises out of research funded by the Arts and Humanities Research Council (AHRC) of the UK to examine OPCAT and the role of its National Preventive Mechanisms (NPMs) in particular. The three-year study enabled us to interview some 150 individuals, from international and regional treaty bodies, national governments, NHRIs, national NGOs, and civil society organizations of nearly thirty countries. We have covered all regions of the world and selected countries that have ratified OPCAT and already had established or were in the process of establishing their NPMs. We visited countries that had only signed OPCAT and were preparing for ratification and also those that had decided not to ratify the instrument at all. We of course interviewed the SPT members and spoke with the staff of the Office of the High Commissioner for Human Rights (OHCHR) and interviewed representatives of international civil society. The project team hosted a range of high profile seminars in the UK, in Bristol, Cape Town, Prague, and elsewhere, bringing together key policy stakeholders to discuss implementation of OPCAT. In September 2006 we established the OPCAT Contact Group, a gathering of civil society organizations that all work on aspects of OPCAT's monitoring and implementation. The OPCAT Contact Group has gained standing before the SPT and has participated in all but one sessions of the treaty body, providing assistance and support to the SPT. It now comprises Amnesty International (AI), Association for the Prevention of Torture (APT), International Federation of Action by Christians for the Abolition of Torture (FIACAT), Human Rights Implementation Centre (HRIC), International Disability Alliance (IDA), Mental Disability Advocacy Centre (MDAC), World Organisation against Torture (OMCT), Penal Reform International (PRI), Rehabilitation and Research Centre for Torture Victims (RCT), and World Network of Users and Survivors of Psychiatry (WNUSP). Throughout the course of the project we also participated in numerous events surrounding the implementation of OPCAT, provided expert advice to various States on the aspects of its implementation, and produced a number of policy papers and other academic articles.

As a result, our research findings are driven very much by what those we spoke to were saying was relevant in the actual application and implementation of OPCAT in States and by the SPT. This book reflects those findings and therefore does not purport to provide a comprehensive analysis or description of OPCAT. It takes as its starting point the background to the drafting of OPCAT and discussions that took place prior to its adoption and is then structured around the observations we have picked up, from visits to States, participation in the UN SPT sessions, hosting of events, and other activities. These observations may not have been what we initially thought would be the focus of OPCAT on the ground but they do reflect the reality faced by those at the national, regional, and international levels as they go about implementing OPCAT.

OPCAT had not entered into force when this project was conceived. It entered into force in June 2006 just as this project commenced, and so in some ways this has been a common, and at times shared, journey. Our understandings and perceptions have of course evolved as the practice under OPCAT has evolved, and to that extent we are examining a constantly 'moving target', with all the challenges that that brings. However challenging this has been, it pales in comparison to the challenge which the SPT now faces: as this book is completed it is preparing to meet for the first time as an expanded body of twenty-five members—making it, remarkably, the largest of the UN human rights treaty bodies. It is hoped that the publication of this book at this time will provide a timely opportunity to reflect on the experience of the 'old' SPT in a fashion which can help inform the thinking of the 'new' as OPCAT steps into its next phase of development.

As authors of the book, we have therefore gained a unique insight into how OPCAT is operating in its first years and we hope to be able to reflect that here. Elina Steinerte was also a member of the Independent Monitoring Board in HMP Bristol for part of the time that she worked on the research. In addition, during the course of the research and writing of this book one of our team, Professor Malcolm Evans, became a member of the SPT, with effect from November 2009. As a result, it is important to stress that in writing this book the authors have relied solely on information concerning the work of the SPT which is in the public domain, or which is the product of their research interviews. The positions taken and opinions expressed reflect those of the research team and do not represent the views of the SPT, except to the extent that they are a reflection of those public materials. As regards views expressed in this book regarding the composition and work of the SPT itself, Professor Evans, as a member of the SPT, does not associate himself with them, in either a positive or negative fashion, these having been determined by the other members of the research team in order to preserve the independence of the research and its findings and to respect the independence of the members of the Subcommittee.

Rachel Murray
Elina Steinerte
Malcolm Evans
Antenor Hallo de Wolf
Bristol, February 2011

Acknowledgements

First and foremost we must thank the Arts and Humanities Research Council UK (AHRC) which funded the initial three-year project from which this book stems. Its support has not only enabled us to undertake this research but also provided us with a solid platform upon which to continue to examine and be involved in the monitoring of the implementation of OPCAT.

We would also like to thank the current and previous members of the Subcommittee on Prevention of Torture (SPT) not only for their openness and willingness to engage with us during the lifetime of the project but also beyond. Similarly, the Office of the High Commissioner for Human Rights (OHCHR) staff supporting the SPT, those in the National Institutions Unit, and others who have shared with us documents and their opinions and facilitated our participation in sessions and other events.

The Association for the Prevention of Torture (APT), an NGO synonymous with OPCAT, has provided invaluable support for our work and through the hosting of most of the OPCAT Contact Group meetings enabled us and others to work closely together and acquire information that would otherwise be difficult to come by.

We would also like to acknowledge all the members of the OPCAT Contact Group (Amnesty International (AI), Association for the Prevention of Torture (APT), International Federation of Action by Christians for the Abolition of Torture (FIACAT), Human Rights Implementation Centre (HRIC), International Disability Alliance (IDA), Mental Disability Advocacy Centre (MDAC), World Organisation against Torture (OMCT), Penal Reform International (PRI), Rehabilitation and Research Centre for Torture Victims (RCT), and World Network of Users and Survivors of Psychiatry (WNUSP)), a group of civil society organizations that we brought together when OPCAT came into force and which since then has played a central role in monitoring OPCAT at the UN, regional, and national levels.

During the course of the research we spoke to many individuals, including members of UN committees, staff at the OHCHR, members and staff of regional human rights bodies, government representatives, members of designated and potential NPMs, and other civil society organizations. Their comments have formed the core of this research and we would like to thank them for their willingness to engage with us.

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Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
AI	Amnesty International
APF	Asia Pacific Forum
APT	Association for the Prevention of Torture
ASEAN	Association of South East Asian Nations
CAT	UN Committee Against Torture
CEDAW	UN Convention on the Elimination of All Forms of Discrimination Against Women
CERD	UN Convention on the Elimination of All Forms of Racial Discrimination
CoE	Council of Europe
CPT	European Committee for the Prevention of Torture
CPTA	Committee for the Prevention of Torture in Africa
CRPD	UN Convention on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
ECPT	European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ECtHR	European Court of Human Rights
EJIL	European Journal of International Law
EU	European Union
FIACAT	International Federation of Action by Christians for the Abolition of Torture
HMIP	Her Majesty's Inspectorate of Prisons
HRC	UN Human Rights Committee
HRLR	Human Rights Law Review
IAPL	International Association of Penal Law
ICC	International Coordinating Committee of National Human Rights Institutions
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
IDA	International Disability Alliance
IMB	Independent Monitoring Board
LOIPR	List of Issues Prior to Reporting
MDAC	Mental Disability Advocacy Centre
NGO	Non-governmental organization
NHRI	National human rights institution
NI Unit	National Institutions Unit of the Office of the High Commissioner for Human Rights
NPM	National Preventive Mechanism

OAS	Organization of American States
ODIHR	Office for Democratic Institutions and Human Rights
OHCHR	Office of the High Commissioner for Human Rights
OMCT	World Organisation Against Torture
OPCAT	Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
OPCAT CG	OPCAT Contact Group
OSCE	Organization for Security and Cooperation in Europe
PRI	Penal Reform International
RCT	Rehabilitation and Research Centre for Torture Victims
SCAT	Swiss Committee Against Torture
SPT	Subcommittee on Prevention of Torture
UN	United Nations
UNCAT	United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UNHCR	United Nations High Commissioner for Refugees
UNMIL	United Nations Mission in Liberia
UNODC	United Nations Office on Drugs and Crime
UPR	Universal Periodic Review
WNUSP	World Network of Users and Survivors of Psychiatry

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The Origins and Background of OPCAT

A. Introduction

The Optional Protocol to the Convention against Torture (OPCAT, or Optional Protocol) is unlike any of the other principal UN human rights treaties[1] in that it does not set out any additional substantive human rights commitments but is primarily focussed on establishing mechanisms to further the realization of the pre-existing commitment of States Parties to the UN Convention against Torture (the UNCAT) not to subject anyone to torture, or cruel, inhuman or degrading treatment or punishment.

The existence of a general obligation under international law not to subject anyone to torture, or cruel, inhuman, or degrading treatment or punishment is beyond doubt.[2] In addition to the strength of the prohibition, there is also a long history of the international community adopting innovative means of addressing torture. Although the prohibition was a central component of the human rights instruments which emerged in the years following the end of the second world war,[3] the resurgence of torture and the increased prominence that this received during the 1970s combined to create the international momentum that resulted in

[1] In this, it is of course similar to other Protocols to UN human rights treaties, such as the first Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), providing for the system of individual communications to the Human Rights Committee established by the principal instrument. In many ways, however, OPCAT is best understood as a free-standing treaty rather than as a Protocol to another, though a number of small but important connections to the UN Convention against Torture do exist within the text of the Protocol and as an Optional Protocol it is only open to Parties to the UNCAT. These connections will be considered in detail in Chapter 7, below.

[2] See, for example, Rodley, N, with Pollard, M, *The Treatment of Prisoners under International Law*, 3rd edn (Oxford: Oxford University Press, 2009), p 80 where, after an exhaustive survey of the materials, it says that 'it is safe to conclude that the prohibition of torture and other ill-treatment is one of general international law, regardless of whether a particular state is party to a treaty expressly containing the prohibition'. It is also noted that 'it appears that the General Assembly of the United Nations now accepts that the prohibition of torture is itself a norm of *jus cogens* or "a peremptory norm of general international law" ' (ibid). There is now a wealth of authority supporting this proposition.

[3] See, for example, Article 5, UN Universal Declaration on Human Rights, GA Res 217A (III), adopted 10 December 1948 (UDHR); Article 3, Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, ETS No 5; 213 UNTS 222 (ECHR); Article 7, International Covenant on Civil and Political Rights; Article 7, International Covenant on Civil and Political Rights, GA Res 2200A (XXI), adopted 16 December 1966, 993 UNTS 171 (ICCPR)—all of which address torture and ill-treatment in similar terms.

the adoption of the UN Declaration against Torture in 1975[4] and the Convention against Torture (the UNCAT) in 1984,[5] to which 147 States are currently party. The Declaration was based on a text originally discussed at the 5th UN Congress on Crime Prevention and established the concept that acts of torture ought to be criminal offences under domestic law, that where there are reasonable grounds to suspect that such acts have occurred the domestic authorities should investigate, and that, where appropriate, criminal proceedings should be brought.[6] This introduced a 'criminalizing' dynamic which was subsequently taken up, refined and expanded during the drafting of UNCAT itself.[7] In this, it follows the approach found in a number of other international conventions which had been adopted beforehand[8]—and which have been followed since[9]—in providing a definition of the forms of conduct to be tackled, requiring that States Parties make such conduct an offence subject to appropriate forms of penalty and obliging them, when persons suspected of having committed such offences are within their jurisdiction, either to submit their cases to the prosecuting authorities or, if requested, to extradite them to another State which wishes to do so.

This approach, summed up in the expression '*aut dedere aut judicare*'—extradite or prosecute—is a well-known technique of 'closing the net' on alleged offenders[10] and in the context of the UNCAT, its essential 'architecture' is as follows.

[4] Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res 3452 (XXX), adopted 9 December 1975 (Declaration against Torture).

[5] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res A/RES/39/46, adopted 10 December 1984, 1465 UNTS 85 (Convention Against Torture or UNCAT).

[6] Declaration against Torture, Articles 7, 9, and 10. See Burgers, J and Danelius, H, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (The Hague: Martinus Nijhoff, 1988), pp 13–18.

[7] This approach had been sanctioned by the UN General Assembly which had requested the Commission to develop a text on the basis of the 1975 Declaration. See UN GA Res 32/62, adopted 8 December 1977 and Nowak, M and McArthur, E, *The United National Convention against Torture: A Commentary* (Oxford, Oxford University Press, 2008), p 23. The principal draft used by the Working Group of the Commission was that of Sweden. This was largely modelled on the 1975 Declaration and its criminalizing approach but went beyond it by providing for the exercise of universal jurisdiction. The text of the initial Swedish Draft is reproduced in Nowak and McArthur, p 1216. The other principal draft submitted as a potential basis for discussion was that of the International Association of Penal Law (IAPL). It was similar to the Swedish Draft from a jurisdictional perspective but was more limited in scope, addressing only torture and not 'cruel, inhuman or degrading treatment or punishment'. See Nowak and McArthur, ibid p 1210.

[8] The models used for the Swedish Draft and others drawn on during the drafting process were chiefly the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft (860 UNTS 105), the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (974 UNTS 177), the 1973 New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons (1035 UNTS 167), and the 1979 New York International Convention against the Taking of Hostages Convention (1316 UNTS 205).

[9] See, for example, the 1997 International Convention for the Suppression of Terrorist Bombings (2149 UNTS 256); the 1999 International Convention for the Suppression of the Financing of Terrorism (2178 UNTS 197); and the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism (2445 UNTS 89).

[10] For a general exploration of these forms of treaty see Reydams, L, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford, Oxford University Press, 2004). See also

The definition of torture, for the purposes of the convention,[11] is given in Article 1(1), and 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 a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him 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.

Article 4 provides for the criminalization of such acts, providing that:

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Moving on to the issue of jurisdiction, Article 5(1) of UNCAT first of all requires that States extend their jurisdiction in a range of situations reflecting the well-established jurisdictional 'heads' of 'territoriality', 'nationality', and 'passive personality'[12] before moving on to the controversial yet vital provision in Article 5(2) regarding the exercise of 'universal' jurisdiction, this providing that:

Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8[13] to any of the States mentioned in paragraph I of this article.

Reydams, L, 'The Rise and Fall of Universal Jurisdiction' in Schabas, W and Bernaz, N (eds), *Handbook of International Criminal Law* (London: Routledge, 2010).

[11] For discussion of the scope of the definition of torture as found in Article 1 of UNCAT see, *inter alia*, *The Definition of Torture:* Proceedings of an Expert Seminar, Geneva 10–11 November 2001 (Geneva: APT, 2003); Evans, M D, 'Getting to Grips with Torture' (2002) 51 *ICLQ* 365; Nowak and McArthur, *Commentary*, n 7 above, pp 27–86; Rodley, with Pollard, *The Treatment of Prisoners*, n 2 above, pp 82–144; Rodley, N, 'The Definition(s) of Torture under International Law' (2005) *CLP* 467. See also APT/CEJIL, *Torture in International Law: A Guide to the Jurisprudence* (Geneva: APT and Washington: CEJIL, 2008).

[12] Article 5(1) provides that:

> [e]ach State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:
>
> (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
> (b) When the alleged offender is a national of that State;
> (c) When the victim is a national of that State if that State considers it appropriate.

[13] Article 8 concerns the modalities of extradition, rather than the obligation to extradite which is found in Article 7(1).

Having provided for the establishment of the necessary definitional, criminal, and jurisdictional frameworks, Article 7(1) binds them together through the obligation to 'extradite or prosecute', providing that:

> 1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

It is beyond the scope of this work to look generally at the many practical problems associated either with these jurisdictional provisions or other substantive provisions of UNCAT, though a more detailed examination of some of the provisions of UNCAT most relevant to an understanding of the Optional Protocol will be noted where relevant throughout this book.[14] This framework is presented in order to underline the extent to which the Convention against Torture is, in some ways, a hybrid instrument. Although from the outset it formed a key part of the 'canon' of international human rights treaties[15] it went significantly beyond existing instruments in the way in which it created obligations concerning the manner in which torture was to be addressed as a matter of domestic criminal law and, as will be seen, this finds echo in, and has practical implications for, the work undertaken within the framework of the Optional Protocol. It is only with the recently adopted International Convention for the Protection of All Persons from Enforced Disappearances that a similar approach has finally been taken in a subsequent UN human rights treaty dealing with a different subject matter.

Nevertheless, in common with the other principle UN human rights treaties—and unlike all the other 'terrorism' treaties[16] based on the '*aut dedere*

[14] Mention might, however, be made here of the particularly significant exploration currently before the International Court of Justice concerning the precise scope and substantive content of Article 7(1) itself in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*. This case concerns the failure of Senegal to extradite Mr Habre, formally President of Chad and who has been living in Senegal since1990, to face criminal charges in Belgium arising out of alleged acts of torture and crimes against humanity committed during his Presidency. The UN Committee against Torture (see below) had already determined that Senegal was in breach of its obligations under Article 5(2) by not being in a position to prosecute Habre for want of an appropriate domestic legal framework and under Article 7(1) for not having done so (see *Guengueng and others v Senegal*, CAT Communication No 181/2001). Although it has amended its domestic law, Senegal is yet to either prosecute or extradite Habre, as a result of which, Belgium, as a State seeking extradition, is claiming that Senegal is in breach of its obligations under the Torture Convention. In response to a request for an award of interim measures, the ICJ, whilst declining to make such an order on other grounds, has determined that it does, prima facie, have jurisdiction on the basis that there is a dispute concerning the interpretation and application of Article 7(1). See *Questions Relating to the Obligation To Prosecute Or Extradite (Belgium v Senegal)*, Provisional Measures, Order of 28 May 2009, ICJ Reports, 2009, not yet reported.

[15] The UNCAT has from the outset been serviced by and operated under the auspices of the UN Office in Geneva, now the Office of the High Commissioner for Human Rights, and understood to be a part of the human rights machinery of the UN—unlike the crime prevention and 'suppression' conventions which generally fall within the sphere of the UN office in Vienna.

[16] The Convention on Enforced Disappearances also establishes a treaty monitoring body—the Committee on Enforced Disappearances—but uniquely, in UN Human Rights instruments, Article

aut judicare' approach—the UNCAT establishes a monitoring body, the Committee against Torture (CAT), to which States are required to submit reports on a periodic basis[17] and which can consider individual and inter-state communications provided that the relevant consents have been given.[18] In addition to these fairly standard means of oversight, Article 20 of the UNCAT establishes what was at the time an extremely innovative procedure by which the CAT might undertake an inquiry *proprio motu* and consider conducting a visit to a State Party in cases where it decides, on the basis of reliable information, that there are 'well-founded indications that torture is being systematically practiced in the territory of a State Party . . . '.[19] Article 20 proved to be one of the most controversial in the convention and agreement on its inclusion was only reached at the very end of the drafting process in the UN General Assembly Third Committee when a proposal that parties be able to opt out of this procedure was adopted.[20] At the time of writing, only eight States have exempted themselves from the scope of Article 20.[21] Nevertheless, given its controversial nature, the CAT has proceeded with caution and has to date

27 of the Convention provides for a review of its effectiveness by the States Parties between four and six years after its entry into force in order to determine whether to transfer its monitoring functions to another body. The modalities for amendment are, however, such that they make this an unlikely outcome.

[17] See UNCAT Article 19. The Committee against Torture has adopted a variant on this procedure, by which it adopts in respect of each State a 'List of Issues Prior to Reporting (LOIPR)' and the State in question is invited to address these issues rather than submit a full 'periodic' report as provided for in Article 19. See 2007 Report of the Committee against Torture to the General Assembly, A/62/44, paras 23 and 24; 2009 Report of the Committee against Torture to the General Assembly, A/64/44, para 27.

[18] See UNCAT Articles 21 (inter-state communications) and 22 (individual communications). No use has ever been made of the inter-state procedure and, as of 30/11/2010, only sixty-four States had recognized the right of individual communication under Article 22. As of that date, a total of 429 cases had been lodged. 337 cases had been concluded, and of the 169 considered on the merits fifty-two had resulted in a finding of a violation (and nearly half of which concern Canada, Sweden, or Switzerland). The vast majority of cases brought concern the non-refoulement provision, UNCAT Article 3.

[19] Four other UN human rights treaties now expressly provide for an 'inquiry procedure' of this nature, these being Article 8 of the Optional Protocol to the Convention on the Elimination of Discrimination against Women; Article 6 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities; Article 11 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and Article 33 of the International Convention for the Protection of All Persons from Enforced Disappearances. In addition, the Rules of Procedure of some treaty bodies embrace the possibility of conducting country visits as a part of their 'follow-up procedures'. See, for example, Human Rights Committee Rules of Procedure, Rule 101, concerning follow-up to individual communications (CCPR/C/3/Rev.8, 22 September 2005) and, indeed, the CAT itself: Rules of Procedure, Rule 114(4) (CAT/C/3/Rev.4, 9 August 2002).

[20] See UNCAT Article 28(1). For a discussion of the drafting see Nowak and McArthur, n 7 above, pp 659–673. See also Burgers and Danelius, *Handbook on the Convention against Torture*, n 6 above, passim; Ingelese, C, *The UN Committee against Torture: An Assessment* (The Hague: Kluwer Law International, 2001), ch 6.

[21] These being Afghanistan, China, Equitorial Guinea, Israel, Kuwait, Mauritania, Saudi Arabia, and Syrian Arab Republic. See Report of the Committee against Torture (forty-third and forty-fourth sessions), UN GA Doc A/65/44, Annex II. The length of this list has varied considerably over time. Initially most Eastern European group States, and other socialist States, made declarations but following the end of the cold war these have been withdrawn (one of the last to do so being Poland in 2008). For a detailed breakdown and analysis see Nowak and McArthur, n 7 above, pp 840–843.

carried out seven inquires under the Article 20 procedure,[22] these being in respect of Turkey,[23] Egypt[24], Peru,[25] Sri Lanka,[26] Mexico,[27] Serbia and Montenegro,[28] and Brazil.[29]

It is against this general background of procedural innovation in general and the controversy over the Article 20 procedure in particular that the development of the Optional Protocol to the Torture Convention (OPCAT) must be placed and understood.

B. The Origins of the Optional Protocol

The origins of the Optional Protocol lie in the belief that torture and ill-treatment can be prevented—or the risk of such treatment occurring can be lessened—by visits to places of detention undertaken by external independent observers with appropriate powers of access and recommendation. The story is now well known.[30]

[22] The only other Committee to have conducted such an inquiry to date is CEDAW acting under Article 8 of the Optional Protocol to the Convention on the Elimination of Discrimination against Women, in Mexico in 2003. The other inquiry provisions (see n 19 above) are of more recent origin and have yet to be used.

[23] The Committee commenced its inquiry regarding Turkey in April 1990, culminating in a visit which took place in June 1992. The CAT published its summary findings in November 1993. See CAT Annual Report, A/49/44 (1994) paras 172–177 and A/48/44/Add.1 for the summary account and Nowak and McArthur, n 7 above, p 684.

[24] This inquiry commenced in November 1991. Egypt declined permission for members to conduct an in situ visit and so the CAT produced a report on the basis of information submitted to it and published a summary account of this in May 1996. See CAT Annual Report A/51/44 (1996), paras 180–222 and Nowak and McArthur, n 7 above, p 685.

[25] This inquiry was initiated in April 1995 and resulted in a visit being conducted in September 1998. The summary findings were not published until May 2001. See CAT Annual Report A/56/44 (2001) paras 144–193 and Nowak and McArthur, n 7 above, pp 685–686.

[26] This inquiry was initiated in July 1998 and a visit took place in September 2000. Uniquely so far, the CAT concluded that whilst torture occurred, it did not amount to a systematic practice. Its findings were published in November 2001. See CAT Annual Report A/57/44 (2002) paras 123–195 and Nowak and McArthur, n 7 above, pp 686–688. The decision of the CAT on this matter prompted considerable criticism. See, for example, Rodley, with Pollard, n 2 above, p 218 where it is said that this conclusion 'defies analysis'.

[27] This inquiry was initiated in October 1998, with a visit taking place in August/September 2001. The Mexican authorities consented to the publication of the full report (along with its reply) in May 2003. See CAT Annual Report A/58/44 (2003) paras 147–153 and the report both of which are available as CAT/C/75. See also Nowak and McArthur, n 7 above, p 688.

[28] The CAT commenced its consideration in 1997 but deferred it until May 2000 due to the political situation. A visit took place in July 2002, resulting in a finding that torture had been systematic in Serbia prior to October 2000, during the presidency of Slobodan Milosevic. See CAT Annual Report A/59/44 (2004) 156–240 and Nowak and McArthur, n 7 above, p 689.

[29] The CAT initiated its inquiry in November 2002 and a visit took place, after a number of postponements, in July 2005. The Brazilian authorities consented to the publication of the full report (along with its reply) in November 2007. See CAT Annual Report A/63/44, paras 64–72 and the report, both of which are available as CAT/C/39/2.

[30] The most authoritative account of the early years is that given by the first Secretary General of the SCAT, Francois de Vargas, for which see de Vargas, F 'History of a Campaign' in International Commission of Jurists and the Swiss Committee against Torture, *Torture: How to Make the International Convention Effective* (Geneva: ICJ/SCAT, 1979). See also Evans, M and Morgan, R, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading*